



International Covenant on Civil and Political Rights

Distr.: General
22 November 2021

Original: English

Advance unedited version

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2365/2014***

<i>Communication submitted by:</i>	K.A. et al. (represented by counsel, Katherine Wrigley, of the Refugee Advice and Casework Service)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	13 March 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 March 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	8 July 2021
<i>Subject matter:</i>	Detention of minors in immigration facilities
<i>Procedural issues:</i>	Lack of substantiation
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment; liberty and security of person; human dignity; children's rights; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 7, 9 (1) and (4), 10, 17, 23, and 24
<i>Articles of the Optional Protocol:</i>	2 and 3

* Adopted by the Committee at its 132nd session (28 June-23 July 2021).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Kobayyah Kpatcha Tchamdja, Carlos Gómez Martínez, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Hélène Tigroudja, Imeru Tamerat Yigezu, and Gentian Zyberi

1.1 The authors of the communication are A.K., born on 31 December 1998, A.R., born on 11 February 1997, G.Z., born on 31 December 1998, B.A.A., born on 31 December 1998, E.E., born on 31 December 1997, H.M., born on 31 December 1996, S.H., born on 31 December 1997, K.M., born on 25 April 1999, all nationals of Afghanistan, A.Z., born on 12 February 1997, S.M., born on 1 June 1996, H.I., born on 31 December 1994, A.M., born on 1 January 1998, all nationals of Pakistan, and D.D., born on 15 February 1997, a national of Iraq. In 2013, the authors arrived as unaccompanied minors to Australia and were placed in a detention centre. Initially, they claimed that the State party would violate their rights under article 24 (1) of the Covenant in case they were transferred to the Nauru regional processing centre. In the subsequent submission of 24 March 2014, the Committee was informed that the authors were also claiming violations of articles 2 (3), 7, 9 (1) and (4), 10, 17 and 23 of the Covenant. On 10 September 2015 the authors submitted additional claims about the conditions of their detention on the mainland Australia under articles 17, 23 and 24 of the Covenant. The Optional Protocol entered into force for Australia on 25 December 1991. The authors are represented by counsel, Katherine Wrigley from the Refugee Advice and Casework Service.

1.2 When submitting the communication, on 13 March 2014, the authors requested that, pursuant to rule 94 of its rules of procedure, the Committee request the State party to refrain from deporting or transferring them from Australia while their case was being considered by the Committee. On 21 March 2014, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to accede to the request.

1.3 On 10 September 2015, the counsel informed the Committee that two authors, S.H., born on 31 December 1997, and K.M., born on 25 April 1999, decided to withdraw their complaints.

Factual background

2.1 Between July and November 2013, the authors arrived to Australia as unaccompanied minors. They were placed in a detention centre for illegal migrants and asylum seekers on Christmas Island (Australia) pursuant to section 189 (3) of the Migration Act. The authors' parents either remained in their home countries or were deceased.

2.2 Following their arrival and detention on Christmas Island, the authors were at risk of being transferred to Nauru for further processing in accordance with the Australian Migration Act. The State party's policy at the time was to detain and subsequently transfer all individuals who had arrived as irregular maritime arrivals to a regional processing country, subject to a condition that there were vacant accommodation and facilities suitable for the needs of transferred individuals. In March 2014, the authors' counsel sent two letters to the Australian Department of Immigration and Border Protection and to the Minister for Immigration and Border Protection requesting that the authors be exempted from the transfer to Nauru on the ground of their status of unaccompanied minors. The counsel also wrote to Christmas Island Case management requesting assurances that some of the minors would not be transferred. The authors did not receive a reply to these letters. They did not seek judicial review of the situation, as they believed that there was no effective judicial remedy available to them to prevent the transfer. Subsequently, the authors' counsel noted that she was unaware whether there had been any remedies capable of preventing the transfer.

2.3 In autumn 2014, the Minister for Immigration and Border Protection announced that all unauthorized maritime migrants, who had arrived to Australia between 19 July and 31 December 2013 and had not yet been transferred to a regional processing country, would not be transferred to offshore processing centers. In December 2014, all minors, including six authors¹, were moved from Christmas Island to the Australian mainland. They were all placed in group housing arrangements. The remaining authors were also relocated to the mainland between December 2014 and February 2015.

2.4 A.K. arrived to Christmas Island in August 2013. He had spent approximately 15 months in the detention center on Christmas Island. He was relocated to a community detention center in Geelong, Victoria. In May 2016 he was in community detention in

¹ The following authors were transferred: A.Z., D.D., B.A.A., A.K., A.R., A.M.

Queensland. Later on, the author was granted a Bridging Visa. He filed an application for a protection visa, but it was refused. The author challenged the refusal in courts. In July 2019, the proceedings were still pending.

2.5 A.Z. arrived to Christmas Island in August 2013. He had spent approximately 16 months in the detention center on Christmas Island. He was relocated to a community detention center in Geelong, Victoria. He was released on an unspecified date upon receipt of a Bridging Visa. He was living in Victoria and was granted a Safe Heaven Enterprise visa on 17 March 2017.

2.6 E.E. arrived to Christmas Island in November 2013. He had previously been transferred to a regional processing center and subsequently returned to Australia in February 2014. In total, he had spent approximately 14 months in the detention center on Christmas Island. He was then relocated to a community detention center in Geelong, Victoria. The author was released on an unspecified date upon receipt of a Bridging Visa. He was living in Victoria and was granted a Safe Heaven Enterprise visa on 2 January 2018.

2.7 A.R. arrived to Christmas Island in August 2013. He had spent approximately 15 months in the detention center on Christmas Island. On an unspecified date, he was relocated to a community detention center in Geelong, Victoria. In June 2015, he was transferred to the Maribyrnong Immigration Detention Centre due to behavioral issues. The author voluntarily returned to Afghanistan on 19 September 2016.

2.8 D.D. arrived to Christmas Island in September 2013. He had spent approximately 15 months in the detention center on Christmas Island. On an unspecified date, he was relocated to a community detention center in Brisbane, Queensland. When he turned 18, three months after his relocation, D.D. received a Bridging Visa and was released from the detention center. He was living in Sydney, New South Wales. In July 2019, the author's Safe Heaven Enterprise visa request was still pending.

2.9 S.M. arrived to Christmas Island in August 2013. He had spent approximately 16 months in the detention center on Christmas Island. In December 2014 he received a Bridging Visa and was released. He was living in Melbourne, Victoria and author was granted a Safe Heaven Enterprise visa on 5 July 2018.

2.10 G.Z. arrived to Christmas Island in August 2013. He had already been transferred to a regional processing center and subsequently returned to Australia in December 2013. In total, he had spent approximately 15 months in the detention center on Christmas Island. In January 2015 he received a Bridging Visa and was released. The author lived in Adelaide, South Australia. His Safe Heaven Enterprise visa application was refused. In July 2019, his legal status was under review by the Immigration Assessment Authority.

2.11 B.A.A. arrived to Christmas Island in October 2013. He had spent approximately 13 months in the detention center on Christmas Island. He was relocated to a community detention center in Sydney, New South Wales. On 28 October 2016, the author's Safe Heaven Enterprise visa request was granted. The author has a brother in Australia, who was in community detention on the mainland upon the author's arrival. At some point after his arrival, the author requested to be taken care of by his brother, but, as the latter was minor at the time, this request was denied.

2.12 H.M. and H.I. arrived to Christmas Island in July 2013. They had spent approximately 17 and 18 months, respectively, in the detention center on Christmas Island. In January 2015 they received a Bridging Visa and were released. They were living in Melbourne, Victoria. On 6 August 2018, H.I. was granted a Safe Heaven Enterprise visa. H.M.'s Safe Heaven Enterprise visa request was granted on 21 June 2019.

2.13 A.M. arrived to Christmas Island in August 2013. He had spent approximately 15 months in the detention center on Christmas Island. He was relocated to a community detention center in Geelong, Victoria. On 10 March 2017, the author was granted a Safe Heaven Enterprise visa.

The Complaint

3.1 At the time of the initial submission, the authors claimed that by transferring them to Nauru the State party would be in violation of its non-refoulement obligations under article 7 of the Covenant. The authors argue that conditions of the authors' detention in Nauru would have been inadequate and contrary to requirements of articles 7, 10, 9 (1) and (4), 17, 23, and 24 of the Covenant. They claim that in Nauru they would have been arbitrarily detained and deprived of necessary educational, medical and social facilities. The authors submit that State party bears responsibility for these potential violations in case of their transfer.

3.2 The authors also claim that they were arbitrarily detained on Christmas Island for an excessive period of time contrary to requirements of article 9 (1) of the Covenant. They recall the Committee's jurisprudence and argue that their detention was neither necessary nor proportionate. Furthermore, the claim that the State party was in violation of article 9 (4), as the authors did not have an avenue to challenge their detention

3.3 The authors argue that facilities and services available to them while in detention on Christmas Island were inadequate and contrary to requirements of articles 7, 10, 17, 23 and 24 of the Covenant. They submit that national authorities did not provide them with all necessary facilities and support. Specifically, they argue that they did not have proper access to physical and mental health facilities.

3.4 The authors submit that conditions of community detention on the Australian mainland were in breach of articles 17, 23 and 24 of the Covenant. They argue that some of them were separated from other members of their families in Australia. They further specify, that B.A.A. was not allowed to reside with his brother, who had arrived to Australia 12 months earlier and was detained in community detention on the mainland. They further claim that community detention did not provide adequate facilities required by the authors.

3.5 The authors refer to article 2 (3) of the Covenant, without making any specific claim. As remedies, they request that the State party acknowledge the violations of the Covenant, apologize to them and provide them with adequate compensation and reparation.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 22 June 2016, the State party submitted its observations on the admissibility and the merits of the present communication.

4.2 The State party recalls the facts on which the present communication is based on the authors' claims, and submits that the communication should be declared inadmissible. Should the Committee declare the communication admissible, the State party submits that the authors' claims are without merit.

4.3 The State party submits that the authors' claims under articles 2 (3), 7, 9, 10, 17, 23 and 24 regarding their potential transfer from Christmas Island to Nauru are either inadmissible *ratione materiae* or not properly substantiated. The State party indicates that claims regarding conditions of living in Nauru are matters for the sovereign government of this State. Furthermore, there is no intention of transferring the authors to Nauru. The State party argues that, even if there was a decision to transfer the authors, the obligations of non-refoulement under articles 6 and 7 of the Covenant would not be triggered, as there is no real risk of irreparable harm. The authors did not provide sufficient details to substantiate possible personal risks they would face in Nauru. They made general and vague claims, without referring to individual circumstances with respect to each author.

4.4 The State party further argues that the authors' claims under 2 (3), 7, 9, 10, 17, 23 and 24 of the Covenant concerning their detention on Christmas Island are insufficiently substantiated.

4.5 With respect to claims under article 7 of the Covenant, the State party notes that the authors did not provide any evidence to support their claim that conditions of detention on Christmas Island were inadequate. The State party also notes that between 2009 and 2014 individual welfare assistance to unaccompanied minors in immigration detention was provided by private contractors. They supplied appropriate food and clothing, organized programmes and activities. They also provided an individual officer for each unaccompanied

minor, who met with their wards regularly and provided individual help. All programmes and trainings were tailored to individuals' age, gender, religious background and needs. National authorities carefully monitored quality of the services provided by the private companies.

4.6 The State party further submits that the authors made only general allegations under article 10 of the Covenant about their conditions of detention on Christmas Island, without providing any evidence or supporting information. The State party contends that all individuals detained in immigration facilities are treated with respect and that conditions of detention are appropriate. Several private contractors ensure wellbeing of individuals in detention. They provide communication services (e.g. access to computers, Internet, television, libraries), educational programmes (including primary and secondary education), mental health enhancement activities, access to religious practice, legal advice, health care, and other services. The State party emphasises that all individuals in detention, and specifically minors, are provided with access to qualified mental health professionals to monitor and avoid deterioration of their mental state. All individuals entering immigration detention are subject to mental health screening within 72 hours of their arrival. Subsequent medical evaluations take place after six, twelve, eighteen months and regularly thereafter. Special programmes are introduced for vulnerable individuals (e.g. victims of torture). The State party further notes, that whilst on Christmas Island, the authors were housed in Alternative Places of Detention or so-called Construction camps. These camps are used to meet specific needs of individuals which cannot be fulfilled in regular immigration detention centres or community detention. They include facilities-based forms of detention (e.g. immigration residential housing) and specifically designated places in the broader community. The State party further notes that immigration detention is subject to regular review to ensure that individuals' detention arrangements remain appropriate. In the light of the abovementioned factors, the State party concludes that the authors' conditions of detention were adequate in compliance with requirements of article 10 of the Covenant.

4.7 The State party notes that the authors have failed to substantiate their claims under article 9 (1) of the Covenant. They did not submit sufficient evidence to show that their detention was in violation of domestic law or otherwise arbitrary. The State party notes that all authors were detained in accordance with procedure provided by the Migration Act. Their detention on Christmas Island was as short as possible. Alternatives measures, length and conditions of detention were subject to regular administrative review. The State party submits that review of immigration detention (including review of conditions of detention) is conducted by case managers from the Department of Immigration and Border Protection and by the Commonwealth Ombudsman. The latter has an obligation to investigate a person's case, after he or she has spent two years in immigration detention. The case managers from the department perform monthly reviews of individual detention placements, including their lawfulness. The State party notes, that the authors' individual cases were handled by officers from the Department of Immigration and Border Protection in full accordance with national law and in shortest time possible.

4.8 The State party notes that the authors' claims under article 9 (4) of the Covenant are unsubstantiated and, therefore, inadmissible. Referring to the *travaux préparatoires* to the Covenant, the State party notes that 'lawfulness of detention' implies compliance with national law of a State. Broader interpretation, that includes compliance with international law standards, would have undoubtedly be reflected by the drafters. The State party notes that the authors had access to the judicial review of the legality of their detention in accordance with section 256 of the Migration Act and section 75 (iii) of the Australian Constitution.

4.9 The State party submits that the authors did not provide any specific information to substantiate their claims under articles 17, 23 and 24 of the Covenant about inadequate conditions on the mainland. Furthermore, as indicated above, all possible measures of protection were provided to the authors in compliance with requirements of the Covenant.

4.10 The State party further refers to the situation of B.A.A. who, as claimed by the counsel, was separated from his brother, who had arrived to Australia 12 months earlier, in violation of articles 17 and 23 of the Covenant. The State party recalls that B.A.A. was transferred from Christmas Island in December 2014. Initially he was placed in an Alternative Place of

Detention for eight days. After that, the author was moved and reunited with his brother in a community detention centre. When the author's brother turned 18 years old and was granted a Bridging Visa, he was released from the detention centre. B.A.A.'s brother lives close to the detention centre. They have regular phone contacts and short-term visits. On several occasions the author was allowed to stay with his brother for short periods of time. To take on custodianship from social services, the author's brother should be 21 years old. Consequently, there was no violation of B.A.A.'s rights under articles 17 and 23 of the Covenant.

4.11 The State party, referring to the author's claims under article 24 of the Covenant, recalls relevant provisions of domestic law and submits that all authors have access to comprehensive social aid while in detention or when released on Bridging Visas. Several NGOs are contracted to provide help and assistance to migrants. Unaccompanied minors are assigned to a custodian. As specified above, individuals in detention centres have access to a wide range of services. Individuals released on Bridging Visas receive income and rent support, accommodation assistance, orientation, trainings and practical information, health services. The State party also notes that A.R. was transferred to the Maribyrnong Immigration Detention Centre from community detention due to behavioral and criminal problems. His placement in the detention center is regularly reviewed. At the time of his transfer, the author was considered to be an adult.

4.12 With respect to the claims under article 2, the State party reiterates the authors have failed to substantiate allegations of breaches of any other substantive provisions of the Covenant. The State party further notes, that initial remedy sought by the authors, that is prohibition of their transfer to Nauru, has already occurred through a change in national policy. All authors are invited to apply for Temporary Protection or Safe Haven Enterprise visas in Australia.

Authors' comments on the State party's observations

5.1 The authors provided their comments on 25 October 2016.

5.2 The authors argue that their claims about conditions of detention on Christmas Island on the mainland, as well as claims about State party's non-refoulement obligations, are sufficiently substantial and supported by evidence. They further recall national legislative provisions relevant to the case. The authors submit that the risk of being transferred to a place where their human rights may be violated existed and is still present.

5.3 The authors argue that article 7 of the Covenant precludes Australia from transferring them to Nauru where conditions of detention are well documented.] There are no sufficient resources and facilities to provide protection and assistance to minors and meet their needs. The authors refer to the UNHCR conclusions on Nauru², which highlights harshness of conditions for child asylum seekers. The risk of transfer has drastic effects on their mental health. They all suffer mental anguish, while some of them became suicidal.

5.4 The authors note that their prolonged detention on Christmas Island caused them severe mental suffering. Their detention involved humiliation and debasement. The State party's submission on conditions of detention on the island are general and do not indicate specific arrangements implemented for the authors. Cultural, education and recreational programmes are insufficient to mitigate effects of poor conditions of detention.

5.5 The authors further argue that their extended detention on Christmas Island was in violation of article 10 of the Covenant. They note that unaccompanied minors are extremely vulnerable and require special treatment from national authorities. Migrants frequently come from dangerous environments, they have mental health problems. The authors recall that they did not have access to adequate medical and hygienic facilities,

² UNHCR monitoring visit to the Republic of Nauru from 7 to 9 October 2013.

they lacked appropriate clothing. The State party did not explain how the authors personally benefited from the programmes and services available on Christmas Island.

5.6 The authors argue that their detention was arbitrary in violation of article 9 (1) and (4) of the Covenant. They note that there were less restrictive means to achieve compliance with national immigration laws, rather than detaining the authors on Christmas Island for such a long period of time. While their detention could have been in compliance with national law, it was not necessary and proportionate. The authors argue that any detention in excess of six months is *prima facie* arbitrary. By April 2014, the authors have been detained on Christmas Island for five to eight months. The extended detention was not duly assessed. The authors note that the State party does not demonstrate individual grounds for their detention. Furthermore, the authors lacked proper avenue of review of their detention. The authors were unable to challenge lawfulness of their detention before Australian courts. Even if they had access to judicial review, it would be ineffective, as it is unable to order their release on the grounds of violation of provisions of the Covenant.

5.7 The authors reiterate their claims under articles 17, 23 and 24 of the Covenant. They indicate that a number of them had family members living across Australia. Contrary to requirements of article 17 of the Covenant, the authors were separated from their families. Furthermore, separation of B.A.A. from his brother was arbitrary. Phone calls and short-term visits were insufficient to comply with international standards. Moreover, return of A.R. to a detention centre was inadequate to address his mental problems and needs. The authors reiterate that alleged violations of substantive provisions of the Covenant are sufficiently substantiated. The State party has violated article 2 of the Covenant. The authors are still vulnerable and require protection from possible transfer to a regional processing centre.

5.8 Finally, the authors provide medical documents, personal statements and other information.

The State party's additional comments

6.1 In a note verbale dated 31 July 2019, the State party submitted additional information to the Committee. It submits that the comments of the authors of 25 October 2016 have not provided any information capable to substantiate their claims. The authors rely on vague and generalized assertions, without any reference to specific facts and circumstances. The State party therefore generally reiterates positions expressed in its observations of 22 June 2016. Furthermore, the State party provides update on the authors' legal status. This information has been included into the Factual background part of the present Views.

6.2 The State party notes that six authors have been granted a Safe Heaven Enterprise visas. Four of them are holding Bridging visas. One author has voluntarily returned to Afghanistan. There are no plans to transfer any of the authors to a regional processing center.

6.3 The State party notes that the authors have indicated that facilities available on the Christmas Island were inadequate and the authors' detention was not properly assessed. However, they did not provide any specific facts and evidence to support these claims. The State party argues, that the authors tries to shift the burden of proof onto the Government by requesting it to disprove unsubstantiated assertions.

6.4 With respect to the authors' claims about violations occurred in the mainland Australia, the State party recalls its previous submissions and notes that neither of these claims is supported by evidence.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 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.

7.3 The Committee notes the authors' claim that they have exhausted all available domestic remedies. The Committee also notes the State party's argument with respect to claims under article 9 of the Covenant that the authors had access to the judicial review of the legality of their detention in accordance with the Migration Act and the Australian Constitution. However, the Committee considers that the State party has not demonstrated the availability of this remedy for the authors and has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention.³ In the absence of objections by the State party in that connection with respect to the remaining claims of the authors, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 As to the State party's argument that the authors' claims about their potential transfer to Nauru under article 7, as well as articles 9 (1) and (4), 10, 17, 23, and 24 of the Covenant should be declared inadmissible owing to insufficient substantiation, the Committee notes that as of late 2014 the State party had no intention of transferring the authors to Nauru or any other offshore facility. In these circumstances, the Committee considers that the authors have not sufficiently substantiated their claims and therefore declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

7.5 The Committee notes the authors' claims that conditions of their detention on Christmas Island and on the Australian mainland were inadequate contrary to requirements of articles 7, 10, 17, and 23 of the Covenant. The Committee observes that the authors made only general statements in support of their claims. The Committee considers, consequently, that the authors have not sufficiently substantiated their claims for purposes of admissibility, and that this part of the communication must therefore be declared inadmissible in accordance with article 2 of the Optional Protocol.

7.6 The Committee notes, with respect to the authors' claims under articles 17, 23 and 24 of the Covenant that some of them have been separated from their relatives living on the Australian mainland, that it has only been provided with explanation on the family situation of B.A.A. The Committee considers that B.A.A.'s claims have been sufficiently substantiated for purposes of admissibility and declares them admissible. Similar claims brought on behalf of the remaining authors have been insufficiently substantiated for purposes of admissibility and must therefore be declared inadmissible in accordance with article 2 of the Optional Protocol.

7.7 With regard to the authors' claims under article 2 (3) of the Covenant, the Committee recalls its jurisprudence to the effect that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol. Consequently, the Committee declares this part of the communication to be inadmissible under article 3 of the Optional Protocol.

7.8 Regarding the claims under articles 9 (1) and (4), and 24 of the Covenant about the authors' detention on Christmas Island, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

7.9 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues about detention on Christmas Island under articles 9 (1) and (4), and 24 of the Covenant with respect to all authors and under articles 17, 23 and 24 of the Covenant with respect to B.A.A.

Consideration of the merits

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

8.2 The Committee notes B.A.A.'s claim that he was not allowed to reside with his brother, who had arrived to Australia 12 months earlier in violation of articles 17, 23 and 24 of the Covenant. The Committee recalls that, in accordance with the submissions of the parties, the author arrived to Christmas Island in October 2013. At that time his brother was in

³ See, *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 8.3.

community detention on the mainland. On an unspecified date, the author requested to be transferred under his brother's care, but, as the latter was minor at the time, the request was denied. In December 2014 the author was transferred from Christmas Island and initially was placed in an Alternative Place of Detention for eight days. After that, the author was moved and reunited with his brother in a community detention centre. On an unspecified date, the author's brother was released from the detention centre, when he turned 18 years old, and was granted a Bridging Visa. While staying on Christmas Island, B.A.A. had regular phone contacts with his brother who had been living close to the detention centre. He also had short-term visits with him. The Committee notes the State party's argument, that it was not possible to transfer guardianship over B.A.A. to his brother, while the latter was still a minor. After the author's brother turned 18 years old, national authorities decided that it was in B.A.A.'s best interests to remain in community detention, as his brother was unable to provide all required services and appropriate living conditions. At the same time, national authorities attempted to facilitate family contacts to the possible extent. The Committee recognizes that there existed reasonable grounds not to transfer guardianship over B.A.A. to his brother. The author does not provide any evidence or arguments to substantiate that his brother was in a position to provide him with required assistance and caretaking. In addition, the Committee takes note of that fact that the author did not specify at what exact point in time after his arrival he had requested to be placed under the care of his brother. In light of these circumstances, and having noted the efforts undertaken by national authorities to establish and maintain personal contacts between the author and his brother, the Committee cannot conclude that the State party's authorities have not acted with the best interests of the author in mind nor that they violated their duties under articles 17, 23 and 24 of the Covenant.

8.3 With regard to articles 9 (1) and 24 of the Covenant, the Committee notes the authors' allegation that their immigration detention on Christmas Island was arbitrary and unreasonably prolonged, and conditions of detention and facilities on the Christmas Island were inadequate for their needs. The Committee notes the State party's argument that the authors' detention occurred in accordance with procedures established by the Migration Act; their detention was as short as possible and regularly reviewed on an individual basis.

8.4 The Committee further notes, that neither party argues that the detention on Christmas Island was unlawful under the Australian law. At the same time, 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. Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. 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 review⁴.

8.5 In addition, the Committee reminds its General Comment No. 35: "Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors."⁵ The Committee recalls that the

⁴ See, *M.G.C. v. Australia* (CCPR/C/113/D/1875/2009), para 11.5.

⁵ General Comment No. 35 (2014), para. 18. Moreover, in its previous Conclusions Observations on Australia (2017, CCPR/C/AUS/CO/6, para. 37), , the Committee expressed its concern "about what appears to be the use of detention powers as a general deterrent against unlawful entry rather than in response to an individual risk, and the continued application of mandatory detention in respect of children and unaccompanied minors, despite the reduction in the number of children in immigration detention." The Committee was "also concerned about poor conditions of detention in some facilities, the detention of asylum seekers together with migrants who have been refused a visa due to their criminal records, the high reported rates of mental health problems among migrants in detention, which allegedly correlate to the length and conditions of detention, and the reported increased use of force and physical restraint against migrants in detention." See also Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations

authors arrived on Christmas Island on different dates between July and November 2013 as unaccompanied minors. In accordance with the national policy at the time, they were all placed in immigration detention. They spent between 13 and 18 months in immigration detention before being transferred to community detention centres on the mainland. The Committee considers that the State party has not demonstrated on an individual basis that the authors' continuous and protracted detention was justified for such an extended period of time. The State party has also not demonstrated that other less intrusive measures could not have achieved the same end of compliance with the State party's need to ensure that the authors would be available for removal. Specifically, it has not been shown that the authors, who were minors at the time, could not have been transferred earlier to community detention centres, which are more tailored to meet specific needs of vulnerable individuals. For all these reasons, the Committee concludes that placing the authors, as unaccompanied minors, in immigration detention was arbitrary and contrary to article 9 (1) and to article 24 of the Covenant.

8.6 The Committee also notes the authors' claims that they did not have any effective domestic remedy to challenge legality of their detention before domestic courts contrary to requirements of article 9 (4) of the Covenant. The Committee considers the State party's argument that the authors had access to a judicial review of legality of their detention in accordance with domestic law. At the same time, the State party argues that review of 'lawfulness of detention' within the meaning of article 9 (4) of the Covenant implies only compliance with national law of a State.

8.7 The Committee recalls 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). The Committee further notes its previous jurisprudence concerning review of detention of non-citizens without valid entry documentation in Australia⁶. In particular, it previously established that the scope of domestic judicial review of immigration detention was insufficiently broad to examine an individual's detention in substantive terms. Furthermore, relevant national jurisprudence showed that even a successful legal challenge of detention could not necessarily lead to release from arbitrary detention.⁷ The State party has not provided relevant legal precedents showing the effectiveness of an application before the national courts in similar situations. Moreover, it has not demonstrated the availability of this remedy for the authors and has not shown that national courts have the authority to make individualized rulings on the justification for each author's detention. Therefore, the Committee does not see a ground to depart from its well-established approach and considers that the facts in the present case involve a violation of article 9 (4).

9. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under article 9 (1) and (4) and article 24 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors 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*, to provide the authors with adequate 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 review its migration legislation and policies to ensure their conformity with the requirements of articles 9 and 24 of the Covenant.

11. 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 and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy

regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (2017), para. 8.

⁶ See, *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 9.6.

⁷ *Ibid.*

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.
