



Note No. 717/2014

The Australian Permanent Mission to the United Nations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and the Human Rights Committee and has the honour to refer to Communication No. 2094/2011 (submitted on behalf of Gafoor et al, anonymised by the Committee as F.K.A.G. et al) and Communication No 2136/2012 (submitted on behalf of Mufis Mofis et al, anonymised by the Committee as M.M.M. et al).

The Australian Permanent Mission has the further honour to refer to the *note verbale* of the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) dated 20 August 2013, transmitting the text of the Views adopted by the Human Rights Committee concerning these communications.

The Australian Government hereby provides its response to the Views of the Human Rights Committee. The Australian Government sincerely regrets the delay in lodging its response.

The Australian Permanent Mission avails itself of the opportunity to renew to the Human Rights Committee and the Office of the United Nations High Commissioner for Human Rights the assurances of its highest consideration.



Geneva  
17 December 2014

OHCHR REGISTRY

17 DEC 2014

Recipients : *P. L. Cairns*.....  
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**RESPONSE OF THE AUSTRALIAN GOVERNMENT  
TO THE VIEWS OF THE HUMAN RIGHTS COMMITTEE IN  
COMMUNICATION NO 2094/2011 (F.K.A.G. V AUSTRALIA) AND  
COMMUNICATION NO 2136/2012 (M.M.M. V AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Human Rights Committee.
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 2094/2011 (F.K.A.G. v Australia) and Communication No. 2136/2012 (M.M.M. v Australia), both transmitted on 20 August 2013. These Views have been published on the website of the Australian Attorney-General's Department.<sup>1</sup> Australia provides the following comments on certain aspects of the Committee's Views.

*Article 9, paragraph 1*

3. Australia acknowledges its obligations under the International Covenant on Civil and Political Rights (the Covenant) not to subject individuals to arbitrary detention, and further acknowledges that there are some circumstances in which the lawful and permissible detention of a person may become arbitrary if there are no longer any grounds to justify it.
4. Australia reiterates that it is entitled to take measures, including detention, to uphold Australia's national security. Security assessments can be issued when the Australian Security Intelligence Organisation (ASIO) - Australia's national security intelligence service - makes an assessment on whether it would be consistent with the requirements of security, or whether the requirements of security make it necessary or desirable, for prescribed administrative action to be taken, where an individual is directly or indirectly a risk to security.<sup>2</sup> It is Australia's policy that unlawful non-citizens who are the subject of adverse security assessments from ASIO will remain in held immigration detention, pending the resolution of their cases.

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<sup>1</sup> Human Rights Communications, Australian Attorney-General's Department website: <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx#hrcommitee>.

<sup>2</sup> *Australian Security Intelligence Organisation Act 1979*, section 35. 'Prescribed administrative action' includes the exercise of any power or the performance of any function under the *Migration Act 1958* or the regulations under that Act.

5. Australia notes that the four dependent child authors are lawful non-citizens and were not required to remain in detention. The decision on whether the children reside in immigration detention or in the community with a carer, parent or guardian is that of the parent/s or legal guardian.
6. It is Australia's view that in forming its Views on article 9, paragraph 1 of the Covenant, the Committee failed to give adequate weight to various processes and policy developments outlined in Australia's submissions.
7. The authors' adverse security assessments have been reviewed regularly since the time at which they were issued. This includes regular internal review processes by ASIO and, since 2012, additional review by the Independent Reviewer of Adverse Security Assessments. The Independent Reviewer of Adverse Security Assessments was appointed on 3 December 2012. The Reviewer provides an independent review process for those individuals who remain in immigration detention, having been found to be owed international protection obligations, but not granted a permanent visa as a result of an adverse security assessment.
8. As at 27 November 2014, a total of 12 adult authors have been released from immigration detention following new security assessments by ASIO. The four dependent child authors, who remained in detention at the discretion of their parents, are also no longer in immigration detention.
9. In eight of these 12 cases, ASIO issued new security assessments on the basis of the provision or receipt of new information separately to consideration by the Independent Reviewer. New information can relate directly to the individual, or to external factors such as changes in the security environment or other intelligence which inform ASIO's judgment.
10. In addition, the remaining four persons in this cohort of 12 have been released from immigration detention following new security assessments issued by ASIO, further to recommendations of the Independent Reviewer that an adverse security assessment was not an appropriate outcome in those cases.
11. The Independent Reviewer has found, in an additional four cases, that the adverse security assessment issued by ASIO was not an appropriate outcome. ASIO has issued new security assessments in respect of those persons, and the Department of Immigration and Border Protection is considering their cases.
12. The Independent Reviewer has a total of 47 cases, of which 31 reviews have been completed. Of these 31 cases, the Independent Reviewer has found that an adverse

security assessment is appropriate in 23 cases. Of the eight cases in which the Independent Reviewer found that an adverse security assessment was not an appropriate outcome, ASIO has issued new assessments (of a qualified or non-prejudicial nature). In four of these eight cases, the Independent Reviewer based her conclusions on new information that ASIO did not have during its original assessments. As mentioned above, of these eight cases, four persons have been released from immigration detention, and the cases of the remaining four persons are under consideration by the Department of Immigration and Border Protection.

13. Australia notes that it has also made significant efforts to explore options for third country resettlement for the authors.

*Article 9, paragraph 2*

14. Australia disagrees with the Committee's Views in respect of article 9, paragraph 2. The term 'arrest' in article 9, paragraph 2 is not applicable to these communications, as the authors were not 'arrested' in the ordinary meaning of the term, which relates to a criminal law context.
15. As the Committee is aware, the terms of a treaty are given their ordinary meaning in their context and in light of the treaty's object and purpose.<sup>3</sup> Australia submits that the term 'arrest', based on its ordinary meaning, 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 police 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. Australia submits that although the relevant authors are in 'detention' for the purposes of article 9, they have not been 'arrested' in order to be taken into detention for the purposes of article 9, paragraph 2.
16. The *travaux préparatoires* confirm this interpretation of article 9, paragraph 2 which limits the scope of the term 'arrest' to a criminal context. The *travaux préparatoires* suggest that the drafters of article 9, paragraph 2 intended to protect the rights of persons arrested in relation to the commission, or alleged commission, of a criminal offence. For example, in the 13<sup>th</sup> Session of the Third Committee in 1958, the delegate from Israel explained that the 'reasons' for arrest, for the purposes of article 9, paragraph 2 should be understood as a precursor to criminal 'charges', which

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<sup>3</sup> *Vienna Convention on the Law of Treaties* [1974] ATS 2, article 31.

States would also be required to furnish and which were ‘of a more exacting and serious nature’.<sup>4</sup>

17. Australia further notes that, despite the views expressed by the Committee in relation to article 9, paragraph 2 in its General Comment No. 8, to Australia’s knowledge the Committee has not found article 9, paragraph 2 to apply to administrative detention in any previous communication to date.<sup>5</sup>

*Article 9, paragraph 4*

18. Australia disagrees with the Committee’s interpretation of article 9, paragraph 4. The obligation on States Parties is, in accordance with the words of that article, to provide for review of the lawfulness of detention. In Australia’s view, there can be no doubt that the term ‘lawfulness’ refers to lawfulness according to the Australian domestic legal system.
19. There is nothing apparent in the terms of the Covenant that suggests that ‘lawful’ was intended to mean ‘lawful at international law’ or ‘not arbitrary’. Where the term ‘lawful’ is used in other provisions of the Covenant it clearly refers to domestic law: see for example, article 9, paragraph 1; article 17, paragraph 2; article 18, paragraph 3 and article 22, paragraph 2. Furthermore, there is nothing in the Committee’s General Comments, or the *travaux préparatoires* of the Covenant, to support the finding that ‘lawfulness’ in article 9, paragraph 4 extends beyond domestic law.<sup>6</sup> Accordingly, Australia does not accept the Committee’s view that Australia has breached article 9, paragraph 4.
20. Australia notes that the Committee reached its view on article 9, paragraph 4 partially on the basis of its understanding that the outcome of the High Court of Australia’s judgment in the case of *M47/2012 v Director General of Security and Ors*<sup>7</sup> did not result in the release of the authors from immigration detention despite the complainant’s success in that case. Australia considers that this is not the correct conclusion to reach from these circumstances. In that case, the specific legal points

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<sup>4</sup> UN General Assembly, *Report of the Third Committee: Draft International Covenants on Human Rights*, UN Doc. A/4045, paragraph 51. UN General Assembly, *Thirteenth Session: Agenda Item 32: Draft International Covenants on Human Rights*, UN Doc. A/C.3/SR.866, paragraph 21 (E). Marc J Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 1987, page 204.

<sup>5</sup> Human Rights Committee, *General Comment No. 8: Article 9: Right to Liberty and Security of Persons*, 20 June 1982.

<sup>6</sup> M Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers (1987) 212-216.

<sup>7</sup> *M47/2012 v Director General of Security and Ors* [2012] HCA 46; (2012) 292 ALR 243.



on which the complainant was successful were not related to the lawfulness of the detention and, accordingly, did not lead to release from detention as a remedy. It is also worth noting that the Court was asked to decide whether, in furnishing the adverse security assessment, ASIO failed to comply with the requirements of procedural fairness. The Court found that there was no denial of procedural fairness in the circumstances.

21. A successful challenge to the High Court of Australia by a person who engages Australia's protection obligations, but is subject to an adverse security assessment, would result in release from detention if the Court found that the detention was unlawful. Australia further considers that the Committee placed too much weight on the outcomes of previous High Court cases in coming to its decision on the possible outcomes of review. These outcomes were based on specific factual situations and should not be read as an indication that judicial review at the High Court is not available to the authors, nor that release from detention may not be an outcome of such review. In particular, Australia considers that the Committee did not give enough weight to Australia's submissions that *Al Kateb v Godwin*<sup>8</sup> is precedent that could be overturned consistent with the role of the High Court as the highest independent review body in Australia.

#### *Article 7*

22. Australia is mindful of the impact of continuing detention on individuals with adverse security assessments while noting that it does not consider that detention *per se* causes harm to individuals.
23. Australia notes the Committee's finding that the authors were suffering from psychological harm and that this harm played a key role in the Committee's conclusion that the authors' treatment amounted to a violation of article 7 of the Covenant.
24. In *C v Australia*, the Committee took a similar approach. In that case, the separate opinion of Committee members Ando, Klein and Yalden expressed the view that the Committee's reasoning in respect of article 7 was flawed. This was because such reasoning led to a conclusion that where an author is detained and is suffering psychological harm, the only manner by which such harm could be remedied is by release from detention. The consequence is that a State is necessarily in breach of

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<sup>8</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

article 7 where a detainee is suffering psychological harm and is not able to be released. The separate opinion of Committee members Ando, Klein and Yalden considered that this reasoning expanded the scope of the article 7 inappropriately.<sup>9</sup>

25. The separate opinion of Committee members Ando, Klein and Yalden in *C v Australia* also accords with the European Court of Human Rights' position in *A and others v UK*.<sup>10</sup> In that case, the Court found that the right to freedom from torture or cruel inhuman or degrading treatment<sup>11</sup> does not give rise to an automatic obligation to release detainees on health grounds, but does impose an obligation to protect the physical and mental well-being of detained individuals, for example, by providing them with requisite medical assistance.<sup>12</sup> The Court therefore found no violation in that case as the treatment of detainees had not reached the requisite threshold to justify a finding of inhuman and degrading treatment.
26. Australia agrees with the separate opinion of Ando, Klein and Yalden in *C v Australia*, and considers that that view is equally applicable to this communication. On this basis, Australia disagrees with the Committee's conclusions in respect of article 7.
27. Australia submits that the treatment of the authors does not meet the threshold to satisfy a violation of article 7, as steps were taken to meet the psychological health needs of the authors through medical and other health services. Australia is committed to minimising the factors that contribute to mental health deterioration of individuals in immigration detention, and ensuring that those individuals in need of medical assistance are promptly given treatment.
28. The Government provides individuals with access to health care and mental health support services, and ensures qualified health professionals conduct individual health assessments. All individuals in immigration detention have a mental health assessment upon entry to detention and are offered regular mental health screening throughout their time in detention, conducted by mental health clinicians. Concerns

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<sup>9</sup> *C v Australia*, (900/1999), 28 October 2002.

<sup>10</sup> *A and others v UK* 3455/05 49 EHRR 29. Australia notes that it is not a party to the European Convention on Human Rights (ECHR) and is not bound by its jurisprudence. However, the views of the European Court may provide useful guidance in interpreting the Covenant to the extent the obligations in the two treaties overlap.

<sup>11</sup> Article 3 of the European Convention of Human Rights is the prohibition on torture or cruel inhuman and degrading treatment and is the equivalent of article 7 of the Covenant.

<sup>12</sup> *A and others v UK* 3455/05 49 EHRR 29, paragraph 127.



in respect of an individual's mental health can be raised by any party at any time, and the individual will be referred for prompt assessment.

29. All people in immigration detention facilities are supported under the Government's Psychological Support Programme (PSP) Policy. The focus of the PSP is on preventative and monitoring strategies to reduce detainee self-harm risk through:
  - supportive monitoring and engagement
  - coordinated and individual care planning
  - provision of meaningful activities, and
  - provision of a supportive environment.
30. The PSP is an interdisciplinary approach that enhances communication and promotes integrated care between service providers. Detainees assessed to be at higher risk of self-harm receive a higher level of clinically guided support.
31. The immigration detention facilities in which the authors reside have on-site primary health care services (including general practitioner, nursing, counselling and psychological). These services are of a standard generally comparable to the health care available to the Australian community, are provided by qualified health professionals and take into account the diverse and potentially complex health care needs of people in immigration detention. Where individuals require specialist medical treatment not available on-site, they are referred to off-site specialists.
32. As set out in Australia's submissions, a number of the authors have received specific treatment and support in relation to their physical and mental health issues, pursuant to the frameworks and policies described above.
33. For the reasons outlined above, Australia submits that the treatment of the authors is not such that it has reached the threshold necessary to satisfy a finding of a violation of article 7.
34. Australia avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.

