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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2926/2017*, **, ***

Communication submitted by:	Imran Ali and Bakhtaware Ali (represented by counsels Dr. Eirik Bjorge and Professor Mads Andenas)
Alleged victims:	Wahaj Ali, Imran Ali and Bakhtaware Ali
State party:	Norway
Date of communication:	4 January 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 5 January 2017 (not issued in document form)
Date of adoption of Views:	14 July 2022
Subject matter:	Pre-removal detention
Procedural issue:	Admissibility – exhaustion of domestic remedies
Substantive issues:	Arbitrary arrest – detention; conditions of detention; children's rights; torture; family rights
Articles of the Covenant:	7, 9, 17 (1) and 24
Article of the Optional Protocol:	5 (2) (b)

1.1 The authors of the communication are Imran Ali, born in 1980, and Bakhtaware Ali, born in 1983, both nationals of Afghanistan. They claim that the State party has violated the rights of their son, Wahaj Ali, a national of Afghanistan born in 2012, under article 24 of the Covenant, and their own rights, under articles 7, 9 and 17 (1) of the Covenant . The Optional

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martinez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Chongrok, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** The texts of joint opinions by Committee members José Manuel Santos Pais and Imeru Tamerat Yigezu (partially dissenting), Arif Bulkan and Hélène Tigroudja (partially dissenting) and Furuya,Shuichi and Marcia V.J. Kran (dissenting); and an individual opinion by Committee member Duncan Laki Muhumuza (concurring) are annexed to the present Views. The annexes are circulated in the language of submission only.

Protocol entered into force for the State party on 23 March 1976. The authors are represented by counsels.

1.2 On 2 February 2018, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to deny the State party's request for the admissibility of the communication to be examined separately from the merits.

Facts as submitted by the authors

2.1 The communication concerns the detention of the authors and their son, who was between 1 and 2 years of age at the time, in the Norwegian Police Immigration Detention Centre at Trandum for 76 consecutive days. The authors note that on 18 July 2012, the Directorate of Immigration rejected their application for asylum and the Immigration Appeals Board rejected their appeal on 5 February 2013. They were ordered to leave Norway by 13 March 2013. Fearing for their lives in Afghanistan, they appealed this decision, but received adverse decisions on 18 and 22 March 2013.[1] On 17 March 2014, the authors and their son were deported to Afghanistan; however, on arrival in Kabul they claimed to be Pakistani nationals, which resulted in a refusal by the Afghan authorities to admit them. On 18 March 2014, the authors and their son were detained at the Police Immigration Detention Centre at Trandum.

2.2 By a decision dated 19 March 2014, the Oslo District Court ordered the family's detention until 2 April 2014. The Court considered that the fact that the family had not left Norway for more than one year after the deadline supported the real possibility that they might abscond, especially as, when initially deported to Afghanistan, the authors had claimed to be Pakistani nationals. They were therefore returned to Norway, where they confirmed their Afghan nationality and expressed a strong wish to remain there. The Court concluded that they would not return to Afghanistan voluntarily and that, owing to the risk of their absconding, there were no alternatives to detention. The Court referred to article 99 of the Immigration Act on the use of coercive measures and the Convention on the Rights of the Child and considered the authors' argument that detention would be disproportionate as they had an infant born in May 2012. It found, however, that, in the circumstances, detention was not disproportionate. The family was to be detained in the family unit at the Trandum centre, where their son would have access to outdoor playing areas. The Court noted, in this regard, that the Child Welfare Services had no objections to the son's staying at the family unit. The family would be taken to the Afghan embassy with a view to their obtaining travel documents.

2.3 The Court's decision was upheld by the Borgarting High Court on 25 March 2014 and in twin decisions by the Supreme Court on 1 April 2014. The Oslo District Court took subsequent decisions ordering the family's detention: on 2 April 2014 for four weeks; on 30 April 2014 for two weeks; on 14 May 2014 for two weeks (upheld by the Borgarting High Court on 16 May 2014); and on 28 May 2014 for two weeks. The reasoning underpinning the decision of 19 March 2014 was reintroduced in all subsequent decisions. Although all of the decisions also concerned the authors' son, he was not treated as a party. The family was removed to Afghanistan on 2 June 2014.

2.4 The authors comment that the facilities at the Trandum centre are badly equipped to accommodate families with small children for more than one night and most do not stay there for a longer period. The family was accommodated in a small cell which was locked at night. The authors' son was frightened by the police presence and was feverish. He was unable to eat the "inferior" food, which caused him to develop an allergic reaction and made him lose weight.[2] Initially, the police refused to let him play outside of the cell, saying that this would breach the rules. The situation made him cry. In despair, Ms. Ali hit her head against the cell door. Finally, a police officer allowed their son to be outside of the cell until 10 p.m. When he later fell ill, it took a week before they saw a doctor. Although the authorities claim the

[1] The authors do not state which institution issued those decisions on appeal.

[2] The authors refer to a report of the Child Welfare Services dated 25 April 2014, in which it is stated that Mr. Ali showed that his son had a rash over large parts of his body and had lost weight owing possibly to an allergic reaction to Norwegian food products. The authors were therefore allowed to cook food but complained of the level of frequency of access to fresh ingredients. The police indicated that the family had access to a skilled doctor who took their son's skin problems seriously.

family unit is shielded from the rest of the centre, they were exposed to the cries and shouts of detainees, including whenever they went to the outdoor area or to consult the doctor or their legal adviser, and witnessed attempts at self-harm and suicide. This profoundly impacted their son, who cried at night. As at 22 March 2014, the family had not yet been visited by the Child Welfare Services and felt utterly dejected.

2.5 The authors' son's sleep pattern became disturbed and he would remain awake during the night, which the Child Welfare Services attributed to a lack of engagement in activities during the day. He became increasingly ill, showing signs of aggressive fever, particularly after 10 p.m. On one evening when he was in a particularly bad state, the authors requested, unsuccessfully, that they be allowed to go to the playing room and see a doctor, which led them to look for items that they could use to commit suicide. When the Child Welfare Services took them out of the centre so that their son could play, numerous uniformed police officers were in attendance, making them feel like criminals. Seeing other children come and leave the centre added to his feeling of dejection.

2.6 According to the authors, in a report by the Human Rights Committee of the Norwegian Psychological Association it is stated that the Trandum centre is not suitable for children, functions like a "prison" and allows access to hardly any psychologists or psychiatrists. It is noted in the report that the family unit does not allow for close physical contact which children may need and that tall barbed wire fences are visible from the outdoor playing area. Children are not allowed to retain their toys, stuffed animals or clothes and parents cannot regulate the lives of their children. The environment is characterized by stress and instability. In December 2015, the Ombudsperson of the Norwegian Parliament and the National Preventive Mechanism against Torture and Ill-Treatment criticized the centre as being unsuitable for children both because of the level of noise coming from the country's biggest airport nearby and because the family unit is not shielded from other units, which results in the exposure of children to riots, incidents involving self-harm and attempted suicides. The head of the Norwegian Union of Social Educators and Social Workers has argued that detention of children in Norway is unlawful, that the centre does not offer a satisfactory psychosocial environment for children and that current practices breach the provisions of the Convention on the Rights of the Child.

2.7 The National Police Immigration Service, the authority responsible for the centre, has acknowledged that the centre is not "an optimal place for a child". The centre is the only prison that is not part of the National Prison Service and is therefore not subject to the normal system of authority of the Norwegian police. Furthermore, the National Police Immigration Service is directly responsible to the Ministers of Justice and Immigration and is thus subject to political direction. According to the authors, the public prosecution service would not request the detention of children, which is in breach of Norwegian criminal law.

2.8 The authors submit that they have exhausted domestic remedies as they took their case through all the levels of the State party's court system. The leading decision of the Supreme Court[3] shows that they had no reasonable prospect of success in engaging further remedies.

2.9 The authors indicate that they are living in Pakistan in a letter dated 29 January 2017, to which they attach a medical report prescribing medication for their son's "phobias".

Complaint

3.1 The authors claim that the family's detention was arbitrary and unlawful under article 9 of the Covenant. The detention of a child based on the parents' migration status is always unlawful under article 9 and a violation of the child's rights.[4] This is all the more so in the

[3] See HR-2016-00619-U of 18 March 2016.

[4] See Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, as contained in the annex to the report of the Working Group on Arbitrary Detention (A/HRC/30/37), paras. 113–114; report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), 5 March 2015, para. 80; and European Court of Human Rights, *Popov v. France*, Application Nos. 39472/07 and 39474/07, Judgment (merits and just satisfaction, 19 January 2012; *A.B. and Others v. France*, Application No. 11593/12, Judgment; *A.M. and Others v. France*,

present case, given the length of the family's detention and the authorities' failure to conduct a proper proportionality analysis and to demonstrate the inadequacy of less intrusive measures. A real review would not have resulted in authorization of the detention of an infant for 76 days. According to United Nations experts, there is never a justification for placing children in immigration detention; such detention is never in their best interest and constitutes a clear violation of children's rights.[5] Similarly, the Committee on the Rights of the Child and the Office of the United Nations High Commissioner for Refugees have stated that detention of children has devastating effects on their physical, emotional and psychological development.[6] In the present case, the family's detention necessarily provoked anxiety in the authors' son. He was required to be present at interviews and court proceedings and, when taken out of the centre, was accompanied by police officers. The fact that the family was locked in at night was deeply detrimental to his well-being, directly and indirectly, as he had to endure the suffering of his parents. The family zone is separated from the adult zone in an unsuitable manner, with the result that young children must deal with their strong reactions to what they witness.

3.2 The authors claim an additional breach of article 9 of the Covenant, as Norwegian legislation does not satisfy the Covenant's requirements concerning the quality and clarity of the legislative regime allowing for deprivation of liberty. Section 106 (1) (b) of the Immigration Act provides that "[a] foreign national may be arrested and remanded in custody if … there are specific grounds for suspecting that the foreign national may evade the implementation of an administrative decision entailing that he or she is obliged to leave the realm". According to section 106 (3), "[s]ections 174 to 191 of the Criminal Procedure Act shall apply insofar as appropriate". The formulation "insofar as appropriate" has been criticized by the Husabø Commission. According to the authors, it is not clear which among sections 174 to 191 apply to children; and this lack of clarity is evident, for example, in section 185 (2), where a maximum of two weeks' detention is established,. The authors argue that some of the decisions in the present case seem to have assumed the applicability of section 185 (2) while others have not. The courts tend to prescribe two weeks of detention and to prolong that duration multiple times. While under section 184 of the Criminal Procedure Act detention of children is required to be a last resort only, according to the Husabø Commission, this standard is mentioned in only half of the cases.

3.3 The authors claim a violation of articles 7 and 9 of the Covenant, as the arbitrary character of the family's detention, its protracted character and the difficult conditions under detention, including exposure to unrest, witnessing or fearing incidents of self-harm or suicide and inadequate physical and mental health services, cumulatively inflicted serious and irreversible harm on the family.

3.4 The authors also claim a breach of their son's rights under article 24 of the Covenant, and a breach of article 17 (1) of the Covenant concerning the whole family. The authorities did hardly anything to put forth other, less intrusive measures than detention, such as placing the family in another kind of accommodation or obliging them to report on their whereabouts, a condition that the authors had indicated they would accept. Further, in its decision of 25 March 2014, the Borgarting High Court dismissed alternatives to detention on the grounds that the authors had not stated where they would reside other than at the Trandum centre, even though their counsel had suggested that they stay at an asylum centre. The authorities and courts did not consider alternatives to detention, did not provide evidence that the proportionality of the detention had been considered and did not properly consider the situation of the authors' son.

Application No. 24587/12, Judgment; *R.C. v. France*, Application No. 76491/14, Judgment; *R.K. and Others v. France*, Application No. 68264/14, Judgment; and *R.M. and Others v. France*, Application No. 33201/11, Judgment.

[5] OHCHR, "Children and families should never be in immigration detention – UN experts", available at https://www.ohchr.org/en/press-releases/2016/12/children-and-families-should-never-be-immigration-detention-un-experts. (The authors do not refer to any specific statement by the Committee on the Rights of the Child.)

[6] Office of the United Nations High Commissioner for Refugees, "Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees", p. 5.

3.5 The authors request that the State party acknowledge the violations of the Covenant; that it apologize to the family; and that it provide them with adequate compensation, including for their mental distress and psychological suffering, in the amount of $50,000 for each family member and $10,000 for legal representation. They also request that the State party give assurances that it will cease to detain children at the Trandum centre and that, where its authorities consider immigration detention necessary, it will provide a proper and individual assessment of the necessity; consider less intrusive alternatives; provide a procedure for independent periodic review of the necessity of continued detention; and provide for effective judicial review. They further request that Norwegian law be amended to eliminate any form of detention of children on the grounds of their or their parents' immigration status or immigration-related offences.

State party's observations on admissibility

4.1 In its observations dated 14 March 2017,[7] the State party submits that the communication is inadmissible owing to the non-exhaustion of domestic remedies, as the authors did not appeal against the decisions of the District Court of 2 April, 30 April and 28 May 2014 or against the decision of the Borgarting High Court of 16 May 2014. The State party notes that they were entitled to free legal aid and that they had two highly skilled counsels.

4.2 The State party observes that the authors did not, under the final subsection of section 184 of the Criminal Procedure Act and section 106 of the Immigration Act, request a reversal of the detention orders concerning them. They also never requested from the court release under the final subsection of section 185 of the Criminal Procedure Act, which the court may grant "at any time" if it finds that the police "is not proceeding as quickly as it should" in its endeavours to obtain identification papers necessary for removal and that "continued remand in custody is not reasonable". Finally, the authors did not request a release pursuant to section 187 (a) of the Criminal Procedure Act, according to which a person remanded in custody "shall be released as soon as the court or the prosecuting authority finds that the grounds for remand in custody no longer apply".

4.3 The State party submits that the domestic remedies were available and effective. First, the Supreme Court's judgment in HR-2016-00619-U postdates the family's detention by two years and thus did not eliminate any prospect of success of an appeal against the courts' decisions. Second, that judgment concerned the detention of a family for 8 days with a view to removal in another 10 days, as opposed to 76 days in the present case, and the Supreme Court has held that courts must assess petitions for continued detention more stringently as time progresses (Rt. 2007, p. 797). Therefore, the Supreme Court's judgments of 1 April 2014, rendered after 14 days of detention, did not eliminate any prospect of success of future appeals. The authors could reasonably have expected another assessment from the Supreme Court at a later stage of their detention. Third, the claim of a lack of reasonable prospects of success is contradicted by the close scrutiny to which the courts at different levels subject petitions for detention under section 106 of the Immigration Act and their order of release if detention is not proportionate or does not comply with Norway's international obligations. The State party refers to the decision of the Oslo District Court of 1 October 2014 to release a mother and her 3-year-old daughter and the decision of the Borgarting High Court of 12 August 2016 to release a family with four children.

4.4 Further, the authors did not raise articles 7, 9, 17 (1) or 24 of the Covenant nor claim, in substance, the violation of articles 7, 17 or 24 of the Covenant before the Supreme Court. They also did not raise the issue of its being unclear which of the guarantees in sections 174–191 of the Criminal Procedure Act apply to children in detention. They could have put this to the Supreme Court, which can review the application of the law to the facts of a case.

[7] The State party encloses a 15-page background note on the procedures under Norwegian law for exhausting domestic remedies in asylum and detention cases.

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

5.1 In their comments of 10 April 2017, the authors argue that the State party has not disputed that they had exhausted domestic remedies by appealing to the Supreme Court for their first period of detention until 2 April 2014. They also argue that they had exhausted all effective domestic remedies with a reasonable prospect of success concerning the whole period of their detention. The Supreme Court's judgments of 1 April 2014 were among the first in which it pronounced itself on the detention of child migrants. It was clear that henceforth the Court would approve of such detention, except if the authors' circumstances were to change dramatically. The Court rejected the next appeal brought to it against child detention in 2016 and has never declared the detention at the Trandum centre of families with infant children illegal.

5.2 The authors dispute that the final subsections of sections 184 and 185 and section 187 of the Criminal Procedure Act would have been effective, as it would have made no sense to request the end of the family's detention by going beyond the Oslo District Court's reviews of the legality of the detention at the beginning of each new period. Moreover, sections 185 and 187 are designed for criminal proceedings, which was not in issue.

5.3 The authors argue that the State party tries to postpone the Committee's consideration of the communication to extend the detention of migrant children, in the context of the 2017 general elections. They note that "wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies".[8] They also note that according to international jurisprudence, "it is sufficient if the claimant has brought his suit up to the highest instance of the national authority" and it is not necessary to engage further remedies "if the result must be the repetition of a decision already given".[9] The expertise of their counsels underlines that they knew what they were doing when they did not appeal all decisions.

5.4 Additionally, the authors argue that the Supreme Court has a limited competence of review. In its decisions of 1 April 2014, the Supreme Court observed that its competence was limited to reviewing the case management and the High Court's legal interpretation, in accordance with section 388 (1) of the Criminal Procedure Act and the Court's jurisprudence (Rt. 1998, p. 1599). The Court therefore disregarded the authors' invocations of article 3 of the Convention on the Rights of the Child and article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention on Human Rights). It was also barred from reviewing the proportionality and necessity of the detention and any new facts. Further, the Supreme Court's decision (in Rt. 2007, p. 797) has no relevance, as the Court did not take the same approach in their case. The State party has never before argued that the Supreme Court can review the compatibility of detention with the State party's obligations arising from human rights treaties.

5.5 Further, the decision of the Borgarting High Court of 16 May 2014 upheld the family's detention, which by then had lasted for eight weeks, showing that no appeal jurisdiction would have found the detention illegal at any earlier point or in respect of the Oslo District Court's decision of 28 May 2014.

5.6 On 23 June 2017, the authors provided a copy of a judgment of the Borgarting High Court of 31 May 2017 declaring the detention of a family with children in the Trandum centre

[8] *Imari Länsman and Others v. Finland* (CCPR/C/52/D/511/1992), para. 6.2.

[9] *Salem Case (Egypt, USA)* (8 June 1932), Reports of International Arbitral Awards (RIAA), vol. II, pp. 1161 and 1189; Permanent Court of International Justice, *Panevezys-Saldutiskis* (1939), Series A/B, No. 76, p. 18; European Commission of Human Rights, *X. v. Austria* (1960), 30 *International Law Records* (ILR) 268, 271, para. 202; *Interpretation of Article 24 of the Treaty of Finance and Compensation of 27 November 1961 (Austria v. Federal Republic of Germany)* (15 January 1972), Reports of International Arbitral Awards (RIAA), vol. XIX, pp. 3 and 16; and third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur (A/CN.4/523), para. 42.

for a "much shorter period" in 2014 to be illegal. On 22 August 2017, the authors explained that the judgment had become final.[10]

State party's observations on admissibility and the merits

6.1 In its observations of 6 June 2018, the State party notes the reasoning of the courts in ordering and confirming the family's detention, including with respect to their son's rights. In the communication, the following information is omitted: those parts of the decision of the Borgarting High Court of 25 March 2014 in which his situation in the Trandum centre was considered; alternatives to detention; and information regarding the plan of the police to present the family at the Afghan embassy in order to obtain documentation. The State party also notes that, in its petition of 28 March 2014, the police informed the Oslo District Court that the Child Welfare Service had advised that it would be better for the authors' son to stay with his parents and to spend more time at a playground outdoors. The Service had also suggested bringing him more or different toys and announced its intention to visit the family once per week. The police indicated that the family was no longer locked in at night from 24 March 2014 and had been moved to a suitable room near the playroom. The next day they were taken to an activity centre where they had the opportunity to cook and engage in play. As their son had had a cold since their arrival, he had been examined by a nurse every day from Monday to Friday. The police stated that the family unit was staffed with qualified personnel used to interacting with the target group and that arrangements had been put in place to enable the family to make more decisions on its own.

6.2 The police subsequently informed the District Court that the Child Welfare Service had visited the family on 25 April 2014 and found that despite the crisis situation, their son did not seem very much affected by what was going on around him, although it would be good for him to spend time outdoors outside the centre. On 30 April 2014, the Oslo District Court granted the request to prolong the detention but, in the interest of the son, set the period at two weeks instead of four as requested,. The District Court found that a child of his age should not live at the Trandum centre, at least not for a prolonged period. It noted that the Child Welfare Service would visit the family twice weekly and that plans had been made to take him out on activities three times in the four-week period.

6.3 In its ruling of 14 May 2014, the District Court again ordered the family's remand in custody for two weeks rather than the four weeks requested, ruling, "with some doubt", that continued remand was not disproportionate. On 16 May 2014, the Borgarting High Court rejected the authors' appeal, emphasizing the progress of the work of the police in returning the family to Afghanistan and opining that their son, given his very young age, was likely not experiencing detention as older children would. On 28 May 2014, the Oslo District Court again ordered the family's detention for two weeks instead of the four weeks requested.

6.4 The State party argues that the authors' description of the Trandum centre contains inaccuracies and notes that the National Police Immigration Service answers to the Police Directorate. The centre, with, inter alia, its shared living room, kitchen, yard and activity area, was equipped to cater for families with children. In the 2016 report of the centre's supervisory council, it is stated that the family unit is well organized and staffed and does not resemble a prison and that the outdoor area is adapted to the needs of children. Personnel at the unit are mostly female, with experience in working with families. A sufficient number of options and adequate amounts of food and beverages are available. Health services are more extensive than those available to most foreigners in Norway. Families with children are shielded from contact with other detainees as far as practically possible. There were no riots in 2014. The only incident of self-harm in 2014 involved Ms. Ali. In December 2017, the family unit at the Trandum centre was moved to a new location. In March 2018, the Norwegian parliament adopted legislation in which it stipulated that children can be detained only as a last resort and set new limits to the duration of detention.

6.5 The State party notes that the family unit was staffed with extra personnel to ensure that the family would receive sufficient support. The State party refers to the utility system

[10] The authors refer to a publication on the judgment available at https://idcoalition.org/news/historic-norway-ruling-detention-of-children-is-inhumane/.

(UTSYS) log of incidents related to supervision, allotment of medicine and appointments with doctors involving the family.[11] Owing to a change in routine, the family had their door locked at night only until 24 March 2014. Routines were practised with flexibility; to a large extent, it was up to the authors to decide when they wished to make use of the yard or the activity hall. Nurses and a doctor ministered to their needs almost daily and assessed the son's condition to ensure that he was doing well overall. The personnel offered the family the opportunity to visit a playground outside of the centre. Guards accompanied them, as Mr. Ali had tried previously to escape. The National Police Immigration Service cooperated closely with the Child Welfare Service, including with respect to his interest in being placed in an emergency home. The State party cannot assess the content of the medical report concerning his son's phobias, issued more than two years after their stay in the centre.

6.6 The State party disputes that the authors exhausted domestic remedies for the first period of their detention, as they did not invoke the present claims before the courts. Alternatively, they have not exhausted remedies concerning articles 7 and 17 of the Covenant for the whole period of their detention or those concerning articles 9 and 24 for the period after 2 April 2014. The doubts expressed by the courts (see paras. 6.2–6.3 above) show that their assessments were not static.

6.7 The State party notes that in its judgment of 31 May 2017 on the detention of another family, the Borgarting High Court considered that the Immigration Act allows for detaining children with their parents, that the reference in the Immigration Act to the Criminal Procedure Act is sufficiently clear to prevent arbitrary detentions and that sections 184 and 187 of the Criminal Procedure Act apply in immigration cases.[12] However, the Court considered continued detention disproportionate and found violations of articles 3, 5 (1) and 8 of the European Convention on Human Rights; articles 3 and 37 (a) and (b) of the Convention on the Rights of the Child; and article 93, second sentence, and article 94, second sentence, of the Constitution of Norway. According to the State party, this shows that there was a reasonable prospect of domestic remedies' being effective.

6.8 The State party notes that the competence of the Supreme Court is limited to reviewing how the High Court handled a case and its interpretation of the law, including whether it provided sufficient reasons for its proportionality assessment. However, the competence of the Supreme Court is not limited concerning the High Court's application of the human rights principles set forth in the Constitution or the Human Rights Act.

6.9 The State party submits that the circumstances associated with the family unit of the Trandum centre did not breach the family's rights under article 7 of the Covenant, as the facilities and access to activities, medical services and the Child Welfare Services were sufficiently adequate to ensure their physical and psychological integrity and human dignity (see paras. 6.1–6.5 above).

6.10 Concerning the claim under article 9 of the Covenant, the State party submits that the family's detention had a basis in law and refers to the decisions of the courts. Section 106 of the Immigration Act provides for the detention of "foreigners", comprising adults and children under 15 years of age. The reference in the Immigration Act to the Criminal Procedure Act provides sufficient clarity on the conditions of detention of families with children. The discretion left to the police and courts is sufficiently narrow to preclude arbitrary detention. Further, the European Court of Human Rights did not find a breach of article 5 of the European Convention on Human Rights in all cases invoked by the authors and the passage of the Husabø report that they cite concerns children applying for asylum on their own.

[11] The State party notes that the log system was down from 28 until 31 March 2014, but that the police indicated that the same routine was followed during this period, with time outdoors and activities beyond the set schedule being offered.

[12] The State party notes that this understanding of the Criminal Procedure Act was confirmed in a proposal for a new regulation of the Ministry of Justice (Prop. 126 L (2016-2017)), pp. 37 and 42) and is now reflected in amended section 106 b, § 6, of the Criminal Procedure Act. The Ministry acknowledged that section 185, § 6, of that Act is not suitable for application in immigration cases.

6.11 The State party submits that the Covenant does not provide for "such a fine-grained proportionality assessment" as advanced by the authors and that the courts provided reasonable grounds concerning the necessity and proportionality of the detention. The Human Rights Committee and the Committee on the Rights of the Child have not ruled out detention of children.[13] While the Working Group on Arbitrary Detention and the Committee on the Rights of the Child consider the detention of children exclusively because of their parents' migration status to be unacceptable, such a determination is not provided by Norwegian legislation. Families are detained only if they do not cooperate with respect to their return and if there is a real risk that they will abscond, as in the present case. The best interests of the child must be assessed concretely. This was also done in the case of the authors' son, including as time progressed. In cases where there are sufficient grounds to detain parents, it is regularly in the child's interest that parents and child be kept together. As the National Police Immigration Service and the courts considered that less-intrusive measures were inadequate given the risk of their absconding, the detention was not disproportionate. The length of the detention, while undesirable, resulted from the parents' refusal to cooperate and was regularly reviewed.

6.12 On the same grounds, the State party considers that the family's detention was reasonable, necessary and proportionate and that there was consequently no violation of article 17 or 24 of the Covenant.

6.13 The State party observes that under the Covenant, the Committee is not explicitly mandated to deliver opinions regarding remedies in the event of a violation of the Covenant. In any case, the State party does not consider the Committee's views to be legally binding. If the Committee finds a violation, this would constitute sufficient reparation. There is no reason to deviate from the Committee's rule not to specify sums of money. Notwithstanding its views, the State party has decided to award a compensation of 70,000 Norwegian kroner (NKr)[14] to the son, given the unique features of his stay at the Trandum centre. The State party submits that this constitutes sufficient reparation in case of a finding of a violation. The request for legislative amendments goes beyond the requirements of non-repetition. A request for non-repetition would be obsolete (see para. 6.4 above).

Authors' comments on the State party's observations on admissibility and the merits

7.1 In their comments dated 19 June 2018, the authors argue that the compensation offered does not provide grounds for a friendly settlement or constitute satisfactory reparation (see para. 3.5 above). The amount of the compensation offered is insufficient given international and Norwegian precedents.[15]

7.2 In their comments dated 18 August 2018, the authors argue that the State party's offer of compensation amounts to a recognition of a breach of the Covenant. They disagree with the State party's presentation of the facts. They argue that it is impossible for them to prove the breaches that occurred during their detention and that the burden is on the State party to prove that the breaches did not occur.[16] The State party's observation that the same regime was followed from 28 until 31 March 2014 when the UTSYS log at the Trandum centre was down is no more than an assertion. No credence can be attached to it or to the UTSYS log. The door to the cell was locked every night of their stay. No doctor was made available to them. The State party's observation that nurses ministered to their needs almost daily shows how difficult their stay was for them.

[13] The State party refers to Committee on the Rights of the Child general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 61–63.

[14] Approximately €7350 at the time of the State party's observations.

[15] The authors refer to the sum of $85,000 awarded by the International Court of Justice for the detention of one person in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012,* p. 324, and to the award of 40,000 Norwegian kroner by the Oslo Court of Appeal to each of the children in the case of another family detained at the Trandum centre.

[16] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010*, pp. 639 and 660–661, para. 55.

7.3 The authors argue that the judgment on damages of the Borgarting High Court of 31 May 2017 departed from constant jurisprudence and concerned a family that had challenged their detention unsuccessfully. Further, the judgment was rendered three years after the present family's deportation.

State party's additional observations

8.1 In its additional observations of 19 September 2018, the State party observes that it has awarded NKr 70,000 to the son. The State party argues that the authors' reference to the reasoning on the burden of proof in the judgment of the International Court of Justice in *Diallo* cannot stand, as that case concerned procedural guarantees, in contrast to the allegations in the present case. As a starting point, it is for the authors to prove their allegations. The State party considers that it has complied with its obligation to produce relevant evidence where it is better positioned than the other party to acquire relevant evidence.

8.2 The State party refers to the decision of the European Court of Human Rights in *I.F. v. Norway and I.F.F. v. Norway*, concerning an Afghan family with a 1-year-old daughter who complained of their detention at the Trandum centre in 2016.[17] The Court declared the applications inadmissible based on a failure to exhaust domestic remedies based on the judgment of the Borgarting High Court of 31 May 2017.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

9.3 The Committee notes the State party's observation that the communication is inadmissible for a lack of exhaustion of domestic remedies, as the authors did not appeal the decisions of the District Court of 2 April, 30 April and 28 May 2014 or the Borgarting High Court's decision of 16 May 2014. The Committee also notes the authors' contention that they exhausted all effective domestic remedies with a reasonable prospect of success, given the judgments of the Supreme Court of 1 April 2014, the limited scope of the Court's review and its lack of express consideration for the grounds invoked by the authors concerning their human rights. The Committee further notes their argument that the judgment of the Borgarting High Court of 16 May 2014 shows that no appeal jurisdiction would have found the detention illegal at any earlier point in time. The Committee notes their argument that the decision of the Oslo District Court of 28 May 2014 shows the ineffectiveness of engaging any further remedies, as they had already been detained for eight weeks by then. Nevertheless, the Committee notes that the doubts expressed by the Oslo District Court concerning the proportionality of the continued detention in its decisions of 30 April 2014 and 14 May 2014 are consistent with the State party's observation that, according to the jurisprudence of the Supreme Court, the courts must assess petitions for continued detention more stringently as time progresses. The Committee therefore considers that the Supreme Court's judgments of 1 April 2014 did not eliminate any prospect of success of future appeals. In this light, the Committee considers that the authors' argument of the futility of engaging further remedies did not absolve them from doing so, given that the domestic courts had to make a factual assessment in their case. The Committee concludes that the authors have not exhausted all available domestic remedies concerning their detention after 2 April 2014.

9.4 Noting the State party's observation that the authors did not use the procedures under the final subsection of section 184 of the Criminal Procedure Act and section 106 of the Immigration Act or the final subsection of sections 185 and 187 (a) of the Criminal Procedure

[17] Decision of 28 June 2018 (Application Nos. 62363/16 and 62803/16).

Act, the Committee observes that the State party has not explained whether those procedures would have offered the authors any better chance of securing their release than the remedies that they engaged. In the light of the above, the Committee considers that the authors have exhausted all available domestic remedies insofar as their detention from 19 March 2014 until 2 April 2014 is concerned.

9.5 The Committee notes the State party's argument that the authors did not raise articles 7, 9, 17 (1) or 24 of the Covenant or the substance of articles 7, 17 or 24 of the Covenant before the Supreme Court. The Committee also notes, however, that in their appeal before the Supreme Court, the authors referred to their appeal before the Borgarting High Court, in which they had invoked article 5 of the European Convention on Human Rights and article 3 of the Convention on the Rights of the Child. The Committee is therefore satisfied that the authors raised the substance of their claims under articles 9 and 24 of the Covenant before the domestic courts but cannot ascertain that they raised the substance of their claims under article 7 and 17 (1) of the Covenant. The Committee therefore, concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication insofar as the claims under articles 9 and 24 of the Covenant are concerned and therefore declares the communication admissible as raising issues under these articles with respect to the family's detention from 19 March 2014 until 2 April 2014 and proceeds with its consideration on the merits.

Consideration of the merits

10.1 The Committee has examined the present communication in the light of all the information provided by the parties.

10.2 The Committee notes the authors' argument that the family's detention was arbitrary and unlawful under article 9 of the Covenant, as the basis of the Norwegian legislative regime on deprivation of liberty is not sufficiently clear; no proper substantiation for the detention as a necessary, proportionate and least invasive measure was proffered; and the detention of a child based on the parents' migration status is always unlawful.

10.3 The Committee recalls that while detention in the course of proceedings for the control of immigration is not per se arbitrary, the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[18] The Committee also recalls that detention decisions must consider relevant factors case by case and must not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[19] The Committee further recalls that 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.[20]

10.4 In the present case, the Committee notes that the family was detained pursuant to an order thereto by the Oslo District Court of 19 March 2014, based on section 106 (1) (b) of the Immigration Act, which provides that "[a] foreign national may be arrested and remanded in custody if … there are specific grounds for suspecting that the foreign national may evade the implementation of an administrative decision entailing that he or she is obliged to leave the realm". The Committee also notes that the relevant preparatory works confirm the State party's observation that the term "a foreign national" was intended to cover adults and children.[21] The Committee therefore finds that the family's detention from 19 March 2014 until 2 April 2014 had a basis in domestic law.

[18] General comment No. 35 (2014) on liberty and security of person, para. 18.

[19] Ibid.

[20] Ibid., paras. 18 and 62.

[21] Proposition to the Norwegian Parliament, No. 3 L (2010–2011), p. 55; and Proposition to the Norwegian Parliament, No. 138 L. (2010–2011), p. 54

10.5 The Committee recalls that an arrest or detention may be authorized by domestic law but may nonetheless be arbitrary.[22] The notion of "arbitrariness" is not to be equated with being "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[23] In this regard, the Committee notes that the decisions of the District Court of Oslo of 19 March 2014 and of the Borgarting High Court of 25 March 2014 were based not on a mandatory rule for a broad category but on an assessment of the family's detention in the light of the specific circumstances of their case. This included the finding that alternatives to detention were, according to the courts' assessments, not suitable given the existence of concrete grounds for suspecting that the family would abscond, as they had exceeded the deadline for leaving Norway for more than a year and had not cooperated with respect to their return, including by denying their Afghan nationality upon an earlier removal to Afghanistan.

10.6 The Committee notes the authors' arguments concerning the conditions of the detention (see paras. 2.4–2.7 above). The Committee recalls that although conditions of detention are addressed primarily under articles 7 and 10 of the Covenant, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.[24] Further, decisions regarding the detention of migrants must take into account the effect of the detention on their physical or mental health.[25] Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and not in prisons.[26] Based on the information on file, the Committee considers that the authors have not shown that their treatment in detention did not relate to the purpose for which they were detained. In light of the foregoing, the Committee cannot conclude that the family's detention from 19 March 2014 until 2 April 2014 breached their rights under article 9 of the Covenant.

10.7 The Committee notes, however, the authors' claim of a breach of their son's rights under article 24 of the Covenant. The Committee reiterates that the principle of the best interests of the child forms an integral part of every child's right to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State, as required under article 24 (1) of the Covenant.[27] The Committee notes joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, in which it is stipulated that the detention of any child on the basis of the migration status of that child's parents constitutes a violation of children's rights and contravenes the principle of the best interests of the child, given the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, and that the possibility of detaining children as a measure of last resort should not apply in immigration proceedings.[28] The Committee also notes the jurisprudence of the European Court of Human Rights in which the Court has assessed the existence of a violation of article 3 of the European Convention on Human Rights based on three factors in the context of the placement of children in immigration detention, namely, the age of the child, the suitability of the premises in which that child is detained and the length of the detention.[29] The Committee further notes that the Court has emphasized that the particular

[22] General comment No. 35 (2014) on liberty and security of person, para. 12.

[23] Ibid.

[24] Ibid., para. 14.

[25] Ibid., para. 18.

[26] Ibid.

[27] *Maalem v. Uzbekistan* (CCPR/C/123/D/2371/2014), para. 11.8; and *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002), para. 9.7.

[28] Joint general comment No. 4/No. 23 (2017), paras. 5, 9 and 10.

[29] European Court of Human Rights, *N.B and others v. France*, Application No. 49775/20, 31 March 2022, para. 46; *M. and others v. France*, Application No. 33201/11, 12 July 2016, para. 70; and *S.F. and others v. Bulgaria*, Application No. 8138/16, 7 December 2017, paras. 78–83.

vulnerability of a minor child is a decisive factor in the assessment, which takes precedence over the immigration status of the parents of that child.[30]

10.8 In the present case, the Committee notes the authors' claims that the facilities at the Trandum centre were poorly equipped to accommodate families with small children for more than one night and their information that most families did not stay at the centre for longer than one night. The Committee also notes the authors' claims that the family was accommodated in a small cell which was, at least initially, locked at night and their claim that their son was frightened owing to the police presence. The Committee further notes their claims that the family unit was not separated from the rest of the centre, so that their son was exposed to the cries and shouts of other detainees, including whenever they entered the outdoor area or consulted the doctor or their legal adviser. The Committee notes the authors' claim that their son's sleep pattern became disturbed and that he was awake during the night, which the Child Welfare Services attributed to a lack of engagement in activities during the day. The Committee also notes the authors' information that a report by the Human Rights Committee of the Norwegian Psychological Association found that the Trandum centre was not suited for children, as it functioned like a prison, to which psychologists or psychiatrists had limited access. The Committee further notes the authors' information that, according to the report, the family unit did not allow for the close physical contact that children may need, that tall barbed wire fences were visible from the outdoor play area, that children were not allowed to retain their toys, stuffed animals or clothes and that parents could not regulate the lives of their children. The Committee notes the authors' information that the Ombudsperson of the Norwegian Parliament acting as the national preventive mechanism against torture and ill-treatment has criticized the centre as being unsuitable for children because of the level of noise coming from the nearby airport and because the family unit was not shielded from other units, resulting in the exposure of children to riots, incidents of self-harm and attempted suicides. The Committee also notes the authors' information that the head of the Norwegian Union of Social Educators and Social Workers had found that the centre does not provide a satisfactory psychosocial environment for children. The Committee further notes the authors' claims that the authorities of the State party did not make any attempt to put forth other, less intrusive measures than detention, such as placing the family in another kind of accommodation, and that they did not give proper consideration to their son's situation. In this connection the Committee notes that in a letter dated 6 June 2018, the Ministry of Justice and Public Security informed the authors that it "on its own motion [had] considered the particular circumstances of Mr. Wahaj Ali's 76 days' stay at the Trandum facility" and "decided to award him [NKr] 70,000 in compensation". The Committee also notes the parties' information (see paras. 5.6 and 6.7 above) that on 31 May 2017, the Borgarting High Court, in a case concerning the detention of another family with children in the Trandum centre, considered the continued detention of that family to be disproportionate and found violations of articles 3, 5 (1) and 8 of the European Convention on Human Rights, articles 3 and 37 (a) and (b) of the Convention on the Rights of the Child and articles 93 and 94 of the Constitution of Norway.

10.9 The Committee notes the State party's argument that the detention of the family at the Trandum centre was considered to be a measure of last resort owing to the assessed risk of their absconding before the deportation order could be executed. The Committee specifically takes note, however, of the authors' claims regarding the nature and conditions of the Trandum centre and its unsuitability for children, as detailed in the preceding paragraph, and considers that a reasonable assessment of all of the circumstances would have militated against the detention of the child for such an extended period as occurred here. The Committee therefore considers that, by detaining the authors' son in such conditions as those existing at the centre and by failing to adequately consider possible alternatives to the detention, the State party did not duly take his best interests into account as a primary consideration, in violation of his rights under article 24 of the Covenant.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the authors' son's rights under article 24 of the Covenant.

[30] *N.B and others v. France*, para. 47.

12. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author's son 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' son with adequate compensation for the violations of his rights. It should also prevent the recurrence of such violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information regarding 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 official language of the State party.

Annex I

Joint opinion of Committee members José Manuel Santos Pais and Imeru Tamerat Yigezu (partially dissenting)

1. We regret not being able to fully agree with the majority of the Committee in the present Views. We consider instead that there was also a violation of the authors' rights and their son's rights under article 9 of the Covenant.

2. The authors have exhausted all effective domestic remedies with a reasonable prospect of success as regards the full time of their detention, given the judgments of the Supreme Court of 1 April 2014, the limited scope of the Court's review and its lack of express consideration for the grounds invoked by the authors concerning their human rights. In our view, unlike the majority's rather questionable and formal reasoning (para 9.3), not just the detention period from 18 March until 2 April 2014 but the whole period of the detention of the authors and their son should have been considered. There is in fact no evidence that an appeal jurisdiction would have found the detention of the authors illegal at any earlier or later point in time as of April 2014.

3. By a decision dated 19 March 2014, the Oslo District Court ordered the detention of the family until 2 April 2014, considering that it had not left Norway for more than one year after the imparted deadline and that there was a real possibility that the family might abscond. The Court concluded that the family would not return to Afghanistan voluntarily, that there were no alternatives to detention and that the detention was not disproportionate. The family was to be detained at Trandum centre (para 2.2).

4. This decision was upheld by the Borgarting High Court on 25 March 2014 and in twin decisions by the Supreme Court on 1 April 2014 (para 2.3). The Supreme Court stated, in this regard:

> "The Supreme Court, sitting in a three-judge formation, observes that its competence is limited to reviewing the case management and the legal interpretation of the High Court: Criminal Procedure Act s 388 (1), finds unanimously that it is clear that the appeal cannot succeed. The appeal is refused pursuant to Criminal Procedure Acts 387 (a) (1)."

No further arguments were provided.

5. The Oslo District Court took subsequent decisions extending the family's detention on 2 April, 30 April, 14 May (upheld by Borgarting High Court on 16 May) and 28 May 2014. The reasoning in the first decision of 19 March was the same in all subsequent decisions (para 2.3), meaning that the detention of the authors and their son, which lasted for 76 consecutive days, continued to be held proportionate by domestic courts during this whole period.

6. Detention of the authors at Trandum centre profoundly impacted them and their son (paras. 2.4–2.5 and 7.2) and even the State party acknowledges difficulties (paras. 6.1–6.5). This centre was considered unsuitable for children by the Human Rights Committee of the Norwegian Psychological Associations, as well as the Ombudsperson of the Norwegian Parliament and the National Preventive Mechanism. The head of the Norwegian Union of Social Educators and Social Workers argued that detention of children in Norway was unlawful and that the centre provided an unsatisfactory psychosocial environment (para 2.6). Even the authority responsible for the centre, the National Police Immigration Service, acknowledged that the centre was not "an optimal place for a child" (para 2.7).

7. The authors considered that they had no reasonable prospect of success in engaging further remedies for successive prorogations of their detention (para 2.8). In this regard, the State party notes that the Supreme Court has held that courts must assess petitions for continued detention more stringently as time progresses (Rt. 2007, p. 797) (para 4.3). However, domestic courts continued to extend the family's detention, holding it to be proportionate each time. The Supreme Court's judgments of 1 April 2014 (see para. 4 above) were among the first in which it pronounced itself on the detention of child migrants. The

Supreme Court, however, even two years after the authors and their son had been removed to Pakistan in June 2014, still rejected, in 2016, an appeal brought to it against child detention (involving detention of a family for 8 days as opposed to the detention for 76 days in the present case (para. 4.3)). Moreover, the Supreme Court has never declared detention of families with infant children at Trandum centre to be illegal (paras. 2.8 and 5.1) and considered itself barred from reviewing proportionality and necessity of detention and any new facts (para 5.4), an argument that the State party acknowledges (para. 6.8).

8. Judicial decisions of 30 April and 14 May 2014, even with doubts on the disproportionate nature of the remand, still extended it with the same justification (paras. 6.2–6.3), although courts should have assessed petitions for continued detention more stringently as time progressed (see para. 7 directly above). Moreover, domestic courts have not seriously considered the best interests of the child. Although detention may have been held lawful and proportionate at the outset of the family's detention, it became arbitrary and disproportionate with its successive prorogations as regards both the authors and their child. Probably for similar reasons to these, by a judgment of 31 May 2017, three years after the removal of the authors, the Borgarting High Court finally declared the detention in 2014 of a family with children at Trandum centre, for a "much shorter period", to be illegal (para. 5.6).

9. Even the rationale for ordering the family's detention remains questionable. In its decision of 25 March 2014, Borgarting High Court dismissed alternatives to detention since the authors had not stated where they would reside other than at Trandum centre. Their counsel, however, clearly suggested at the time that they were willing to stay at an asylum centre instead (paras. 3.1 and 3.4).

10. We therefore fail to see which effective remedies with a reasonable prospect of success the authors would need to have pursued in order to challenge the whole duration of the family's detention. Such detention, from 19 March until 2 June 2014, was therefore arbitrary and disproportionate, entailing a violation of article 9 of the Covenant as regards the whole family.

Annex II

Joint opinion of Committee members Arif Bulkan and Hélène Tigroudja (partially dissenting)

1. We agree with the conclusion of the majority on the violation of article 24 of the Covenant regarding the rights of the authors' child due to his detention, a violation that was implicitly acknowledged by the State party itself through the ex gratia payment of "compensation" [*sic*] for his 76-day detention. As clearly stressed by many universal and regional human rights organs, such as the Committee on the Rights of the Child, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Working Group on Arbitrary Detention, the Inter-American Court of Human Rights and the European Court of Human Rights, the deprivation of the liberty of a child based exclusively on the migratory status of their parents is at odds with the special protection that their condition of childhood demands. In its Advisory Opinion OC-21/14 of 19 August 2014, the Inter-American Court of Human Rights drew the clear distinction between the deprivation of liberty within the context of criminality (under the juvenile criminal system) and detention in migration proceedings. The same standards cannot apply to both and in the latter context, the San José tribunal highlighted that "the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order".[1] Endorsing this position and joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,[2] the majority of the Committee found a violation of article 24 of the Covenant based on the failure of the State party's authorities to provide special protection to the authors' 2-year-old child.

2. Quite oddly, however, the majority of the Committee simultaneously concludes that there was no violation of article 9 of the Covenant (regarding individual liberty) with respect to the authors and their child. This conclusion is factually and legally inconsistent with its finding that the provisions of article 24 had been breached. Factually, it is impossible to respect the best interests of a 2-year-old child in the context of immigration proceedings while ignoring the corresponding necessities of the parental role. There is no way for any State party to respect its obligations in respect of a minor child while detaining his or her parents, as children of such tender years cannot function independently. Accordingly, detention of parents in such a context is arbitrary and a violation of article 9; alternatively, the majority's position sets an unattainable standard. More critically, this approach is fraught with danger, as it could encourage States parties to separate children from their parents.

3. The majority of the Committee missed one of the main claims of the authors, that is to say, the arbitrariness of the family deprivation of liberty (para. 3.1), and conducted an artificial examination of the situation of the 2-year-old child under article 24 of the Covenant separately from the detention issue under article 9. Our position is that these two claims cannot be examined separately: for the above-mentioned reasons, the 2-year child should under no circumstance have been placed in detention and the State's representation of the nature of the facilities is irrelevant. The necessity test for depriving the parents of their own liberty should therefore have figured more prominently: it was not sufficient to mention that they had "sufficient grounds", as indicated by the State migration authorities, to detain the parents (para. 6.11). The special vulnerability of the 2-year-old child should have compelled them to find measures alternative to the family's deprivation of liberty.

[1] Inter-American Court of Human Rights, *Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14 of August 19, 2014, Series A, No. 21*, para. 154.

[2] For the relevant reference, see also paragraph 10.7 of the present Views.

4. In the face of the authors' claim, the State party's reliance on the "family unit" principle (para. 6.11) was both cynical and insensitive to evolving notions of children's rights. The position that children must stay with their parents, including when the parents are deprived of liberty, cannot be used as a shield. As stressed by the European Court of Human Rights in *Popov v. France*, "whilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life … it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained".[3] This means that States cannot use the "family unit" principle to breach the best interest of the child. In addition, the State party's arguments attest to a concerning disregard for the child's mental, emotional and physical development. In its submission to the Committee, the State party argues that the child was very young and thus unappreciative of the stressful environment of the detention facilities (see especially para. 6.3). Such reasoning, however, ignores the special vulnerabilities of children, including even very young children. States cannot justify the detention of a family with infants by merely invoking the argument that all that they need is to remain with their parents. Children, including very young children, are extremely fragile and their mental, emotional and physical development should be treated as an important factor when the necessity test for the deprivation of the liberty of the family is being considered.

5. In the present case, the State's authorities have taken the parents' migratory situation as the starting point for an analysis of the necessity and proportionality of the family deprivation of liberty. Considering the very young age of the child and his extreme vulnerability, they should instead have taken the child's rights as the starting point and given it due weight in the decision-making process regarding the family as a whole. As a result of the State's authorities' not having done so, we consider that the facts disclose a violation not only of article 24 of the Covenant but also of article 9 with respect to the family.

6. To conclude, we would like to welcome the implicit acknowledgement by the State party of the violation of the authors' son's rights, as indicated by its ex gratia payment to the authors. The gravity of the facts and the vulnerability of the child should, however, have led the State party to recognize more clearly and unequivocally the wrongdoings of its authorities and the breaches of the Covenant in order to provide guarantees of non-repetition.

[3] European Court of Human Rights, *Popov v. France*. Application Nos. 39472/07 et al., Judgment, 19 January 2012, para. 134.

Annex III

Joint opinion of Committee members Furuya Shuichi and Marcia V.J. Kran (dissenting)

1. We have come to a different conclusion from that of the majority of the Committee and would not find a violation of the rights of the authors' son under article 24 of the Covenant.

2. The issue in this case is whether the authors have demonstrated that the State party failed to adequately protect their son, as required under article 24 of the Covenant, by detaining him in Trandum centre between 19 March 2014 and 2 April 2014.

3. As regards the problems specified by the authors regarding the Trandum centre, their main allegations are that, while detained, (a) they were housed in a small cell which was locked at night; (b) there was a lack of daytime activities for their son who was between 1 and 2 years of age; (c) their son had no access to toys; and (d) he had no access to psychological care. The authors also argued that the State party had not considered less intrusive measures than detention in the Trandum centre.

4. The State party has rebutted each claim, noting that the recommendations of the Norwegian Child Welfare Service were implemented to ensure physical and psychological integrity and human dignity for the authors' son. After five days, on 24 March 2014, the family's room was not locked at night, the family was moved to a more suitable room near the children's playroom and their son was examined by qualified medical personnel so that the cold he had developed could be treated. The State party submits that the Borgarting High Court did consider less intrusive measures on 25 March 2014.

5. The authors and the State party consequently have differing perspectives on whether the authors' detention at the Trandum centre met the requirements for the detention of a child within the immigration context.

6. As noted in the majority opinion, the period of detention for which all domestic remedies were exhausted was the 15-day period from 19 March 2014 to 2 April 2014. The conditions in the Trandum centre must consequently be measured against the prevailing requirements for the detention of children in the immigration context in March and April 2014. The majority's reference to heightened standards for detention of children which were later developed holds the State party to a standard that did not exist at the time, which is contrary to the general principle against retroactive application of law.

7. The requirements with respect to detention of children in the immigration context in March and April 2014 can be found in relevant international documents and guidelines from this time period. First, the jurisprudence of the Human Rights Committee and Committee on the Rights of the Child general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration specify that the primary consideration for any action involving minors is the best interests of the child. Second, as indicated by the Committee on the Rights of the Child in its concluding observations and decisions on individual complaints and in the reports of the Special Rapporteur on the human rights of migrants, children should not be separated from their family. Third, under the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention of the Office of the United Nations High Commissioner for Refugees (UNHCR), it is required that all asylum-seekers be treated in a humane and dignified manner. Under the applicable standards it is also specified that detention should not be punitive; family accommodation must be found; appropriate medical treatment must be given; physical recreational activities must be allowed; and the detention of children should be considered a last resort.

8. Applying the 2014 standard to the present case, the evidence demonstrates that the State party undertook an ongoing assessment of the best interests of the child and concluded that he should not be separated from his parents. The State party submitted that their Child

Welfare Service recommended that the family's detention room not be locked, that the family be moved closer to the children's play area and that the child have access to recreational activities. All of those recommendations were immediately implemented. The Child Welfare Service visited the family at different times during their detention to ensure that the child was receiving adequate treatment. The child was provided with medical services. Moreover, the State party has indicated that less intrusive measures were in fact considered by the Borgarting High Court of 25 March 2014 but that detention at the Trandum centre was determined to be necessary owing to the risk of the family's absconding, as they had not cooperated with respect to their initial return to Afghanistan. In sum, the evidence before the Committee shows that the State party acted in consonance with the requirements regarding the detention of children in the immigration context that existed in 2014. As these detention standards have since developed, the outcome might have been different had today's standards been applied to the same set of facts. This communication relates, however, to an earlier period of time.

9. The State party indicated that, owing to problems associated with the Trandum centre, the family unit was moved to a new location in 2017. This later modification along with the 2018 legislative amendments to domestic law on children in an immigration context demonstrates the responsiveness of the State party to evolving standards on child detention in the immigration context.

10. In the light of the foregoing, there is an insufficient basis for finding that the State party did not adequately meet the requirements for child detention in March and April 2014. We are therefore unable to find a violation of article 24 of the Covenant.

Annex IV

Individual opinion of Committee member Duncan Laki Muhumuza (concurring)

1. I am glad to associate with the majority view with the following additions.

2. In my view, there is a violation by the State party under article 24 of the Covenant.

3. The communication concerns the detention of the authors and their son, who was between 1 and 2 years of age at the time, in the Norwegian Police Immigration Detention Centre at Trandum for 76 consecutive days. The authors note that on 18 July 2012, the Directorate of Immigration rejected their asylum application. The Immigration Appeals Board rejected their appeal on 5 February 2013 and ordered them to leave Norway by 13 March 2013. Fearing for their lives in Afghanistan, they appealed this decision but did not receive favourable decisions on 18 and 22 March 2013. On 17 March 2014, the authors were deported to Afghanistan. However, on arrival in Kabul. the authors claimed to be Pakistani nationals, resulting in a refusal by the Afghan authorities to admit them. Upon being returned to Norway on 18 March 2014, the authors and their son were detained at the Police Immigration Detention Centre.

4. The next day, on 19 March 2014, the Oslo District Court ordered the family's detention until 2 April 2014. The Court considered that because the authors had not left Norway for more than one year after the deadline, this supported a real possibility that they might abscond. This, together with the false claim of Pakistani nationality, led to the unfavourable Court decision. The Court concluded that they would not return to Afghanistan voluntarily and that owing to the risk of their absconding, there were no alternatives to detention. My considered view is that all this should have directed the Court towards deciding in favour of the authors. Indeed, they cannot voluntarily return to Afghanistan where their lives would be at great risk.

5. I therefore opine that the State party was in violation on the following grounds;

The treatment of the infant was cruel and inhumane and the author's son's status as a minor was completely ignored. He was treated as an adult and subjected to conditions that were deemed unsuitable even for adults. The child's rights under the Covenant are not conditional on his parent's status.

6. The claims by Norway that the authors' son had access to outdoor playing areas evidence a minimalistic approach to the State party's fulfilment of its obligations relating to the right of a child. Having separated the child from his parents, the State party, as the primary duty bearer, ought to have found appropriate alternatives to detention in a prison-like facility in order to serve the best interests of the child.[1]

7. In a report by the Human Rights Committee of the Norwegian Psychological Association, it is stated that the facility at Trandum is not suitable for children. It functions like a "prison" and allows access to hardly any psychologists or psychiatrists. It is noted in the report that the family unit does not allow for close physical contact which children may need and that tall barbed wire fences are visible from the outdoor playing area. Children are not allowed to retain their toys, stuffed animals or clothes and parents cannot regulate the lives of their children. The environment is characterized by stress and instability. In December 2015, the Ombudsperson of the Norwegian Parliament and the National Preventive Mechanism against Torture and Ill-Treatment criticized the centre as being unsuitable for children both because of the level of noise coming from the country's biggest airport nearby and because the family unit is not shielded from other units, which results in the exposure of children to riots, incidents involving self-harm and attempted suicides. The head of the Norwegian Union of Social Educators and Social Workers has argued that detention of children in Norway is unlawful, that the centre does not offer a satisfactory

[1] As described in para. 2.6 of the communication.

psychosocial environment for children and that current practices breach the Convention on the Rights of the Child. The authors' son's sleep pattern became so distorted that he would remain awake at night. The Child Welfare Services attributed this phenomenon to lack of engagement in activities during the day. The authors' son became increasingly ill, showing signs of aggressive behaviour, particularly after 10 p.m. On one evening when he was in a particularly bad state, the authors requested, unsuccessfully, that they be allowed to go to the playing room and see a doctor, which led them to look for items that they could use to commit suicide. When the Child Welfare Services took them out of the centre so that their son could play, numerous uniformed police officers were in attendance, making them feel like criminals.[2]

8. In my opinion, this treatment of the authors' son amounts to cruel "punishment" arising from the actions of his parents, which the State party was seeking to remedy, namely, the separation of the child from his parents, contrary to the provisions of article 9 of the Convention on the Rights of the Child. This separation was initiated by the State party and direct contact with his parents was not maintained. It was therefore a disproportionate measure taken by the State party in handling the matter because it breached the authors' rights to have the decision of the courts enforced.

9. There was indeed a failure by the State party to recognize that the child is an independent individual, with unique rights accruing to him by virtue of his status as a minor. The authorities did hardly anything to put forth other, less intrusive measures than detention, such as placing the family in another kind of accommodation or obliging them to report on their whereabouts, a condition that the authors had indicated they would accept."[3]

10. I would therefore have concluded for a violation of the authors' rights under article 24 of the Covenant owing to the disproportionate measures taken during pre-removal detention. It is regrettable that the Committee could not find a violation in the face of the overwhelming infractions outlined above. Moreover, considering the situation in Afghanistan, as reported in the mainstream media and in official reports of various monitoring agencies, the Committee ought to take judicial notice that to deport anyone in such circumstances is to put their lives in jeopardy. This must be seen for what it is – a violation of the authors' human rights.

[2] Para. 2.5 of the communication.

[3] Para. 3.4 of the communication.