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on civil and
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HUMAN RIGHTS COMMITTEE
Seventy-ninth session
20 October – 7 November 2003

VIEWS

Communication No. 1069/2002

<u>Submitted by:</u>	Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari (represented by counsel Mr. Nicholas Poynder)
<u>Alleged victims:</u>	The authors and their five children, Almadar, Mentazer, Neqeina, Sameina and Amina Bakhtiyari
<u>State party:</u>	Australia
<u>Date of communication:</u>	25 March 2002 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 27 March 2002 (not issued in document form)
<u>Date of adoption of Views:</u>	29 October 2003

On 28 October 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1069/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Seventy-ninth session

concerning

Communication No. 1069/2002*

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

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

State party: Australia

Date of communication: 25 March 2002 (initial submission)

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

Meeting on 29 October 2003,

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

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

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The text of an individual opinion signed by Committee member Sir Nigel Rodley is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

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

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

The facts as submitted

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

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

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

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

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

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

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs Bakhtiyari again made a request to the Minister under s.417 of the *Migration Act*, but was again informed that such matters were generally not referred to the Minister while litigation was underway. On 18 July

¹ The Guidelines, provided by the authors, provide that "public interest" factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person's personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party's obligations under the Covenant, the Convention on the Rights of the Child or the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment into consideration, or where there are unintended but particularly unfair or unreasonable consequences of the legislation.

2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

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

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

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

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

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

² Section 67ZC provides:

“(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.”

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

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

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

The complaint

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

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

³ *A.R.J. v Australia* Case No 692/1996, Views adopted on 11 August 1997, and *T v Australia* Case No 706/1996, Views adopted on 4 November 1997.

⁴ Case No 506/1993, Views adopted on 4 March 1993.

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

3.4 In Covenant terms, the removal of Mrs Bakhtiyari and her children, which will separate them from Mr Bakhtiyari, amounts to an "interference" with the family. While the interference is lawful, it should also, according to the Committee's General Comment 16 on article 17, be reasonable in the particular circumstances of the case. In the authors' view, to return Mrs Bakhtiyari and her children to Afghanistan in circumstances where Mr Bakhtiyari, an Hazara, is unable to return safely to that country in the light of the uncertain situation, would be arbitrary.

3.5 The authors finally argue a violation of article 24, paragraph 1, which should be interpreted in the light of the Convention on the Rights of the Child. No justification has been provided for the prolonged detention of the children, in "clear" violation of article 24. No consideration has been given to whether it would be in their best interests to have spent over a year in an isolated detention facility, or to be released; detention has been a measure of first, rather than last, resort. It is no answer to say that the best interests of the children were served by co-locating them with Mrs Bakhtiyari as no justification for her prolonged detention has been supplied, and there is no reason why she could not have been released with the children pending determination of their asylum claims. In any event, as soon as it became known that Mr Bakhtiyari had been granted a permit and was residing in Sydney, the children should have been released into his care.

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

⁵ The authors refer to Lambert, H.: "The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion", (1999) 11 (3) *International Journal of Refugee Law* 427.

⁶ Waterford v Commonwealth (1987) 163 CLR 54.

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

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

Subsequent issue of request for interim measures of protection

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

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

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

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

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

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

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

⁷ These submissions are available online at www.hreoc.gov.au/human_rights/children_detention/index.html.

as greater care taken to protect and shield children from situations of danger and trauma within the compound. This report was tabled in the South Australian parliamentary House of Assembly, with the Premier requesting the federal government to respond and act upon the recommendations.

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

5.1 By submission of 7 October 2002, the State party contests both the admissibility and the merits of the communication. In the first instance, the State party submits that the entire communication should be dismissed for failure to exhaust domestic remedies, as at that point the authors' High Court action, which could have resulted in a full remedy, was still pending. In addition, with respect to article 9, the State party argues that an action in *habeas corpus* under the *Constitution* Act 1901 would provide a means by which the lawfulness of any detention, administrative or otherwise, may effectively be judicially tested.

5.2 As to the claims under article 7, the State party argues that this aspect of the communication should be declared inadmissible for lack of sufficient substantiation. The authors simply assert, without any explanation, that if deported to Pakistan, they will be sent on to Afghanistan and face treatment contrary to article 7.

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

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

⁸ Case No 165/1984, Decision adopted on 26 March 1986.

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

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

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

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

5.9 The State party emphasises that while in detention, individuals are provided with free legal advice to apply for protection visas, and considerable resources have been invested to provide for more rapid processing of claims, and correspondingly shorter durations of detention. In the present case, the claims were promptly processed: Mrs Bakhtiyari’s application, made on 21 February 2001, was refused by the original decision-maker on 22 May 2001. She was informed of the RRT’s decision on her appeal on 26 July 2001. Thereupon, the Minister denied her request for discretionary action under section 417 of the *Migration Act*. That Act now requires Mrs Bakhtiyari to be removed as soon as “reasonably

⁹ Case No 91/1981, Decision adopted on 28 October 1981.

practicable". However, as they themselves petitioned the Minister and subsequently engaged legal action, the usual steps concerning removal have been delayed pending the outcome.

5.10 The State party rejects the claim that the children should have been released into their father's care. At the time of the submissions, his visa was liable to cancellation on the basis of fraud, namely that he too was a Pakistani national, and his response to the adverse information was before the Department. Cancellation of the visa would result in being placed in immigration detention, and thus it was not considered appropriate to release the children into his care.

5.11 As to the claim under article 9, paragraph 4, the State party observes that the Committee found in A v Australia that arbitrary detention contrary to article 9, paragraph 1, should be able to be tested before a court. The State party however reiterates its position in response to the Committee's Views in A v Australia that there was nothing in the Covenant to indicate that the word "lawful" was intended to mean "lawful at international law" or "not arbitrary". Where lawful is otherwise utilised in the Covenant, it clearly refers to domestic law (arts. 9(1), 17(2), 18(3) and 22(2)). Nor do the Committee's General Comments, nor the *travaux préparatoires* to the Covenant suggest any such notion. If article 9, paragraph 4, were to have extended meaning beyond domestic law, it would have been a simple matter for the drafters to add "arbitrary" or "in breach of the Covenant". At least, such a broad interpretation would be expected to be reflected in the debate and discussion preceding the agreement on the text, but the *travaux* show that this provision "did not give rise to much discussion". In the present case, recourse to the *habeas corpus* jurisdiction of the High Court, possibly funded by legal aid, gives the authors the right to challenge the lawfulness of their detention, consistent with article 9, paragraph 4. While they have failed to take advantage of this right, they cannot be said to have been denied recourse to it.

5.12 As to the claims under articles 17 and 23, paragraph 1, the State party argues, firstly, that "interference" refers to acts that have the result of inevitably separating the family unit. In this respect, the State party considers the individual opinion of four members of the Committee in Winata v Australia¹⁰ to reflect correctly the prevailing view of international law when they stated that: "It is not all evident that actions of a State party that result in changes to long-settled family life involve interference with the family, when there is no obstacle to maintaining the family's unity." In the present case, Mr Bakhtiyari is free to leave with his wife and children, and travel arrangements will be facilitated if needed. If he chooses to remain, that is his own decision rather than that of the State party. The State party thus rejects that, in enforcing its immigration law, it is interfering with the family unit in this case.

5.13 In any event, any interference is not arbitrary. The State party rejects that its laws concerning removal of unlawful non-citizens could be characterized as arbitrary; aliens do not, under international law, have the right to enter, live, move freely and not be expelled.¹¹ The laws are reasonable, being based upon sound public policy principles consistent with the State party's standing as a sovereign nation and with its international obligations, including under the Covenant. The laws are predictable, in that information about them is widely available, and they are applied in consistent fashion, without discrimination. If these laws are

¹⁰ Case No 930/2000, Views adopted on 26 July 2001.

¹¹ C Tiburcio: "The Human Rights of Aliens under International and Comparative Law", *International Studies in Human Rights*, Vol. 65 (Nijhoff, 2001), at 20.

applied to Mrs Bakhtiyari and her children, it will be the predictable and foreseeable operation, that has been explained to them, of having exhausted the available application and appeals processes, which give extensive consideration to their individual circumstances and to the State party's *non-refoulement* obligations.

5.14 As to article 23, paragraph 1, the State party refers to Nowak's characterization of this obligation as requiring the establishment of marriage and family as special institutions in private law and their protection against interference by State as well as private actors.¹² There is a comprehensive federal system of family law, complemented by rigorous child protection laws in States and Territories, which are backed up by State and Territory departments and specialist units with police services. These laws apply to persons in immigration detention (except as inconsistent with federal law). The State has introduced programs and policies to support families in immigration detention, prescribing appropriate standards for the relevant service providers. Medical staff, including nurses, counselors and welfare officers, support and assist parents to care for children and meet parental responsibilities. State child welfare agencies also provide appropriate parenting skills training. The State party thus rejects that it has failed to protect the family as an institution; it has put in place laws, practices and policies designed to protect and support families, including those in immigration detention.

5.15 In terms of the claims under article 24, paragraph 1, the State party, as a preliminary matter, rejects that this provision should be interpreted in a similar way to the Convention on the Rights of the Child (CRC). The Committee has noted that it is not competent to examine allegations of violations of other instruments,¹³ and should thus restrict its consideration to Covenant obligations. It is clear, in any event, that article 24, paragraph 1, is different in nature to CRC rights and obligations, being, as described by Nowak, a comprehensive duty to guarantee that all children within a State party's jurisdiction are protected,¹⁴ whether through support for the family, through support for corresponding private facilities for children, or other measures. The obligation is not complete, extending only to such protective measures as required by the child's status as a minor.

5.16 The State party submits this obligation has been met with respect to the Bakhtiyari children. It refers to the information on the level of medical, educational and recreational services outlined in its response to the Committee's request for information pursuant to Rule 86 of its Rules of Procedure.¹⁵ In addition, all staff in detention facilities must advise local child protection authorities if they consider a child is at risk of harm; to this effect, concerning the Woomera facility, an arrangement was formalized between the Department and the South Australian State Department of Human Services on 6 December 2001.

5.17 Within immigration detention, as generally in the State party, child supervision is a parental responsibility and thus, while general statements can be made about services and facilities available, attendance records are not usually kept. Following the concern about the Bakhtiyaris' well-being, however, special protective measures were implemented. An officer

¹² Nowak, M.: *UN Covenant on Civil and Political Rights: CCPR Commentary*. (NP Engel, Kehl, 1993), at 402.

¹³ The State party refers to K.L. v Denmark Case No 59/1979, Decision adopted on 26 March 1980.

¹⁴ Nowak, *op.cit.*, at 426.

¹⁵ See para 4.3, *infra*.

has been specifically assigned to monitor the children's participation in educational and recreational activities, and to work with Mrs Bakhtiyari to encourage these ends. Records indicate that the two eldest boys attend school regularly, use computer facilities, play soccer regularly and attend exercise classes. They attend regular pool excursions and enjoy watching television, while Muntazar has actively taught other children cycling. Of the other children, the school-aged girls attend school and participate in recreational activities, including sewing with their mother.

5.18 Following concerns about the family, the Department requested the local child welfare authorities (under the auspices of the South Australian State Department of Human Services) to assess the family at the facility. The family did not co-operate with the August 2002 assessment, and Mrs Bakhtiyari did not allow the authorities to speak to the two eldest sons, which compromised the assessment. An independent psychologist made an assessment on 2 and 3 September 2002, and made recommendations the Department is considering.

5.19 The State party argues that consideration has been given to whether the children should remain in detention. In October 2001, when Mrs Bakhtiyari applied to the Minister under section 417 of the *Migration Act*, it was known that Mr Bakhtiyari was in the community. However, there was also information to suggest that he may have committed visa fraud. The Minister considered all these factors in reaching his decision not to substitute a more favourable decision for that of the RRT. As Mr Bakhtiyari's visa was, at the stage of the State party's submission, under consideration for cancellation, it would be inappropriate to release the children to his custody.

5.20 The State party observes, in closing, that efforts have been made to ensure Mrs Bakhtiyari and the children have access to the most comfortable facilities. In August 2002, they were offered a transfer to the new Baxter facility, having contended that the Woomera facility was isolated and too harsh for children. The Baxter facility possesses a family compound, as well as superior educational facilities in a purpose-built school. As at the time of submissions, they had refused to move despite lengthy discussions with staff, preferring to remain at the Woomera facility. The option to transfer nonetheless remained open.

The authors' comments on the State party's submissions

6.1 By letter of 31 March 2003, the authors responded to the State party's submissions, observing that, as at that point, with the High Court's dismissal of their application, Mrs Bakhtiyari and the three youngest children had no further legal options by which they could remain in Australia, and would be detained until deportation. Success for the two sons Alamdar and Montazer before the Family Court could result in their release from detention. Mr Bakhtiyari's only prospect to remain in the State party was if he was successful in his application to the Federal Court to overturn the RRT's affirmation of his visa cancellation.

6.2 In response to the State party's submissions, the authors contend that Mr Bakhtiyari's detention for nine months until the grant of his visa breached article 9, paragraphs 1 and 4. He disclaims any submission as to his current detention pending deportation. Mrs Bakhtiyari and her children had been (at the time of the comments) in detention for two years and four months, in violation of articles 9, paragraphs 1 and 4, and 24, paragraph 1. A remedy of *habeas corpus* is of no assistance as the detentions were, and are, lawful under the State

party's law and thus would be bound to fail. As to the children, the forthcoming decision of the Family Court does not detract from their claims of violations to date.

6.3 The authors emphasise the “universal condemnation” of the State party's attempts to justify mandatory detention for all unauthorized arrivals.¹⁶ No justification has been advanced for the prolonged detention of Mrs Bakhtiyari and the children, and the actual or alleged nationality of the family is irrelevant to this issue. The case is factually indistinguishable from the Committee's Views in A v Australia and C v Australia;¹⁷ if anything, the detention of children makes the breaches more serious.

6.4 To the extent that the family has now been re-united in allegedly unlawful detention and that any removal is likely to involve the whole family, the allegation that the removal of Mrs Bakhtiyari and the children would be in breach of articles 17 and 23, paragraph 1, was at that point no longer maintained.

Supplementary submissions of the parties

7.1 On 7 May 2003, the authors provided the Committee with a letter of 28 April 2003 from the Australian Government Solicitor to the Chief Justice of the Family Court, advising the Court of developments. In particular, as Mrs Bakhtiyari and her children had no outstanding legal proceedings, the Minister considered himself under a duty, pursuant to section 198(6) of the *Migration Act*, to remove them as soon as “reasonably practicable”, and efforts were being made to secure the necessary documentation to enable their removal. As Mr Bakhtiyari had an outstanding application for review of the cancellation of his visa (which was subsequently dismissed) as well as an outstanding application for a permanent protection visa (which did not include Mrs Bakhtiyari or the children), the obligation to remove him had not yet arisen and removal was not imminent.

7.2 The authors considered that removal of Mrs Bakhtiyari and her children in these circumstances would amount to a breach of articles 7, 17, 23, paragraph 1, and 24 of the Covenant. As a result, on 8 May 2003, the Committee, acting through its Special Rapporteur, pursuant to Rule 86 of the Committee's Rules of Procedure, recalled and renewed the request made not to expel Mrs Bakhtiyari and her children, pending the Committee's decision in the case.

7.3 On 22 July 2003, during the Committee's 78th session, the State party made additional submissions, informing the Committee that Mrs Bakhtiyari and the three daughters were currently resident in the Woomera Residential Housing Project, a facility aimed at special needs of women and children. Their residence was one of eight standard houses in Woomera township, considered to be an alternate place of detention by the Department. Mrs Bakhtiyari and her three daughters are able to leave the house provided they are escorted by correctional officers. Mr Bakhtiyari and the two sons remain at the Baxter Immigration Reception and Processing Centre. The sons are over the age limit for release into the Residential Housing

¹⁶ The authors refer to a report of the Human Rights and Equal Opportunities Commission “Those who've come across the seas: Detention of unauthorized arrivals”, available online at www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf.

¹⁷ Case No 900/1999, Views adopted on 28 October 2002.

Project because of “cultural sensitivities and security”. Mr Bakhtiyari is able to visit his wife and daughters at the Housing Project twice a week.

7.4 By letter of 8 October 2003, the authors responded to the State party’s submissions, updating the Committee on the history of proceedings in the Family Court and High Court, with respect to the children, and in the Federal Court with respect to Mr Bakhtiyari. They argued that in the event the appeal to the High Court was resolved against them, that the children would be returned to detention. They observed that Mrs Bakhtiyari remains in immigration detention, though currently in Adelaide hospital pending birth of a child. Mr Bakhtiyari remained in the Baxter facility. If Mrs Bakhtiyari and her children were to be deported imminently, they would be separated from him.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party’s argument that domestic remedies have not been exhausted, the Committee refers to its practice that it decides the question of exhaustion of domestic remedies, in contested cases, at the point of its consideration of the communication, not least for the reason that a communication in respect of which domestic remedies had been exhausted after submission could be immediately re-submitted to the Committee if declared inadmissible for that reason. Upon that basis, the Committee observes that the proceedings brought by Mrs Bakhtiyari and her children in the High Court have, in the intervening period, been adversely concluded. As to the proposed remedy of *habeas corpus*, the Committee observes, as it has done previously, that as the State party’s law provides for mandatory detention of unlawful arrivals, a *habeas corpus* application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to be an effective one, for the purposes of the Optional Protocol. The Committee thus is not precluded under article 5, paragraph 2(b), of the Optional Protocol from considering the communication.

8.3 As to the State party’s argument that the removal of Mrs Bakhtiyari and her children is hypothetical and thus there is not an “actual grievance” for the purposes of the Optional Protocol, the Committee observes that, whatever the position might have been at the time the State party lodged its submissions, according to recent information, the State party regards itself under a duty to remove Mrs Bakhtiyari and her children as soon as is “reasonably practicable” and is taking steps to that end. Accordingly, the claims based on threat of removal of Mrs Bakhtiyari and her children are not inadmissible for reason of being of hypothetical nature.

8.4 Referring to the arguments that Mrs Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time

would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party's authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7. The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

8.5 As to the claims under articles 17 and 23 deriving from a separation of the family unit, the Committee observes that while these claims were withdrawn on the assumption that once Mr Bakhtiyari was placed with his family, they would be dealt with together, the most recent information suggests that the State party is moving to remove Ms Bakhtiyari and her children, while proceedings in relation to Mr Bakhtiyari are in process. Consequently, the Committee regards these claims still to be relevant, and considers these and the remaining claims to be sufficiently substantiated, for purposes of admissibility.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.¹⁸ In the present case, Mr Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr Bakhtiyari. The Committee observes that Mr Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining

¹⁸ A v Australia and C v Australia, *op.cit.*

identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to Mrs Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs Bakhtiyari made her application to the Minister under section 417 of the *Migration Act*, there was already information on Mr Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr Bakhtiyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs Bakhtiyari and her children would face if returned to Pakistan without Mr Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs Bakhtiyari and her children without awaiting the final determination of Mr Bakhtiyari's proceedings

would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs Bakhtiyari and her children while Mr Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

**Individual Opinion of Committee Member Sir Nigel Rodley
(dissenting in part)**

For the reasons I gave in my separate opinion in C. v. Australia (Case No. 900/1999, Views adopted on 28 October 2002), I concur with the Committee's finding of a violation of article 9, paragraph 1, but not with its finding of a violation of article 9, paragraph 4.

[signed] Sir Nigel Rodley

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]