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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. 3686/2019*, **, ***

Communication submitted by:	Ali Khan Safdary (represented by counsel, Alison Battisson)
Alleged victim:	The author
State Party:	Australia
Date of communication:	5 December 2019 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State Party on 11 December 2019 (not issued in document form)
Date of adoption of Views:	17 March 2025
Subject matter:	Protracted immigration detention
Procedural issues:	Level of substantiation of claims; admissibility *ratione materiae*
Substantive issues:	Arbitrary arrest or detention; conditions of detention; discrimination on grounds of nationality
Articles of the Covenant:	9 (1) and (4), read in conjunction with 2 (1) and 26; and 10 (1) and (2) (a)
Articles of the Optional Protocol:	2 and 3

1.1 The author of the communication is Ali Khan Safdary, a national of Afghanistan born in 1992. He claims that his protracted immigration detention in the State Party amounts to a violation of his rights under article 9 (1) and (4), read alone and in conjunction with articles 2 (1) and 26, as well as under article 10 (1) and (2) (a) of the Covenant. The Optional Protocol entered into force for the State Party on 25 December 1991. The author is represented by counsel.

* Adopted by the Committee at its 143rd session (3–28 March 2025).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Ramón Fernández Liesa, Laurence R. Helfer, Konstantin Korkelia, Dalia Leinarte, Bacre Waly Ndiaye, Hernán Quezada Cabrera, Akmal Saidov, Ivan Šimonović, Soh Changrok, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** An individual opinion by Committee member Yvonne Donders (concurring) is annexed to the present Views.

1.2 On 11 December 2019, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the State Party to transfer the author to a community setting arrangement, or to find another way to end his existing situation of detention, while the communication was under consideration by the Committee.

Facts as submitted by the author

2.1 The author arrived at Sydney Airport, Australia, on 7 October 2011 on a flight from Austria. He sought asylum in the State Party owing to a stated fear of harm of being deported to Afghanistan as a member of the minority Hazara ethnic group. He was administratively detained under the Migration Act 1958 upon arrival but released from immigration detention on 11 May 2012 on a bridging visa, pending an appeal relating to his protection visa application. His protection visa application was initially denied by the Department of Immigration and Citizenship on 3 January 2012. The decision was subsequently upheld by the Refugee Review Tribunal and the Federal Circuit Court, on 11 July 2012 and 24 April 2013, respectively. The author was again administratively detained on 14 June 2013 and remained in detention at the time of the submission of the complaint before the Committee. The author also notes that a subsequent International Treaties Obligations Assessment was conducted on 2 September 2015, in which the Department of Home Affairs found that he was not owed protection.

2.2 At the time of the submission of the complaint in December 2019, the author was detained at Villawood Immigration Detention Centre, New South Wales. From mid-2016 to the beginning of 2017, he was detained on Christmas Island.[1] On 19 January 2017, he was severely assaulted by other detainees at the Christmas Island detention facility, resulting in a broken eye socket, vision and hearing impairments, facial distortion and mental health issues. He was evacuated to mainland Australia, where he underwent several medical operations, after which he was detained at the Yongah Hill Immigration Detention Centre in Perth. The perpetrators of the assault were sentenced to prison. On release from prison, one of the perpetrators was housed in the same room as the author. He therefore requested a transfer to another detention facility and was placed in the Perth Immigration Detention Centre.

2.3 The author notes that the Migration Act specifically provides, in sections 189 (1), 196 (1) and 196 (3), that so-called "unlawful non-citizens" must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that even a court cannot release an unlawful non-citizen from detention.[2] The author further states that the High Court of Australia has held that mandatory immigration detention is not contrary to the Constitution or national legislation.[3] As such, the author argues that he lacks any possibility to challenge his detention. He further notes that the Committee has held, in *C. v. Australia*, that there is no effective remedy for persons subject to mandatory immigration detention in the State Party.[4] The author informs the Committee that he has lodged multiple complaints with the Department of Home Affairs, the Australian Human Rights Commission and the Ombudsman concerning his conditions of detention. To date, no favourable outcome has been achieved.

2.4 At the time of the submission of the complaint, the author noted that it was anticipated that he would remain in administrative detention indefinitely, owing to identity and character

[1] Christmas Island is an external territory of Australia.

[2] Section 189 (1) of the Migration Act reads: "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person." Section 196 (1) reads: "An unlawful non-citizen detained under section 189 must be kept in immigration detention until: (a) he or she is removed from Australia under section 198 or 199; or (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or (b) he or she is deported under section 200; or (c) he or she is granted a visa." Section 196 (3) reads: "To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa."

[3] The author refers to High Court of Australia, *Al-Kateb v. Godwin*, Case No. A253/2003, Judgment, 6 August 2004.

[4] The author refers to *C. v. Australia* (CCPR/C/76/D/900/1999).

concerns. He states that, given his migration history and mental health issues, it was highly unlikely that he would meet the requirements to be granted a visa or placement in community detention. He notes that the State Party classifies Afghanistan as a "no return" country, meaning that he will not be deported to Afghanistan and, in addition, as he has no Afghan identity documents, it is unclear whether the Afghan authorities would allow him entry. The author notes that he has been unable to provide sufficient identification documentation to the satisfaction of the State Party's authorities because he arrived in Australia on an Austrian passport in the name of Moslem Ahmad Madjidi.[5] He states that the lack of formal identification documentation is a common problem for the Hazara, and particularly for him, as, when he was a child, his family fled Afghanistan for Pakistan, where they lived without lawful residence status. He notes that the Australian Criminal Intelligence Commission found that his fingerprints matched police records in Austria, but he claims that he has never been charged with a crime in Austria, where he was living as an unaccompanied minor.

Complaint

3.1 The author claims that, by subjecting him to prolonged immigration detention, the State Party has violated his rights under article 9 (1) and (4), read alone and in conjunction with articles 2 (1) and 26, as well as under article 10 (1) and (2) (a) of the Covenant. He argues that the length of his detention, its arbitrary nature and the very difficult conditions of detention, which have resulted in permanent injury, amount to a violation of his rights under the Covenant. Regarding his claims under article 10 of the Covenant, the author notes that he was assaulted by "non-refugees/asylum-seekers". He notes that article 10 (2) (a) of the Covenant stipulates that accused persons shall, save in exceptional circumstances, be segregated from convicted persons. He states that immigration centres in the State Party house a mixed population, including asylum-seekers and refugees with no criminal conviction or charge, individuals awaiting deportation for having committed a criminal offence and mentally ill persons who require heightened supervision.

3.2 In addition to his claims under the Covenant, the author also claims that his prolonged detention has resulted in violations of his rights under articles 7 and 14 of the Universal Declaration of Human Rights.

State Party's observations on admissibility and the merits

4.1 On 9 October 2020, the State Party submitted its observations on the admissibility and merits of the communication. It submits that the communication should be found inadmissible for lack of sufficient substantiation under article 2 of the Optional Protocol. Should the Committee find the author's claims to be admissible, the State Party submits that the claims lack merit. The State Party notes that, in addition to the claims invoked under the Covenant, the author has also referred to claims invoked under the Universal Declaration of Human Rights. It submits that these claims are inadmissible *ratione materiae* under the Optional Protocol and rule 99 (b) of the Committee's rules of procedure because they are not claims concerning rights set forth in the Covenant.

4.2 The State Party informs the Committee that the author arrived at Sydney Airport by plane on 7 October 2011, claiming to be 17 years old and a citizen of Afghanistan. Investigations by the then-Department of Immigration and Citizenship, now known as the Department of Home Affairs, revealed that the author travelled to Australia using a passport under the name of Moslem Ahmad Madjidi. He was subsequently detained pursuant to section 189 (1) of the Migration Act and held at Villawood Immigration Detention Centre in Sydney. On 24 October 2011, the author lodged an application for a protection visa under the name Ali Khan Safdary. An age determination assessment was undertaken by the Department of Immigration and Citizenship. This assessment concluded that the author was over the age of 18.

4.3 On 30 December 2011, the Department of Immigration and Citizenship denied the author's protection visa application because it found that he did not have a genuine fear of

[5] According to the International Treaties Obligations Assessment decision, the Austrian passport that the author used to travel to Australia was found to be fraudulent by the domestic authorities.

harm and that there was not a real chance of persecution if he were to be removed to Afghanistan. On 24 April 2012, the Department referred the author's case to the then-Minister for Citizenship and Border Protection to consider intervening under the Migration Act to either grant the author a visa under section 195A, or make a determination under section 197AB, to allow the author to be released from detention and reside in the community, pending his appeal against the denial of his protection visa application. On 9 May 2012, the Minister decided to intervene under section 195A of the Migration Act and the author was granted a Bridging visa E and released from detention on 11 May 2012. On 11 July 2012, the Refugee Review Tribunal notified the author of its decision to affirm the Department's original decision to refuse his application for a protection visa. On 24 April 2013, the Federal Circuit Court dismissed the author's application for judicial review.

4.4 A condition of a Bridging visa E is that the person must declare that they will voluntarily leave Australia 28 days after the notification of a refusal of a protection visa or at the conclusion of any appeal process. Following the refusal of his protection visa, the author did not voluntarily leave Australia and his Bridging visa E ceased on 22 May 2013. At that point, the author again became an unlawful non-citizen under the Migration Act and, on 14 June 2013, he was lawfully detained under section 189 (1) of the Act and transferred to Villawood Immigration Detention Centre in Sydney. On 20 May 2015, the author was affected by a data breach in which the identity information of persons kept in immigration detention between 10 and 24 February 2014 was unintentionally made public. The Department of Home Affairs commenced an International Treaties Obligations Assessment to determine whether the breach had increased the risk of harm to the author and therefore affected the application of the non-refoulement obligations of Australia. On 2 September 2015, the International Treaties Obligations Assessment found that the author did not engage the non-refoulement obligations of the State Party in relation to the Covenant or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On 30 March 2016, the author lodged an application for judicial review of the Assessment. On 17 July 2017, the Federal Circuit Court found that the International Treaties Obligations Assessment decision was affected by error of law and remitted the decision back to the Department.

4.5 On 21 September 2016, the author was transferred to North West Point Immigration Facility on Christmas Island. The transfer was conducted as part of a network rebalancing operation to reduce capacity issues at facilities on the Australian mainland. On 19 January 2017, the author was assaulted at the facility, sustaining a left orbital wall fracture. He was transported to the Australian mainland for medical treatment and received surgery on 4 February 2017. Following medical treatment, the author was transferred to Yongah Hill Immigration Detention Centre in Perth. On 7 April 2017, the author was transferred from that Centre to the Perth Immigration Detention Centre. The author was transferred to Perth Immigration Detention Centre owing to concerns for his safety. This was due to the transfer of three detainees from Christmas Island to Yongah Hill Immigration Detention Centre, one of whom was alleged to have been involved in the assault on the author.

4.6 Between 31 March 2014 and 30 August 2019, the Department of Home Affairs considered four referrals for ministerial intervention under section 195A of the Migration Act to grant the author a bridging visa. On three out of those four occasions (31 March 2014, 20 June 2017 and 3 August 2018), the Department determined that the guidelines had not been met and therefore did not refer the author's case to the relevant Minister. In making its decisions, the Department considered, among other factors, the length of time the author had been in detention, any security risks posed by the author, whether the author's detention or removal would become protracted, and any deterioration in his mental health. On each occasion, the Department balanced these factors and determined that the author's case did not meet the guidelines for referral to the Minister. On 30 August 2019, in response to the fourth referral request, the Department determined that the guidelines had been met for referral to the Minister for intervention under section 195A of the Migration Act. In making this determination, the Department considered, inter alia, that the author had been in immigration detention for six consecutive years with risk of prolonged and indefinite detention, that he had no criminal convictions in Australia, and that a psychiatrist had assessed that his suicide risk was high and would increase with continued detention.

4.7 On 6 February 2020, the Minister intervened under section 48B of the Migration Act and allowed the author to apply for a Temporary Protection (subclass 785) visa or Safe Haven Enterprise (subclass 790) visa. On 13 February 2020, the Minister agreed to grant the author a Bridging visa E in order to allow him to reside in the community, under section 195A of the Migration Act, and the author was released from immigration detention, enabling him to reside lawfully in Sydney, with full permission to work, obtain access to Medicare and receive support services, including income support services. On 20 February 2020, the author lodged a valid application for a Safe Haven Enterprise (subclass 790) visa.[6]

4.8 The State Party submits that the author's claims should be found to be inadmissible for lack of sufficient substantiation under article 2 of the Optional Protocol. It argues that, although the author has made general submissions about his detention, the communication is not specific or supported by evidence as to how the facts, as alleged, constitute a violation of the prohibition on arbitrary detention under article 9 of the Covenant. The State Party further submits that the author has not pointed to any behaviour by the State Party's courts and refugee tribunals that may be considered arbitrary or discriminatory treatment.

4.9 The State Party submits that the author has not substantiated any claim that would activate its obligations under article 10 (2) (a) of the Covenant, arguing that article 10 (2) (a) is limited in its application to a criminal justice context and thus not applicable to immigration detention in the State Party, which is administrative rather than punitive in nature. Furthermore, the author has not substantiated any particular claim regarding his conditions of detention in general or pointed to any specific instances where his treatment while in detention breached the State Party's obligation to treat him with humanity and with respect for the inherent dignity of the human person or provide him with a minimum of services to satisfy his basic needs. The State Party submits that the author's claims with respect to his conditions of detention should therefore be found inadmissible, as they are insufficiently substantiated.

4.10 In the event that the Committee finds that the author is subject to the protections afforded in article 10 (2) (a), the State Party submits that, in any event, it has not breached article 10 (2) (a) owing to the reservation it has made with respect to said article: "In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively". It further notes that the reservation was upheld by the Committee in *Cabal and Pasini v. Australia* and in *Minogue v. Australia*.[7] It submits that, on the basis of the reservation, it does not have an immediate obligation to ensure that all accused persons are segregated from convicted persons pursuant to article 10 (2) (a).

4.11 As to the merits of the complaint, the State Party submits that the author's detention was at all times consistent with State Party legislation and neither arbitrary nor discriminatory. It argues, in this connection, that article 9 must also be read in the context of the Covenant as a whole, including articles 12 and 13, which make clear that States Parties have the right, under international law, to control the residence, entry and expulsion of aliens.

4.12 The State Party notes that it accepts that the author was in detention, within the meaning of article 9 (1) of the Covenant, while he was detained in immigration detention centres on the Australian mainland and Christmas Island. It, however, submits that the detention was permissible under article 9 (1) because it was lawful and not arbitrary. The detention was in accordance with the legislation and procedures established by the Migration Act, specifically section 189 (1), since by entering Australia without a valid visa, the author was classified as an "unlawful non-citizen" under the Act. It submits that the phrase "in accordance with such procedures as are established by law" in article 9 (1) refers to law in the domestic legal system. It argues that the *travaux préparatoires* demonstrate that the term

[6] The State Party informs the Committee that a Safe Haven Enterprise (subclass 790) visa allows persons who arrived in Australia illegally and who meet the State Party's protection requirements to stay in Australia for up to five years, with work and study rights and access to government services.

[7] See *Cabal and Pasini v. Australia* (CCPR/C/78/D/1020/2001); and *Minogue v. Australia* (CCPR/C/82/D/954/2000).

"lawful", and the phrase "on such grounds and in accordance with such procedures as are established by law", both refer to the domestic laws of States Parties.[8]

4.13 The State Party further submits that the author's detention was not arbitrary because it was reasonable, necessary and proportionate to a legitimate purpose and subject to regular review, which included consideration of whether less restrictive alternatives were available. The State Party submits that the detention of an unlawful non-citizen is not inconsistent per se with a State Party's obligations under article 9 of the Covenant. It submits that there is no rule that detention for a particular length of time will necessarily be considered arbitrary; the determining factor is not the length of the detention but rather whether the grounds for detention are justifiable. In the present case, the State Party submits that the author's detention was reasonable, necessary and proportionate for the legitimate purposes of: (a) preventing unlawful non-citizens from entering the Australian community after travelling to Australia by irregular means; (b) ensuring the integrity of the migration programme of Australia; and (c) assessing the identity and security risk of unlawful non-citizens.

4.14 The State Party further argues that the author's detention in immigration detention facilities did not continue beyond the period for which it was justified and was subject to regular review. The Department of Home Affairs conducts its own internal reviews through the case management service. The review assesses the lawfulness of detention, case progression, the health and welfare of the detainee, whether less restrictive forms of detention are available, and any other relevant information that has been raised or identified during the review. The State Party argues that, accordingly, the Department ensured that individualized assessments were conducted as to the appropriateness of the author's immigration detention, including the length and conditions of detention and the appropriateness of both the accommodation and services provided.

4.15 The State Party further notes the author's claim that, as an unlawful non-citizen, he was unable to access any judicial or administrative processes to challenge his detention. It argues that judicial review of the lawfulness of detention was available to the author under section 75 (v) of the Constitution, which provides that the High Court of Australia has jurisdiction in relation to every matter where a writ of mandamus,[9] prohibition or injunction is sought against an officer of the Commonwealth, and that habeas corpus is also available as an avenue under which a person is entitled to bring proceedings for a court to review the lawfulness of that person's detention. Should the Court find the detention to be unlawful, it would be a matter for the Court to determine the appropriate remedy in the circumstances of the case. The State Party submits that the author was therefore able to test the lawfulness of his detention before a court, and that any claim under article 9 (4) of the Covenant is without merit.

4.16 The State Party further notes that the author has invoked alleged discriminatory treatment regarding the possibility of the author challenging his detention as a non-citizen in the State Party. It submits that both Australian citizens and non-citizens can challenge their administrative detention through writ of mandamus, prohibition, injunction or habeas corpus. There is no difference in treatment between citizens and non-citizens with respect to their ability to seek a judicial remedy in relation to administrative detention.

4.17 The State Party further notes the author's claim that he did not receive appropriate treatment while in detention. It notes that the author refers to being assaulted while being held in the North West Point Immigration Facility on Christmas Island on 19 January 2017. It submits that all appropriate measures were taken to minimize risk to the author. It states that the Department of Home Affairs takes into account each detainee's personal and other circumstances in order to determine the most appropriate detention placement for the individual. These may include any physical and mental health concerns regarding the

[8] Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Brill, 1987), p. 197; and Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2005), pp. 224–227.

[9] The State Party notes that mandamus is a writ issued to compel an inferior court, a public official or a corporation to perform a public duty. It is issued where there is a specific legal right but no corresponding specific legal remedy, or where a remedy exists but it is less convenient, beneficial or effectual.

detainee, the detainee's needs (including age, length of detention, family connections and fitness to travel), the available services and facilities at the receiving immigration detention facility, the risk profile of the detainee, and the risk profile of the immigration detention facility. It argues that, in the author's case, he was provided with timely and appropriate medical care for the injuries sustained. He received immediate medical attention in the days following the assault. The author was then transported promptly to the Australian mainland for surgery on 3 February 2017. Further follow-up treatment was provided. Following his discharge from hospital after surgery, the author complained of ongoing vision problems, hearing loss, pain, dizziness and headaches. The author received care in relation to these issues from an ophthalmologist, optometrist, audiologist, physiotherapist and general practitioner. The author also received mental health support. This care continued throughout 2017, 2018 and 2019. Aside from the treatment required as a result of the assault, the author was also given regular medical care throughout his time in detention and in the community for both physical and psychological health issues.

Author's comments on the State Party's observations on admissibility and the merits

5.1 On 1 April 2022, the author submitted his comments on the State Party's observations. He maintains that the communication is admissible.

5.2 The author reiterates his claims that his rights under article 9 were violated by his prolonged immigration detention in the State Party. He notes that his detention was mandatory under section 189 (1) of the Migration Act and that the length of detention was not fixed to a prescribed period but was to continue on an indefinite basis.

5.3 The author further argues that the protective provisions of article 10 (2) (a) extend to persons held in immigration detention facilities, as such facilities share many of the features of penitentiary systems. The author maintains that the intended spirit of the article – to protect non-convicted individuals from convicted individuals through segregation – is applicable to him, as he was assaulted by detainees who had had their visas cancelled because of criminal convictions. He argues that, under article 10, he should have been physically isolated from detainees with convictions. He submits that, if the Committee is of the view that his claim in respect to the assault is inadmissible under article 10 (2) (a), the facts and evidence surrounding the assault are nevertheless sufficient to substantiate a breach of article 10 (1) of the Covenant. He states that, despite the surgeries he underwent following the assault, he has had persistent symptoms of double vision in his left eye and tinnitus in his left ear. The author argues that the injuries he sustained, and the resulting physical disabilities, would have been avoidable had the State Party taken effective steps to secure his physical safety in detention.

5.4 The author contends that mandatory immigration detention in the State Party, by definition, operates irrespective of the unique circumstances of each individual. The State Party has thus not demonstrated that, in the light of his particular circumstances, there were not less invasive means of achieving the same ends – that is, compliance with the State Party's immigration policies – through, for example, the imposition of reporting obligations, sureties or other conditions that would have taken account of his deteriorating condition. He further argues that the internal reviews referred to by the State Party are insufficient to discharge its obligation to assess the appropriateness, proportionality and necessity of detention and that it is well established that protracted periods of immigration detention have severe psychiatric consequences for detainees.[10]

[10] The author refers, among other publications, to Michael Dudley and others, "Health professionals confront the intentional harms of indefinite immigration detention: an Australian overview, evaluation of alternative responses and proposed strategy", *International Journal of Migration, Health and Social Care*, vol. 17, No. 1 (2021), pp. 35–51; Kyli Hedrick and Rohan Borschmann, "Addressing self-harm among detained asylum seekers in Australia during the COVID-19 pandemic", *Australian and New Zealand Journal of Public Health*, vol. 45, No. 1 (February 2021); Kyli Hedrick and others, "Self-harm among asylum seekers in Australian onshore immigration detention: how incidence rates vary by held detention type", *BMC Public Health*, vol. 20, No. 592 (2020); M. von Werthern and others, "The impact of immigration detention on mental health: a systematic review", *BMC Psychiatry*, vol. 18, No. 382 (2018); and Anagha Killedar and Patrick Harris, "Australia's refugee policies and their health impact: a review of the evidence and recommendations for the Australian

5.5 The author further argues that judicial review of immigration detention decisions in the State Party is limited to whether the detention was lawful in accordance with domestic law and is thus incompatible with article 9 (4) of the Covenant. The only issue justiciable before the domestic courts in relation to the lawfulness of his detention was whether he was a non-citizen who had entered the State Party's territory without valid entry documentation. According to domestic jurisprudence, indefinite immigration detention is lawful and mandatory, even in circumstances where there was no real likelihood or prospect that an individual would be removed, in the reasonably foreseeable future, to their country of origin or to a third country.[11] The author argues that his detention, although compliant with domestic law, is in violation of the right of non-discrimination because it only applies to those who come under the definition of "unlawful non-citizen" under the Migration Act, irrespective of the individual's personal circumstances, and that the discriminatory effect is compounded by the author's inability to have access to judicial intervention, on a substantive level, that is focused on determining whether continued detention is justified or not.

5.6 Regarding the issue of right to judicial review, the author further notes that the High Court of Australia has found that the State Party's authorities have a duty to remove a detainee from Australia pursuant to section 198 (1) of the Migration Act as soon as reasonably possible; a breach of that duty by, for example, failure inferred through unreasonable or unexplained delay will not erase the purposes for which detention is effected, nor will it render detention unlawful. The High Court has held that the appropriate remedy in these circumstances is not a writ of habeas corpus commanding the release of the detainee, but a writ of mandamus commanding the authorities to perform their duty to remove the detainee.[12]

5.7 The author further claims that his rights under article 10 (1) of the Covenant were violated, as he was subjected to violent acts in detention, for which he received inadequate medical attention. He further argues that it is clear from his medical records, submitted in support of his communication, that prolonged detention would have adverse consequences for him and that less invasive measures, such as community detention, would have helped to prevent further mental deterioration. In this connection, he notes that, during his detention, he was diagnosed with post-traumatic stress disorder, major depressive disorder and having an intermittent stutter.[13] On 7 March 2019, following a suicide attempt, he was admitted to hospital as an involuntary patient for being at high risk of suicide and self-harm. The medical report on his hospitalization notes that the uncertainty regarding immigration issues and his subsequent deprivation of freedom, combined with fears for his safety from other detainees, appeared to be notable factors contributing to his health situation. The author thus submits that his placement in immigration detention facilities for a prolonged period of over six years was in diametric opposition to the recommendations made by his treating doctors and psychiatrists.

State Party's additional observations

6.1 On 9 January 2023, the State Party submitted its additional observations on the communication. In response to the author's claim that the State Party's legislation with regard to immigration detention is discriminatory, it recalls its earlier submission that section 75 (v) of the Constitution allows for citizens and non-citizens alike to challenge the lawfulness of their detention. The State Party further reiterates that article 10 (2) of the Covenant does not extend beyond the criminal justice context.

6.2 The State Party notes the author's claim that his placement in detention facilities was contrary to medical advice and thus not in compliance with article 10 (1) of the Covenant. It

Government", *Australian and New Zealand Journal of Public Health*, vol. 41, No. 4 (2017), pp. 335–337.

[11] The author refers to High Court of Australia, *Al-Kateb v. Godwin*, Case No. A253/2003, Judgment, 6 August 2004.

[12] The author refers to High Court of Australia, *Commonwealth of Australia v. AJL20*, Case No. HCA 21 of 2021, Judgment, 23 June 2021.

[13] The author refers to a medical report by a psychiatrist, dated 16 November 2014, and another medical report by a psychiatrist confirming the diagnosis, dated 12 July 2018.

argues that, in the author's case, it took all appropriate measures to minimize risk to the author and to ensure that he received all treatment necessary. It argues that, in all decisions regarding the author's conditions and place of detention, the Department of Home Affairs considered factors aimed at minimizing any risk to him, including his personal circumstances and the circumstances of each detention facility. The State Party reiterates its submission that the author's detention was lawful under domestic law and was reasonable, necessary and proportionate to a legitimate purpose and subject to regular review.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

7.3 The Committee notes that the State Party has not specifically submitted that the author's claims should be found to be inadmissible under article 5 (2) (b) of the Optional Protocol for failing to exhaust domestic remedies. The Committee, however, notes that the State Party has contended that the author could have challenged his detention by applying for a writ of mandamus under section 75 (v) of the Constitution, or for a writ of habeas corpus. The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies, and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.[14] The Committee also recalls that when the highest domestic court has ruled on the matter in dispute in a manner eliminating any prospect that a claim before domestic courts may succeed, authors are not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.[15] The Committee notes the author's argument that, according to the jurisprudence of the High Court of Australia that applied at the time of his detention, indefinite detention of a so-called "unlawful non-citizen" who could not be deported was lawful under domestic legislation.[16] The Committee recalls that it has stated that the possibility that the High Court could someday overrule its precedent upholding indefinite detention of "unlawful non-citizens" did not suffice to indicate the availability of an effective remedy.[17] The Committee notes that, at the time of the author's submission of his complaint before the Committee, said precedent had not been overturned. In the light of the above circumstances, the Committee considers that the author's failure to apply for a writ of mandamus or habeas corpus to challenge his detention is not an obstacle under article 5 (2) (b) of the Optional Protocol to the admissibility of the present communication.

7.4 The Committee notes the author's claim that his rights under article 10 (2) (a) of the Covenant were violated because he was not isolated from detainees with prior criminal convictions. The Committee recalls its general comment No. 21 (1992), in which it stated that article 10 (2) (a) requires the segregation of accused persons from convicted ones in order to emphasize presumption of innocence of unconvicted persons.[18] In the present case, the Committee, however, notes that both the author and the alleged perpetrators of his assault were held in immigration detention; the author was thus not an "accused person", nor were the perpetrators of the assault "convicted persons" under article 10 (2) (a) of the Covenant. In the light of the above, the Committee finds that the State Party's reservation on the

[14] See, for example, *M.L. v. Croatia* (CCPR/C/127/D/2505/2014), para. 6.6.

[15] See, for example, *X et al. v. Greece* (CCPR/C/126/D/2701/2015), para. 8.5.

[16] High Court of Australia, *Al-Kateb v. Godwin*, Case No. A253/2003, Judgment, 6 August 2004.

[17] *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 8.4; *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 9.3; and *Nabhari v. Australia* (CCPR/C/142/D/3663/2019), para. 7.3.

[18] General comment No. 21 (1992) on the humane treatment of persons deprived of their liberty, para. 9.

principle of segregation is not applicable to the claims raised in the communication and that the Committee is therefore not precluded by the reservation from considering said claims. However, taking into account that the author is not an "accused person" within the meaning of article 10 (2) (a), the Committee finds his claims as raised in connection to article 10 (2) (a) to be inadmissible *ratione materiae* under article 3 of the Optional Protocol. The Committee, however, notes that the author has also raised claims that he received inadequate medical care following the assault, as well as claims that his mental health deteriorated following the assault, this being exacerbated by his continued prolonged detention. The Committee considers that these aspects of his claims should be considered under article 10 (1) of the Covenant.

7.5 As to the claims raised by the author under articles 2 (1) and 26 of the Covenant, being invoked in conjunction with his claims under article 9, the Committee considers that the author has not provided sufficient information to support his claims of discriminatory treatment and therefore finds the claims insufficiently substantiated and inadmissible under article 2 of the Optional Protocol.

7.6 The Committee further notes that the author has also invoked claims under articles 7 and 14 of the Universal Declaration of Human Rights. The Committee recalls that, in accordance with article 1 of the Optional Protocol, its competence is limited to the examination of communications claiming a violation of rights under the Covenant. Accordingly, alleged violations of other instruments or agreements fall outside the Committee's competence.[19] The Committee thus finds the claims invoked by the author under the Universal Declaration of Human Rights to be inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.7. The Committee considers that the author has sufficiently substantiated the remaining claims raised in the communication for the purposes of admissibility. Accordingly, the Committee declares the author's claims under articles 9 (1), 9 (4) and 10 (1) of the Covenant admissible and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claims that he was subjected to arbitrary and prolonged detention in the State Party, in violation of his rights under article 9 (1) of the Covenant. It notes the State Party's arguments that the detention was lawful under the Migration Act, in pursuit of the legitimate aim of ensuring the integrity of the State Party's migration policies, and that it was reasonable, necessary and proportionate in the particular circumstances of the case. It notes the State Party's argument that the author's detention did not continue beyond the period for which it was justified and was subject to regular review. The Committee further notes the author's argument that mandatory immigration detention in the State Party, by definition, operates irrespective of the unique circumstances of the individual and that the State Party has thus not demonstrated that, in the light of his particular circumstances, there were not less invasive means of achieving the same ends.

8.3 The Committee refers to its general comment No. 35 (2014), in which it stated that an arrest or detention may be authorized by domestic law yet nonetheless be arbitrary and thus contrary to article 9 (1) of the Covenant.[20] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State Party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the person concerned, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision to detain must consider relevant factors on an

[19] See, for example, *Z v. Denmark* (CCPR/C/137/D/2795/2016), para. 6.4.

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

individualized basis; must not be based on a mandatory rule for a broad category of persons; 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.[21] The inability of a State Party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.[22]

8.4 In the present case, the Committee notes that the author was initially detained upon arrival in the State Party for a period of seven months (from 7 October 2011 to 11 May 2012) before being released on a bridging visa. The author was again detained for a subsequent period of detention of six years and eight months (from 14 June 2013 to 13 February 2020), before being granted another bridging visa, released from detention and allowed to reside in the community. Thus, in total, over both periods, the author spent over seven years in immigration detention under the State Party's mandatory immigration detention policy.

8.5 The Committee notes the State Party's argument that it considered the author's individual needs in determining the appropriateness and necessity of detention (see paras. 4.14–4.16 above). The Committee, however, considers that the State Party has not identified any individualized and specific reasons that would have justified the need to deprive the author of his liberty for such a protracted period. In particular, the State Party has not indicated that it determined that the author posed a risk to public security, public order or safety, or a risk of absconding, nor has it demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends – that is, compliance with the State Party's immigration policies – through, for example, the imposition of reporting obligations, sureties or other conditions that would take account of the author's deteriorating health condition.[23] The Committee therefore finds that the protracted nature of the author's initial and subsequent periods of detention were unreasonable, unnecessary and disproportionate to the State Party's policy objectives and in violation of the author's rights under article 9 (1) of the Covenant.

8.6 The Committee further notes the author's claim that, under the jurisprudence of the Hight Court of Australia in *Al-Kateb v. Godwin*, which applied at the time of his detention, he was unable to seek judicial review of his detention, contrary to the requirements of article 9 (4) of the Covenant.

8.7 Article 9 (4) entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. The Committee refers to its general comment No. 35 (2014), in which it stated that judicial review of the lawfulness of detention under article 9 (4) is not limited to mere compliance of the detention with domestic law, but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9 (1).[24] The Committee further recalls its previous jurisprudence concerning review of the detention of non-citizens without valid entry documentation in the State Party, in which it concluded that the scope of domestic judicial review of immigration detention was insufficient to permit the examination of an individual's detention in substantive terms.[25] In its previous jurisprudence, the Committee has further stated that the State Party has not provided any relevant legal precedents showing the effectiveness of an application for a judicial review of mandatory immigration detention under the Migration Act, nor has it shown that national courts have the authority to make individualized rulings on the justification for an applicant's detention.[26] The Committee

[21] Ibid., para. 18.

[22] Ibid.

[23] *C. v. Australia*, para. 8.2; *A v. Australia* (CCPR/C/59/D/560/1993), para. 9.4; *M.M.M. et al. v. Australia* (CCPR/C/108/D/2136/2012), para. 10.4; *F.J. et al. v. Australia*, para. 10.4; and *Nabhari v. Australia*, paras. 8.6 and 8.7.

[24] General comment No. 35 (2014), paras. 40 and 44. See also *M.M.M. et al. v. Australia*, para. 10.6; *F.J. et al. v. Australia*, para. 10.5; and *F.K.A.G. et al. v. Australia*, para. 9.6.

[25] *M.M.M. et al. v. Australia*, para. 10.6; *F.J. et al. v. Australia*, para. 10.5; and *F.K.A.G. et al. v. Australia*, para. 9.6.

[26] *M.I. et al. v.* Australia (CCPR/C/142/D/2749/2016), para. 10.6.

therefore considers that the facts in the present case amount to a violation of the author's rights under article 9 (4) of the Covenant.

8.8 The Committee notes the author's claims that his rights under article 10 (1) of the Covenant were violated inasmuch as he was subjected to a physical assault in detention, for which he claims he received inadequate medical and psychological care. It further notes his argument that it is clear from his medical records that his protracted detention, contrary to medical advice, caused him severe mental health issues, which were exacerbated by the assault he suffered while in detention. The Committee notes the State Party's contention that the author was provided with timely and appropriate medical care for the injuries sustained in the assault, prompt surgery and any necessary follow-up treatments, including mental health support, throughout the detention period.

8.9 The Committee observes that, while the author has argued that he received inadequate medical care following the assault in detention in 2017, he has not provided any specific information on any treatments for physical injuries that the State Party failed to provide. It therefore finds, based on the information on file, that it cannot conclude that the medical care provided for the physical injuries he sustained as a result of the assault were inadequate. The Committee, however, notes the author's undisputed argument, which is supported by his medical records, that during the detention period he was diagnosed with post-traumatic stress disorder and major depressive disorder, and that, on 7 March 2019, he was admitted to hospital following a suicide attempt and was subsequently diagnosed as being at high risk of suicide and self-harm. The Committee further observes that, on 30 August 2019, the Department of Home Affairs determined that the guidelines had been met for a referral of the author's case to the relevant Minister for intervention under section 195A of the Migration Act. In making this determination, the Department considered, inter alia, that the author had been in immigration detention for six consecutive years with risk of prolonged and indefinite detention and that a psychiatrist had assessed that the author's suicide risk was high and would increase with continued detention.

8.10 The Committee refers to paragraph 3 of its general comment No. 21 (1992), in which it stated that article 10 (1) imposes a positive obligation on States Parties towards persons who are particularly vulnerable because of their status as persons deprived of liberty. It further recalls that decisions regarding the detention of migrants must also take into account the effect of detention on their physical or mental health.[27] The Committee recalls its jurisprudence in which it has held that prolonged and indefinite immigration detention against medical advice resulting in deteriorating mental health may, in combination with the arbitrary character of the protracted duration or indefinite term of detention, amount to a violation of article 10 of the Covenant.[28] In the present case, the Committee notes that, according to the author's medical records, the uncertainty regarding his migration status and the subsequent deprivation of freedom, combined with fears for his safety from other detainees following his assault, were factors that contributed significantly to his vulnerable mental health situation, including a high risk of suicide and a risk of further deterioration if his detention were to continue. The Committee therefore finds that the negative impact that the protracted detention had on the author's mental health, as supported by his medical records, and the difficult conditions of detention that cumulatively inflicted serious psychological harm on the author, constituted treatment contrary to article 10 (1) of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party has violated the author's rights under articles 9 (1) and (4) and 10 (1) of the Covenant.

10. Pursuant to article 2 (3) (a) of the Covenant, the State Party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State Party is obligated to provide the author with medically appropriate rehabilitation and adequate compensation. The State Party is also under an obligation to take all steps necessary to

[27] General comment No. 35 (2014), para. 18.

[28] *Madafferi et al. v. Australia* (CCPR/C/81/D/1011/2001), para. 9.3. See also *M.M.M. et al. v. Australia*, para. 10.7; *F.J. et al. v. Australia*, para. 10.6; *F.K.A.G. et al. v. Australia*, para. 9.8; and *C. v. Australia*, para. 8.4.

prevent similar violations from occurring in the future. In this connection, the State Party should review and modify its migration legislation and policies to ensure their conformity with the requirements of the Covenant, including articles 9 and 10.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State Party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State Party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State Party is also requested to publish the present Views and to have them widely disseminated in the language of the State Party.

Annex

Individual opinion of Committee member Yvonne Donders (concurring)

1. I fully agree with the reasoning and the decision of the Committee in this case. I would like, however, to comment on the invocation by the State Party (para. 4.10 of the Committee's Views) of its reservation to article 10 (2) (a).

2. Article 10 (2) (a) of the Covenant provides that "accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons". This provision is intended to emphasize that unconvicted persons enjoy the right to be presumed innocent. The fact that States Parties may not be able to always guarantee the segregation of accused and convicted persons is covered by the exception in this provision ("save in exceptional circumstances"). States Parties are thereby given the possibility to justify their inability to fully guarantee these rights, to be monitored by the Committee.

3. When Australia ratified the Covenant in 1980, it filed a reservation, which reads: "in relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively".[1] The Committee rightly concludes (para. 7.4 of the Views) that this reservation was not applicable in this case. However, the invocation by Australia of the reservation raises several issues. The language of the reservation reflects the State Party's agreement with the principle of segregation, but also its position that this is an objective that cannot be implemented immediately but rather incrementally and over time. The language of progressive realization reminds us of the International Covenant on Economic, Social and Cultural Rights, article 2 (1) of which requires that each State Party undertake "to take steps, individually and through international assistance and co-operation … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights". The reservation seems to refer to such a form of implementation of article 10 (2) (a).

4. When invoking the reservation in this case, Australia noted that it was upheld by the Committee in earlier decisions. In these cases, the Committee recognized that "while 20 years have passed since the State party entered the reservation and that it intended to achieve its objective 'progressively', and although it would be desirable for all States parties to withdraw reservations expeditiously, there is no rule under the Covenant on the timeframe for the withdrawal of reservations".[2] The Committee further noted the State Party's efforts to construct new detention facilities to house remand prisoners. The Committee concluded that although it was "unfortunate that the State party has not achieved its objective to *segregate* convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a)", it could not at the time find the reservation to be incompatible with the object and purpose of the Covenant.[3]

5. It should be noted that Australia acceded to the Covenant in 1980 and that it withdrew several reservations in 1984, including on article 10 (1).[4] In its most recent concluding observations on Australia in 2017, the Committee recommended that the State Party should review periodically the justifications for, and the necessity of, maintaining this and other

[1] The reservation only refers to the segregation of convicted and unconvicted persons and does not extend to cover the separate treatment element of article 10 (2) (a). See *Cabal and Pasini v. Australia* (CCPR/C/78/D/1020/2001), para. 7.4.

[2] *Cabal and Pasini v. Australia*, para. 7.4; and *Minogue v. Australia* (CCPR/C/82/D/954/2000), para. 6.5.

[3] Ibid.

[4] In a communication received on 6 November 1984, the Government of Australia notified the Secretary-General of its decision to withdraw the reservations and declarations made upon ratification with regard to articles 2 and 50, 17, 19, 25 and to partially withdraw its reservations to articles 10 and 14. For the text of the reservations and declarations, see United Nations, *Treaty Series*, vol. 1197, No. 14668.

reservations “with a view to withdrawing them”.[5] Bearing in mind that there is no fixed time limit for withdrawal of reservations, that 45 years have passed since Australia submitted the reservation to article 10 (2) (a), and that more than 20 years have elapsed since the earlier cases in which the Committee upheld this reservation, one may reasonably ask whether the State Party should not have “progressively achieved” its objectives by now. I have doubts as to how much longer the Committee should consider this reservation to be compatible with the object and purpose of the Covenant.

[5] CCPR/C/AUS/CO/6, para. 8.