Human Rights Committee
Seventy-ninth session
20 October - 7 November 2003

Views of the Human Rights Committee under
the Optional Protocol to the International Covenant
on Civil and Political Rights*

- Seventy-ninth session -

Communication No. 1069/2002

Submitted by: Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari (represented by counsel Mr. Nicholas Poynder)

Alleged victims: The authors and their five children, Almadar, Mentazer, Neqeina, Sameina and Amina Bakhtiyari

State party: Australia

Date of communication: 25 March 2002 (initial submission)

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

Meeting on 29 October 2003,

Having concluded its consideration of communication No. 1069/2002, submitted to the Human Rights Committee by Mr. Bakhtiyari et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:
Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication, initially dated 25 March 2002, are Ali Aqsar Bakhtiyari, an alleged national of Afghanistan born on 1 January 1957, his wife Roqaiha Bakhtiyari, an alleged national of Afghanistan born in 1968, and their five children Almadar Hoseen, Mentazer Medi, Neqeina Zahra, Sameina Zahra and Amina Zahra, all alleged nationals of Afghanistan, born in 1989, 1991, 1993, 1995 and 1998, respectively. At the time of submission, Mr Bakhtiyari was resident in Sydney, Australia, while Mrs Bakhtiyari and the children were detained at Woomera Immigration Detention Centre, South Australia. The authors claim to be victims of violations by Australia of articles 7; 9, paragraphs 1 and 4; 17; 23, paragraph 1; and 24, paragraph 1, of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

1.2 On 27 March 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party to refrain from deporting Mrs Bakhtiyari and her children, until the Committee had had the opportunity to consider their claims under the Covenant, in the event of a negative decision by the Minister for Immigration on their request in October 2001 to exercise his discretion to allow them to remain in Australia. Following the Minister's adverse decision and advice that Mrs Bakhtiyari and her children had applied to the High Court of Australia, this request to refrain from deportation was adjusted by the Special Rapporteur on New Communications, on 13 May 2002, to be conditional on an adverse decision on the application by the High Court.

The facts as submitted

2.1 In March 1998, Mr Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law and. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr Bakhtiyari, Mrs Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ('the Minister') on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ('RRT') dismissed their application for review of the refusal. The RRT accepted that Mrs Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

2.3 Some time after July 2001, Mr Bakhtiyari found out from an Hazara detainee who had been released from the Woomera detention facility that his wife and children had arrived in Australia and were being held at Woomera. On 6 August 2001, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department'), as a matter of standard procedure following an unsuccessful appeal to the RRT, assessed the case in the light of the Minister's public interest guidelines, (1) which include consideration of international obligations, including the Covenant. It was decided that Mrs Bakhtiyari and the children did not meet the test of the guidelines. In October 2001, Mrs Bakhtiyari applied to the Minister for Immigration requesting that he exercise his discretion under s.417 of the Migration Act to substitute, in the public interest, a more favourable decision for that of the RRT, on the basis of the family relationship with Mr Bakhtiyari.

2.4 In a widely-reported incident on 26 January 2002, Mrs Bakhtiyari's brother deliberately injured
himself at the Woomera facility in order to draw attention to the situation of Mrs Bakhtiyari and her children. On 25 March 2002, the present communication was lodged with the Human Rights Committee.

2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the Migration Act. The application sought to require the Minister to grant a visa to Mrs Bakhtiyari and her children based on the visa already granted to Mr Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department') issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs Bakhtiyari made a further request to the Minister under s.417 of the Migration Act, but was informed that such matters were generally not referred to the Minister while litigation was underway.

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs Bakhtiyari again made a request to the Minister under s.417 of the Migration Act, but was again informed that such matters were generally not referred to the Minister while litigation was underway. On 18 July 2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the Family Law Act 1975 (2) for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in 1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr Bakhtiyari replied to these issues.

2.10 On 9 October 2002, the Family Court (Dawe J) dismissed the application made to it, finding it had no jurisdiction to make orders in respect of children in immigration detention. On 5 December 2002, Mr Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

2.11 Following damage to Woomera in early January 2003, Mrs Bakhtiyari and the children were transferred to the newly-commissioned Baxter immigration detention facility, near Port Augusta. After the failure of his challenges in the Federal Court against his transfer, on 13 January 2003, Mr Bakhtiyari was transferred from Villawood to the Baxter facility, to be with his wife and children.

2.12 On 4 February 2003, the High Court, by a majority of five justices against two, refused the application of Mrs Bakhtiyari and her children to be granted a protection visa on account of Mr Bakhtiyari's status. The Court found that as the Minister was under no obligation to make a new decision, no object would be served in setting aside his decision, and in any event it was not tainted by illegality, impropriety or jurisdictional error. Likewise, the RRT's decision on their appeal was not
tainted by any jurisdictional error.

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

2.15 On 30 September and 1 October 2003, the High Court heard the appeal of the Minister against the decision of the Full Court of the Family Court that it had jurisdiction to make welfare orders for children in immigration detention. The Court reserved its decision.

The complaint

3.1 The authors argue that the State party is in actual or potential breach of article 7. They argue that, as it had become apparent that the RRT was in error in finding that Mrs Bakhtiyari and her children were not Afghan nationals, they would be sent on to Afghanistan if returned to Pakistan. In Afghanistan, they fear that they would be exposed to torture or cruel, inhuman or degrading treatment or punishment. They invoke the Committee's General Comment 20 on article 7, as well as the Committee's jurisprudence, (3) for the proposition that the State party's responsibility would arise for a breach of article 7 if, as a necessary and foreseeable consequence of, directly or indirectly, deporting Mrs Bakhtiyari and the children to Afghanistan, they would be exposed to torture or to cruel, inhuman or degrading treatment or punishment.

3.2 The authors also submit that the prolonged detention of Mrs Bakhtiyari and her children violates articles 9, paragraphs 1 and 4, of the Covenant. They point out that under section 189(1) of the Migration Act, unlawful non-citizens (such as the authors) must be arrested upon arrival. They cannot be released from detention under any circumstances short of removal or being granted a permit, and there is no provision for administrative or judicial review of detention. No justification has been provided for their detention. Thus, applying the principles set out by the Committee in A v Australia, (4) the authors consider their detention contrary to the Covenant, and they seek adequate compensation.

3.3 The authors claim that deportation of Mrs Bakhtiyari and her children would violate articles 17 and 23, paragraph 1. The authors compare these provisions to the corresponding articles (12 and 8) of the European Convention on Human Rights, and consider the Covenant rights to be expressed in stronger and less restricted terms. As a result, the individual's right to respect for family life is paramount over any right of the State to interfere, and thus the "balancing exercise" and "margin of appreciation" characteristic of decisions of the European organs will be of lesser importance in cases arising under the Covenant. Against this background, the authors invite the Committee to follow the approach of the European Court of Human Rights to the effect of being restrictive to those seeking entry to a State to create a family, but more liberal to non-citizens in existing families already present in a State. (5)

3.4 In Covenant terms, the removal of Mrs Bakhtiyari and her children, which will separate them from Mr Bakhtiyari, amounts to an "interference" with the family. While the interference is lawful, it should also, according to the Committee's General Comment 16 on article 17, be reasonable in the particular circumstances of the case. In the authors' view, to return Mrs Bakhtiyari and her children to Afghanistan in circumstances where Mr Bakhtiyari, an Hazara, is unable to return safely to that country in the light of the uncertain situation, would be arbitrary.
3.5 The authors finally argue a violation of article 24, paragraph 1, which should be interpreted in the light of the Convention on the Rights of the Child. No justification has been provided for the prolonged detention of the children, in "clear" violation of article 24. No consideration has been given to whether it would be in their best interests to have spent over a year in an isolated detention facility, or to be released; detention has been a measure of first, rather than last, resort. It is no answer to say that the best interests of the children were served by co-locating them with Mrs Bakhtiyari as no justification for her prolonged detention has been supplied, and there is no reason why she could not have been released with the children pending determination of their asylum claims. In any event, as soon as it became known that Mr Bakhtiyari had been granted a permit and was residing in Sydney, the children should have been released into his care.

3.6 As to issues of admissibility, the authors observe that while Mrs Bakhtiyari and her children could have sought judicial review in the Federal Court of the RRT's decision affirming the refusal of a protection visa, they did not do so because there was no identifiable error of law which would have given rise to a claim that the RRT's decision should be set aside, and thus such an application would have been futile. The RRT's decision was based on an error of fact, that Mrs Bakhtiyari and her children were not Afghan nationals. This, according to the authors, was clearly wrong, as Mr Bakhtiyari had, unbeknown to the RRT, satisfied the State party's immigration authorities at the time that he had applied for a protection visa that he was an Afghan national, entitled to protection. However, it is well-established under the State party's law that wrong findings of fact are not reviewable by the courts. (6) In any event, the mistake of fact only came to light after the non-extendable 28 day time limit for applications to the Federal Court had passed.

3.7 The authors contend that it may have been possible to apply to the High Court under its original jurisdiction to review decisions of government officials, however any prospects of success in such proceedings were removed by the entry into force on 27 September 2001 of the Migration Amendment (Judicial Review) Act 2001, which provided that RRT decisions are final and conclusive, and cannot be challenged, appealed against, reviewed, quashed or called into question in any court. (On this point, in a subsequent submission of 9 April 2002, the authors' counsel stated that he had been unaware of the possibility of an arguable case before the High Court, as was in fact subsequently lodged after receipt of additional legal advice from other sources. Given the novelty of the application, there was "considerable doubt" at the time that the application would succeed.) In terms of the Minister's power to exercise his discretion under section 417 of the Migration Act, a refusal to so act cannot be appealed or reviewed in any court.

3.8 The authors state that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

Subsequent issue of request for interim measures of protection

4.1 On 8 May 2002, the authors provided the Committee with a psychologist's report dated 2 December 2001, a report of the South Australian State government's Department of Human Services dated 23 January 2002, and a report of an Australian Correctional Management Youth Worker dated 24 January 2002. These reports found that ongoing detention was causing deep depressive effects upon the children, and the two boys Almadar and Mentazer. The reports referred to a number of instances of self-harm, including instances where the two boys stitched their lips together (Almadar on two occasions), slashed their arms (Almadar also cut the word "Freedom" into his forearm), voluntarily starved themselves and behaved in numerous erratic ways, including drawing disturbed pictures. In addition, the children witnessed Mrs Bakhtiyari's lips sewn shut. The Department for Human Services strongly recommended as a result that Mrs Bakhtiyari and the children have ongoing assessment outside the Woomera facility.

4.2 On 13 May 2002, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested that the State party inform the Committee within 30 days of the measures it had taken on the basis of evaluation by the State party's own expert authorities that, as a result of incidents of self harm inflicted by at least two of the children upon themselves, Mrs Bakhtiyari and her children should have ongoing assessment outside of Woomera detention centre, in order to ensure that further such acts of harm were not suffered.

4.3 By submission of 18 June 2002, the State party responded to the Committee's request. The State party observed that the family is closely monitored, and that individual care and case management plans are in place and regularly reviewed. It points out that the standard of medical
care available at the Woomera facility is "very high", including continuous cover by a general medical practitioner and nurses, including a psychiatric nurse, as well as availability of psychologists and counsellors, dentists and an optometrist. A range of recreational and educational facilities are available to assist in the maintenance of mental health and to foster individual development.

4.4 As to the issue of release from detention, the State party did not consider such a course would be appropriate. Detailed consideration was being given to the family situation, and their circumstances were known to the Minister and to the Department. The State party pointed out that its processes had determined that it did not owe protection obligations to Mrs Bakhtiyari and her children. In addition, the Minister personally considered the case, inter alia in the light of the State party's obligations including the Covenant, and decided that it would not be in the public interest to substitute a more favourable decision. In addition, as Mr Bakhtiyari's visa was under consideration for cancellation for alleged fraud, it would not be considered appropriate to release Mrs Bakhtiyari and the children at that time.

4.5 By letter of 8 July 2002, the authors responded to the State party's observations pursuant to the Committee's request, contesting that the standard of medical care provided was as contended by the State party. Reference was made to evidence provided to the (then) on-going National Inquiry into Children in Immigration Detention conducted by the Human Rights and Equal Opportunities Commission, where a variety of State departments were sharply critical of the level of health services and staffing provided, including concerning mental health and development needs, dental and nutritional issues. There was also considerable criticism of educational facilities, from pre-school level onwards, falling well short of services provided to Australian children, and of scarce access to recreational programs. (7)

4.6 As to the State party's contention that Mrs Bakhtiyari and her children should not be released as it had been determined that no protection obligations were owed, the authors pointed out that the requirement not to detain a person arbitrarily did not depend on the existence of an obligation to provide protection, but rather on whether there were sound grounds justifying detention. In any event, legal proceedings continued to challenge the decision not to grant a protection visa. Moreover, the principle of family unity required that they, as dependents of Mr Bakhtiyari, who had been granted a protection visa, should be released to join him. As to the move to cancel Mr Bakhtiyari's visa on the basis of allegations that he was from Pakistan and a linguistic analysis of dialect, counsel stated that the State party had refused repeated requests for access to the allegations and the analysis, and that this information was being sought by legal action. In addition, a language analysis carried out by his own expert, as well as statements from people that knew him in Afghanistan, confirmed his original evidence.

4.7 By letter of 12 September 2002, the authors provided the Committee with an Assessment Report, dated 9 August 2002, of the Department of Human Services (Family & Youth Services). The assessment was requested by the Department of Immigration and Multicultural and Indigenous Affairs in order to advise on what would be the best living situation for the family. The report recommended, inter alia, that Mrs Bakhtiyari and her children be released into the community in order to prevent further social and emotional harm being done to the children, especially the boys. Ideally, this would be via a temporary bridging visa, but release as a total family unit to a residential housing option would also be an improvement. If the family had to remain in detention, the family should be transferred to the Villawood facility in Sydney for easier access to Mr Bakhtiyari. In addition, increased and better-focussed health, education and recreational resources should be provided, as well as greater care taken to protect and shield children from situations of danger and trauma within the compound. This report was tabled in the South Australian parliamentary House of Assembly, with the Premier requesting the federal government to respond and act upon the recommendations.

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

5.1 By submission of 7 October 2002, the State party contests both the admissibility and the merits of the communication. In the first instance, the State party submits that the entire communication should be dismissed for failure to exhaust domestic remedies, as at that point the authors' High Court action, which could have resulted in a full remedy, was still pending. In addition, with respect to article 9, the State party argues that an action in habeas corpus under the Constitution Act 1901 would provide a means by which the lawfulness of any detention, administrative or otherwise, may effectively be judicially tested.
5.2 As to the claims under article 7, the State party argues that this aspect of the communication should be declared inadmissible for lack of sufficient substantiation. The authors simply assert, without any explanation, that if deported to Pakistan, they will be sent on to Afghanistan and face treatment contrary to article 7.

5.3 Firstly, the State party points out that both the original decision-maker and the RRT made findings of fact that Mrs Bakhtiyari and the children were not from Afghanistan. The original decision-maker noted that she was unable to name the Afghan currency, any of the larger towns or villages around her home village, any of the names of the provinces surrounding her home or which she had passed through on her way out of the country, or a river or mountain near her village. In drawing adverse inferences concerning her veracity, the decision-maker made explicit allowance for her age, level of education, gender and life experience in determining the level of knowledge she could be reasonably expected to have, acknowledging limitations suffered by her as a woman in a Muslim country. The RRT also noted, *inter alia*, that the results of linguistic analysis showed a distinct Pakistani accent, and that she could name neither the Afghan currency nor the years in the Afghan calendar in which her children were born. While she had been unable to provide any information to the original decision-maker concerning her travel route from Afghanistan, by the time she reached the RRT her story had, in the RRT's words, "considerably evolved" and it took the view that she had clearly been coached in the intervening months.

5.4 The State party invites the Committee to follow its approach to fraudulent nationality in *J.M. v Jamaica,* (8) where the State party, in response to a claim of denial of passport, presented information to the effect that at no stage was the author a Jamaican or had possessed a Jamaican passport; moreover, he was unable to provide the most basic information about Jamaica despite having claimed to live there before losing his passport. The Committee accordingly found he had failed to establish he was a Jamaican citizen and thus failed to substantiate his claims of violation of the Covenant. In the instant case, two decision-makers found, as fact, that Mrs Bakhtiyari and her children were not Afghan nationals, and no new contrary evidence has been provided by the authors; thus, there is no basis for the claim that they would be sent on to Afghanistan, if returned to Pakistan.

5.5 Secondly, even if they were from Afghanistan, they have not substantiated, for purposes of admissibility, that they would be exposed to torture or other cruel, inhuman or degrading treatment or punishment. The onus lies on the authors to show a risk of such treatment. The State party points out that UNHCR estimates that 70-80% of Afghanistan is safe for returnees, and there is nothing to suggest that the Bakhtiyaries would not be in such safe areas. UNHCR also confirms a substantial positive change in the situation for Hazaras, with significantly less discrimination against them. Accordingly, the claims under article 7 have not been sufficiently substantiated.

5.6 The State party separately argues, with respect to the article 7 claims, that they should be dismissed for failure to disclose an "actual grievance". In *A.R.S. v Canada,* (9) for example, the Committee found a communication inadmissible under articles 1 and 2 of the Optional Protocol on the grounds that it was merely hypothetical. In the present case, as Mrs Bakhtiyari and her children had initiated actions in the High Court as well as the Family Court, consideration had not been given to whether they would be removed from Australia, and, if so, where. These issues would await the outcome of the legal processes which were pending. Thus, the claims regarding return to Afghanistan, and consequential breach of article 7, are hypothetical and inadmissible.

5.7 As to the merits of the communication, the State party argues that no violation of the Covenant is disclosed. Concerning the claims under article 7, the State party refers to its arguments on the admissibility of this claim, pointing out that, having been found not to be Afghan nationals, there is no evidence that Mrs Bakhtiyari and her children would be sent on to Afghanistan from Pakistan, much less face, as a necessary and foreseeable consequence, a particular or real risk of torture or cruel, inhuman or degrading treatment or punishment there.

5.8 Regarding the claim under article 9, paragraph 1, the State party considers that the detention is reasonable in all the circumstances and continues to be justified, given the factors of the particular family situation. Mrs Bakhtiyari and her children arrived unlawfully, and were required to be detained under the *Migration Act*. That being so, it was appropriate that the children remain with their mother in detention, rather than be housed in alternative arrangements. The purposes of detention of unlawful arrivals is to ensure availability for processing protection claims, to enable essential identity, security, character and health checks to be carried out, and to ensure availability
for removal if protection claims are denied. These purposes reflect the State party's sovereign right under international law to regulate admittance of non-citizens, and accordingly the detention is not unjust, inappropriate or improper; rather, it is proportionate to the ends identified.

5.9 The State party emphasises that while in detention, individuals are provided with free legal advice to apply for protection visas, and considerable resources have been invested to provide for more rapid processing of claims, and correspondingly shorter durations of detention. In the present case, the claims were promptly processed: Mrs Bakhtiyari’s application, made on 21 February 2001, was refused by the original decision-maker on 22 May 2001. She was informed of the RRT’s decision on her appeal on 26 July 2001. Thereupon, the Minister denied her request for discretionary action under section