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Eighty-first session

5 - 30 July 2004

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

- Eighty-first session -

Communication No. 1011/2001

Submitted by: Francesco Madafferi and Anna Maria Immacolata Madafferi
(represented by counsel, Mr. Mauro Gagliardi and Mr. Acquaro)

Alleged victim: The authors and their four children, Giovanni Madafferi,
Julia Madafferi, Giuseppina Madafferi and Antonio Madafferi

State party: Australia

Date of initial communication: 16 July 2001 (initial submission)

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

Meeting on 26 July 2004,

Having concluded its consideration of communication No. 1011/2001, submitted to the Human Rights Committee on behalf of, Francesco Madafferi, Anna Maria Immacolata Madafferi and their four children, 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 authors of the communication, and the State party,

Adopts the following:

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

1.1 The authors of the communication are Francesco Madafferi, an Italian national, born on 10 January 1961 and Anna Maria Madafferi, an Australian national, also writing on behalf of their children Giovanni Madafferi, born 4 June 1991, Julia Madafferi, born 26 May 1993, Giuseppina Madafferi, born 10 July 1996, and Antonio Madafferi, born 17 July 2001. All four children are Australian nationals. Francesco Madafferi is currently residing with his family in Melbourne, Victoria, Australia. The authors claim to be victims of violations by Australia of articles 2, 3, 5, 7, 9, 10, 12, 13, 14, 16, 17, 23, 24 and 26, of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Mauro Gagliardi and Mr. Acquaro.

1.2 An interim measures request to prevent the deportation of Mr. Madafferi, which was submitted at the same time as the initial communication, was at first denied by the Committee's Special Rapporteur on New Communications. However, in light of the psychological report provided, the Special Rapporteur, in the exercise of his mandate, decided to include the following phrase in the note transmitting the communication to the State party with the request for information on admissibility and merits, "The Committee wishes to draw the attention of the State party to the psychological impact of detention upon [Mr. Madafferi], and the possibility that a deportation, if implemented while the communication is before the Committee, may violate the State party's obligations under the Covenant". (1)

The facts as submitted by the authors

2.1 On 21 October 1989, Francesco Madafferi arrived in Australia on a tourist visa, which was valid for six months from the date of entry. He came from Italy, where he had served a two year prison term and was released in 1986. On entering Australia, Mr. Madafferi had no outstanding criminal sentence or matters pending in Italy.

2.2 After April 1990, Mr. Madafferi became an unlawful non-citizen. On 26 August 1990, he married Anna Maria Madafferi, an Australian national. He believed that his marriage had automatically granted him residence status. The couple had four children together, all born in Australia. Mr. Madafferi's extended family are all residents in Australia.

2.3 In 1996, having been brought to the attention of the Department of Immigration and Multicultural Affairs (hereinafter "DIMIA"), Mr. Madafferi filed an application for a spouse visa to remain permanently in Australia. In this application, he disclosed his past convictions and included details of sentences handed down, in absentia, in Italy which only became known to him following his initial interview with the Immigration officers. Extradition was never sought by the Italian authorities.

2.4 In May 1997, DIMIA refused the application for a spouse visa, as he was considered to be of "bad character", as defined by the Migration Act, in light of his previous convictions. This decision was appealed to the Administrative Appeals Tribunal (hereinafter referred to as "AAT").

2.5 On 7 June 2000, and after a two-day hearing, the AAT set aside the decision under review and remitted the matter to the Minister of DIMIA (hereinafter "the Minister") for reconsideration in accordance with a direction that Mr. Madafferi "not be refused a visa on character grounds solely on the basis of the information presently available..." (2) In July 2000, rather than reconsidering the matter in accordance with the direction of the AAT, the Minister gave notice of his intention under a separate section of the Migration Act 1958 - subsection 501A - to refuse Mr. Madafferi's request for a visa.

2.6 In August 2000, the Italian authorities, on their own motion, extinguished part of the outstanding sentences and declared that the remainder of the outstanding sentences would be extinguished in May 2002. (3) According to the authors, the Minister did not take these actions of the Italian authorities into account.

2.7 On 18 October 2000, the Minister used his discretionary power, under subsection 501A, to overrule the AAT decision and refused Mr. Madafferi a permanent visa. On 21 December 2000, following an application by Mr. Madafferi's lawyer, the Minister gave his reasons, claiming that since Mr. Madafferi had prior convictions and an outstanding term of imprisonment in Italy, he was of "bad character" and that therefore it would be in the "national interest" to remove him from Australia. According to the authors, the Minister failed to make proper enquiries with the Italian authorities and relied incorrectly on the assumption that Mr. Madafferi had an outstanding sentence of over 4 years. Further clarification was asked of the Minister and provided by him in January 2001. On 16 March 2001, Mr. Madafferi surrendered himself to the authorities and was placed in the Maribyrnong Immigration Detention Centre in Melbourne for an indefinite period.

2.8 On 18 May 2001, the Federal Court dismissed an application for judicial review of the Minister's decision. On 5 June 2001, this decision was appealed to the Full Court of the Federal Court. On 13 November 2001, the Full Federal Court heard the appeal and reserved its decision. On 31 January 2002, Mr. Madafferi was advised that one of the three judges of the Full Federal Court had fallen ill and would not be able to hand down his judgment. Mr. Madafferi chose to have a reconstituted court decide the appeal on the papers rather than the two remaining judges handing down their decision. On 17 July 2002, the reconstituted Full Federal Court, dismissed the appeal.

The complaint

3.1 The authors claim that as Mrs. Madafferi does not intend to accompany her husband to Italy if he is removed, the rights of all the authors, particularly the children, will be violated as the family unit will be split-up. It is claimed that such a separation would cause psychological and financial problems for all concerned, but more particularly for the children, considering their young ages.

3.2 The authors claim that the decision of the Minister was arbitrary in overturning the decision of the AAT without any new information and without due consideration of the information, facts and opinion of the presiding judge. It is claimed that the Minister abused his discretion and failed to afford procedural fairness to Mr. Madafferi's case. They claim that his decision was politically driven by "the media's contempt for Mr. Madafferi and other members of his family." In this regard, the authors also stress that Mr. Madafferi has never been convicted of an offence in Australia.

3.3 In addition, the authors claim that the detention centre in which Mr. Madafferi was held does not rise to the health standards and humane environment even accorded to serious criminal offenders. It is also claimed that Mr. Madafferi's rights have been violated by denying him other alternative detention measures like home detention or alternate home arrest which would allow him to continue to be with his family, particularly in light of the birth of his last child, pending resolution of his immigration status. In this regard it is claimed that Mr. Madafferi was not allowed to attend the birth of his fourth child, born on 17 July 2001.

The State party's submission on admissibility and merits

4.1 By submission of March 2002, the State party commented on the admissibility and merits of the communication. It submits that the entire communication is inadmissible in so far as it purports to be lodged on behalf of Mrs. Madafferi and the Madafferi children, as they have not given their authority to do so. It submits that the entire communication is inadmissible for failure to exhaust domestic remedies as, at the time of its submission, the Full Court of the Federal Court had not yet handed down its decision and the authors still had the option of appealing a negative decision by this court to the High Court. In addition, it submitted that the authors had not availed themselves of the remedy of *habeas corpus*, to review the lawfulness of Mr. Madafferi's detention, nor did they lodge a complaint with the Human Rights and Equal Opportunities Commission.

4.2 It submits that the entire communication is inadmissible for failure to substantiate any of the allegations. With the exception of the allegations that articles 9, paragraph 1 and 10, paragraph 1, have been violated in relation to Mr. Madafferi, all of the allegations contained in the communication are inadmissible on the basis of incompatibility with the Covenant. A number of the allegations are inadmissible in relation to certain members of the family as they cannot be considered victims of the alleged violations.

4.3 On the merits, the State party submits that the authors failed to provide sufficient pertinent evidence to permit an examination of the merits of the alleged violations. As to a possible violation of article 7, the State party submits that the treatment of Mr. Madafferi and its effects on the other authors did not amount to severe physical or mental suffering of the degree required to constitute torture, but was lawful treatment in accordance with the State party's immigration laws. As to the psychological assessments of the authors, it submits that whilst there is evidence that Mr. Madafferi and the Madafferi children are suffering emotionally as a result of his detention and proposed removal, they do not amount to evidence of a violation of article 7, as they do not document suffering of a sufficient severity caused by factors beyond the incidental effects of detention and its inherent separation from the rest of the family. As evidence, it submits a copy of a medical report,

dated 20 August 2001, which concludes that whilst Mr. Madafferi is suffering a range of stress-related symptoms, these are in the mild to moderate range and consistent with what would be expected given his detention and proposed removal.

4.4 With respect to the alleged violation of article 9, the State party submits that Mr. Madafferi's detention is lawful and in accordance with procedures established by law, the Migration Act. As he does not hold a visa, he is an unlawful non-citizen under the definition in section 14 of the Migration Act. Under Section 189, such unlawful non-citizens in Australia are detained mandatorily. The State party submits that the Minister was entitled to use his discretionary power under the Migration Act not to grant a visa to Mr. Madafferi. His actions in this regard have been challenged throughout the court system and found to be lawful.

4.5 The State party denies that Mr. Madafferi's detention is arbitrary. It submits that detention in the context of immigration is an exceptional measure reserved for people who arrive or remain in Australia without authorisation. The aim of immigration detention is to ensure that potential immigrants do not enter Australia before their claims to do so have been properly assessed and found to justify entry. It also provides Australian officials with effective access to those persons for the purposes of investigating and processing their claims without delay, and if those claims are unwarranted, to remove such persons from Australia as soon as possible.

4.6 The State party submits that the detention of people who seek to remain in Australia unlawfully is consistent with the fundamental right of sovereignty, pursuant to which States may control the entry of non-citizens into their territory. Australia has no system of identity cards, or other national means of identification or system of registration which is required for access to the labour market, education, social security, financial services and other services. This makes it more difficult for Australia to detect, monitor and apprehend illegal immigrants in the community, compared to countries where such a system is in place.

4.7 On the basis of past experience, it may reasonably be assumed that if individuals were not detained but released into the community, pending finalisation of their status, there would be a strong incentive for them not to adhere to the conditions of their release and to disappear into the community and remain in Australia unlawfully, especially where such individuals have a history of non-compliance with migration laws. The State party's immigration detention policy must also be seen in the broader context of the overall migration program. All applications to enter or remain in Australia are thoroughly considered, on a case by case basis. Although the exhaustion of all legal remedies means that the processing time is extended in some cases, it also ensures that all claimants are assured of a detailed consideration of all the factors relevant to their case. This has occurred in Mr. Madafferi's case. The reasonableness of the State party's mandatory detention provisions was considered by the High Court in *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs*. (4)

4.8 The State party submits that its migration laws are not arbitrary per se, and that they were not enforced in an arbitrary manner in the case of Mr. Madafferi. Several factors demonstrate that Mr. Madafferi was treated in a reasonable, necessary, appropriate, predictable and proportional manner to the ends sought, given the circumstances of his case. Firstly, he was always treated in accordance with domestic laws. Secondly, the failure of the character test established by section 501A (5) of the Migration Act due to Mr. Madafferi's criminal record, the fact that he twice overstayed his Australian entry permit and his dishonesty when dealing with migration officials meant that it was reasonable and predictable that he would be denied a visa, notwithstanding the fact that he had established a family in Australia. Direction 17 provides directions on, inter alia, the application of the character test. (6)

4.9 Thirdly, the decision of the Minister was based on a full consideration of all relevant issues as evidenced by the extensive reasons and supplementary reasons provided by the Minister for his decision. These issues included: the interests of Mrs. Madafferi and her children; Australia's international obligations; Mr. Madafferi's criminal history; Mr. Madafferi's conduct since arriving in Australia; the interests of maintaining the integrity of the Australian immigration system and protecting the Australian community; the expectations of the Australian community and the deterrent effect of a decision to deny Mr. Madafferi a visa.

4.10 Fourthly, Mr. Madafferi unsuccessfully sought to challenge the Minister's decision in the Federal Court, which found that the Minister's decision did not involve an error of law, improper exercise of power or bias, was carried out in accordance with the *Migration Act* and was not based on any lack of evidence. Fifthly, he was detained in order to facilitate his removal from the State party and has remained there only whilst he has challenged that removal order. Sixthly, his detention was the subject of review by the Federal Court and was not overturned. It has recently been agreed that Mr. Madafferi be approved for home detention, subject to approval of the practical aspects of such detention.

4.11 The State party contests that it has violated article 10 with respect to the conditions of detention. It provides a statement from the Detention Services Manager for Victoria (Where the detention centre Mr. Madafferi was detained is located) to demonstrate that Mr. Madafferi was treated humanely whilst detained, with the level of services provided more than adequate to satisfy his basic needs.

4.12 In relation to the allegation that Mr. Madafferi was not able to be present at the birth of Antonio Madafferi, it is stated that permission was granted for Mr. Madafferi to be present at the birth as long as he was supervised. It was Mrs. Madafferi who stated that she did not want Mr. Madafferi to be present at the birth under such circumstances. The State party acknowledges that there was a delay in permitting Mr. Madafferi to visit the hospital, but that this was rectified speedily and an extra visit allowed as a result. The State party submits that requiring Mr. Madafferi to be supervised in such circumstances was prudent to ensure that he did not abscond.

4.13 The State party submits that Mr. Madafferi is not lawfully in its territory and this fact negates any allegation that he has been the victim of a violation of article 12, paragraph 1, of the Covenant. The operation of article 12, paragraph 3, which establishes a number of exceptions to the rights established by article 12, paragraph 1 means that Mr. Madafferi's detention does not amount to a denial of the right to liberty of movement or freedom to choose his residence, in contravention of article 12, paragraph 1.

4.14 As to a possible violation of article 12, paragraph 4, the State party submits that Mr. Madafferi's link with Australia is insufficient to assert that it is his own country for the purposes of this provision. None of the situations that were identified by the Committee in *Stewart v. Canada*, (7) as giving rise to special ties and claims in relation to a country so that a non-citizen cannot be considered to be a mere alien, exist in relation to Mr. Madafferi and his relationship with Australia. He has not been stripped of his nationality in violation of international law. Mr. Madafferi did not seek to acquire a right to stay in the State party in accordance with Australia's immigration laws, despite the fact that the State party has well established mechanisms for applying for Australian nationality and does not place unreasonable impediments on the acquisition of Australian citizenship.

4.15 On article 13, the State party submits that Mr. Madafferi is not lawfully in Australia, that the decision to expel him is in accordance with Australian law, and that he had numerous opportunities to have this decision reviewed.

4.16 As to the claim of a violation of article 14, paragraph 1, the State party refers to the Committee's decision in *Y.L. v. Canada*, (8) where the Committee considered the definition of a "suit at law", and adopted a two-pronged interpretation, examining the nature of the right in question and the forum in which the question must be adjudicated. In relation to the nature of the right in question, the State party refers to decisions of the European Court of Human Rights ("ECHR") to demonstrate that the right to a residence permit does not fall within the rights established by article 6, of the ECHR, which is very similar to article 14 of the Covenant. (9) An administrative decision at first instance to deny a visa does not amount to a "suit at law" for the purposes of this provision. Such a decision cannot be characterised as a determination of rights and obligations in a "suit at law", as it does not involve legal proceedings brought by one person to determine their rights as against another, but rather an administrative decision where one person determines the rights of another person pursuant to a statute. A decision on whether to allow a person to enter and/or remain in its territory is a matter for the State concerned. As to the forum in which the right is adjudicated upon, the State party reaffirms that an administrative decision at first instance to deny a visa does not amount to a "suit at law".

4.17 As to article 17, the State party submits that requiring one member of a family to leave Australia while the other members are permitted to remain, does not necessarily involve "an interference" with the family life of the person removed or the people who remain. (10) It submits that article 17 is aimed at the protection of individual privacy and the interpersonal relationships within a family that derive from this right to privacy. The detention and proposed removal of Mr. Madafferi does not interfere with the privacy of the Madafferi family as individuals or their relationships with each other. The proposed removal is not aimed at affecting any of the relations between any members of the family and the State party will not obstruct the maintenance and development of the relationships between the members of the family. The detention and proposed removal of Mr. Madafferi is solely aimed at ensuring the integrity of the State party's immigration system. In its view, decisions about whether the other family members will continue their lives in Australia or travel with Mr. Madafferi to Italy or any other country are for the family to make. It points out that only Mr. Madafferi is subject to removal; the Madafferi children can remain in Australia with Mrs. Madafferi. Considering the young ages of the children and the fact that both of their parents are of Italian ancestry, they would be able to successfully integrate into Italian society, if Mr. Madafferi is joined by other members of his family. In this context, the State party notes the advice of the authors that Mr. Madafferi is not required to serve his outstanding Italian prison sentences when he returns to Italy. Once he is removed from Australia, it is submitted that he will be able to make an offshore application for a visa permitting him to return.

4.18 If the Committee is of the view that the State party's conduct in relation to Mr. Madafferi constitutes an "interference" with the Madafferi family, such interference would be neither "unlawful" nor "arbitrary". Reference is made to the fact that the Covenant recognises the right of States to undertake immigration control.

4.19 The State party contests the claim of a violation of article 23, and argues that its obligation to protect the family does not mean that it is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals. Article 23 must be read in light of the State party's right, under international law, to control the entry, residence and expulsion of aliens. (11) In accordance with this right, the Covenant allows the State party to take reasonable measures to control migration into Australia, even where such measures may involve removal of a parent.

The situation whereby Mr. Madafferi can only be with his family if they travel to Italy would be brought about by Mr. Madafferi's conduct rather than by the State party's failure to take steps to protect the family unit. These submissions show that the decision to deny Mr. Madafferi a visa was made in accordance with Australian law and after a consideration of the impact of the decision on, among other things, the Madafferi family.

4.20 The State party notes that the allegation that article 24 was violated appears to be solely based on the fact that it is proposed to remove Mr. Madafferi from Australia. It submits that this action would not amount to a failure to provide protection measures that are required by the Madafferi children's status as minors. One of the factors considered by the Minister in making the decision to deny Mr. Madafferi a visa was the "best interest" of the Madafferi children. Any long term separation of Mr. Madafferi from the Madafferi children will occur as a result of decisions made by Mr. and Mrs. Madafferi, not the result of State party actions. The authors have not provided any evidence that the children cannot be adequately protected by Ms. Madafferi, should they remain in Australia or that there are any obstacles to the children continuing a normal life in Italy.

4.21 The State party indicates that the alleged violation of article 26 appears to relate to the guarantee of equality before the law by the Minister in denying Mr. Madafferi a visa. The State party refutes this claim and refers to its arguments on article 9; it submits that the Minister's decision was necessary, appropriate, predictable and proportional and argues that: the decision was lawful; that Mr. Madafferi failed the character test; that he was permitted to make submissions to the Minister prior to him making his decision; that the Minister provided reasons for his decision; and that his decision was judicially reviewed and found not to involve any error of law, improper exercise of power or bias, that it was in accordance with the Migration Act and not based on any lack of evidence.

4.22 As to violations of articles 2, 3, 5, 14, paragraph 2 to 7, and 16, the State party provides detailed arguments dismissing these claims on grounds of inadmissibility and lack of merit.

Interim measure request

5.1 On 16 September 2003, the authors informed the Secretariat that the State party intended to deport Mr. Madafferi on 21 September 2003, requested interim measures of protection to prevent his deportation. They further requested a direction from the Committee that he be transferred to home detention.

5.2 The authors provide an update on the factual situation. On 7 February 2002, on the basis of Mr. Madafferi's deteriorating psychological state and the effect the separation was having on the other members of the family, the Minister directed that Mr. Madafferi be released into home detention. This was done on 14 March 2002. In home detention, he continued to suffer mental ill health and was visited by doctors, psychiatrists and counsellors, at his own expense. The symptoms that had developed by the time he was released into home detention did abate, but he continued to suffer from symptoms of mental ill health during the home detention arrangement.

5.3 On 20 June 2003, special leave to the High Court to review the Minister's ability to intervene and to set aside the decision of the AAT was denied. On 25 June 2003, DIMIA terminated the home detention agreement due to the increased risk that Mr. Madafferi would abscond following the High Court decision five days earlier, which meant that domestic remedies were exhausted. On the same day, Mr. Madafferi was returned to immigration detention at Maribyrnong. A constitutional writ issued by the author was dismissed by the High Court on 25 June 2003.

5.4 Mr. Madafferi's return to detention is described as comparable to an "army style raid", during which 17 armed Australian Federal Police arrived unannounced in an escort van accompanied by 2 other vehicles of the Australian Federal Police. Mr. Madafferi surrendered himself without a struggle. Mrs. Madafferi was terrified for the safety of her husband, as she thought he was being removed from Australia. The 2 younger children who also witnessed the event suffered from eating disorders for weeks thereafter. The authors claim that this action by the authorities was unwarranted and disproportionate to the circumstances of the case, particularly in the light of Mr. Madafferi's compliance with all the conditions of home detention over a 15 month period.

5.5 Prior to the termination of home detention, medical evidence was presented to DIMIA, at its request, in support of the contention that home detention ought to continue, since the medical grounds for which the Minister had originally directed detention continued to exist or would likely reappear if the author were to be returned to Immigration Detention at Maribrynong. Thus, the authors argue, the State party acted against its own medical and psychiatric advice in terminating home detention. (12)

5.6 On 22 June 2002, the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentences and cancelled his arrest warrant. In June 2003, Mr. Madafferi requested the Minister to re-visit his decision to refuse Mr. Madafferi a spouse visa in light of this information. The Minister advised that he had no legal basis to re-visit the decision; this was confirmed by the Federal Court on 19 August 2003; that decision is currently on appeal to the Full Court.

5.7 On 18 September 2003, in light of the materials provided, the fact that deportation was scheduled for 21 September 2003, and that consideration of the communication was scheduled for the Committee's 79th session (October 2003), the Special Rapporteur, acting under Rule 86 of the Committee's Rules of Procedure, requested the State party not to deport Mr. Madafferi until the conclusion of this session. He also requested the State party to provide at its earliest convenience information on transferral to home detention or other measures taken to alleviate the risk of serious injury, including serious self-harm, that had been identified to exist, including by the State party's authorities, in the event of Mr. Madafferi's continued immigration detention.

5.8 By submission of 17 October 2003, the State party submitted that it would accede to the Special Rapporteur's request not to deport Mr. Madafferi until its consideration at the Committee's 79th session. It set out the facts of the case as submitted by the authors and added that Mr. Madafferi was removed from home detention having exhausted domestic remedies, in accordance with section 198 of the Migration Act, which requires that unlawful non-citizens should be removed as soon as practicable.

5.9 As to the measures taken to alleviate the risk of further injury, the State party refers to a medical report, dated 26 September 2003, in which the treatment received by Mr. Madafferi since returning to the detention centre is summarised. This includes daily consultations with the Centre Nurse and Counsellor and regular consultations with the South West Mental Health Services. Mr. Madafferi's mental state continued to decline, however, to the extent that he was admitted to a psychiatric hospital on 18 September 2003, and declared unfit to travel abroad. (13)

5.10 On 7 November 2003, the Special Rapporteur, acting under Rule 86 of the Committee's Rules of Procedure, extended the rule 86 request to the State party until the 80th session, in light of further comments received from the authors and a request from the State party to comment thereon.

The author's comments on the State party's submission

6.1 By submission of 30 September 2003, the authors provide an update on the facts of the communication and comments on the admissibility and merits. Mr. Madafferi's transfer to home detention, which lasted from 14 March 2002 to 25 June 2003, was "on an actual cost recovery basis to the department". The estimated cost was \$16,800 per month which was paid in advance and after the placement of a \$50,000 bond, the author was released into home detention on 14 March 2002. The authors paid the initial instalment payment of \$16,800 and a further \$16,800. Since then, no further payments have been made as the family have been unable to raise any more funds. The authors claim that they were under duress to accept the financial conditions of home detention, against the advice of their lawyers, as the only way in which they could be reunited. They also claim that the obligation to procure home detention as an alternative form of immigration detention was a matter incumbent on the State Party to procure given the deteriorating health of Mr. Madafferi and not for the authors to pay as a method of stabilising his medical condition.

6.2 The authors continue to allege violations of all the original articles claimed (as per para. 1) and provide clarification on the claims of articles 9, 10, 12, 13, 17, 23 and 24. As to article 9, they submit that this claim only relates to Mr. Madafferi. They argue that although the decision to detain him is lawful, it was arbitrary, being neither "reasonable" nor "necessary" in all the circumstances of this case. There is no evidence of flight risk, since the very nature of the application was that Mr. Madafferi sought to remain with his family in Australia. Neither was there evidence that he had committed an offence since arriving in Australia. He has no remaining attachments to Italy but has lived in Australia for 15 years where he has a family, business (retail fruit shop), a mortgage and a tax number. He was the sole bread winner of his family; should he be returned to Italy, there is no likelihood of him gaining any meaningful employment sufficient to maintain and support his family. In these circumstances, his detention is disproportionate and unwarranted. By reason of his detention, Mrs. Madafferi is denied social security benefits as a single mother, as the domestic law does not consider the parties legally separated. Neither is she eligible for an invalid or carer's pension, on the basis of his inability to work.

6.3 Alternative forms of detention, prior to his detention at the Maribyrnong Immigration Detention Centre were not considered by the State party. Home detention was only implemented following the emotional distress to Mr. Madafferi and only for a limited period. No reasons have been provided by the State party on why home detention or a similar form report style of detention was not considered or implemented at any other period. When home detention was finally directed by the Minister the DIMIA took in excess of 8 weeks to implement the direction.

6.4 As to the State party's argument that Mr. Madafferi overstayed his visa on 2 occasions, the authors argue that he was 15 years old the first time subject to the care and guidance of his father, and thus had no control over his departure. The second overstay resulted from his incorrect belief that by marrying an Australian citizen, he would be entitled automatically to remain in Australia. The authors highlight that his entry into Australia occurred prior to the introduction of the character strengthening provision (Direction 17) of domestic legislation. **(14)**

6.5 According to the authors, procedural fairness was not afforded to Mr. Madafferi, since he had a reasonable expectation that on the determination of his application for a spouse visa before the AAT, that the AAT would finally determine his application for a spouse visa. The Minister did not appeal the decision of the AAT nor did DIMIA reconsider the decision in accordance with the directions of the AAT. In setting aside the AAT decision and re-commencing the process of review Mr. Madafferi was not afforded procedural fairness. It is submitted that but for the Minister's further intervention and decision of 18 October 2000, it was reasonable to expect that Mr. Madafferi's application for a spouse visa would be granted on reconsideration by the DIMIA.

6.6 The authors clarify that the allegation of a violation of article 10, paragraph 1, of the Covenant relates only to Mr. Madafferi. Prolonged detention of Mr. Madafferi at Maribyrnong was not appropriate as this facility is considered a short term facility only. The facilities have been overstretched and overcrowding has been frequent. The anxiety and stress of confinement of detention is claimed to be a strain on the habits, religious practices and customs of detainees. The authors submit that conditions of detention centres in Australia are well documented.

6.7 The authors point to the following episodes which are not exhaustive but are illustrative of the violation of the author's rights under this provision. Firstly, the failure to allow the author to attend the birth of his fourth child since a detention officer stated that a taxi could not be organised in time despite the fact that 4 hours prior notice was given to DIMIA. Following the birth, the attendance of security guards at the labour ward intimidated Mrs. Madafferi and resulted in the visit being terminated. Secondly, the failure of DIMIA to allow the author more than one visit of his wife and child at the hospital and on the arrival of the child at home. The author concedes that the State party allowed a further visit at the hospital however this was under heavy escort of guards by the State party.

6.8 Thirdly, the failure of the DIMIA to consent to a more liberal arrangement of home detention to allow the family to participate and interact as a family unit for the benefit of the children. Mr. Madafferi was either prevented from attending family functions or escorted by guards, attracting public attention. This only served to further highlight the public humiliation of the author and his family in a public place. Fourthly, the manner in which home detention was terminated by DIMIA on 25 June 2003 by the use of unnecessary and disproportionate force. Fifthly, the neglect and/or refusal to act on medical advice and warnings of the State party's own medical and psychological doctors that the continued immigration detention of Mr. Madafferi had a severe impact on his mental health. He was not treated for mental health problems for a prolonged period. His admission as an involuntary patient in a psychiatric hospital could have been avoided if the warnings were acceded to.

6.9 The authors contend that article 12, paragraph 1, does apply to the circumstances of this case and nothing in paragraph 3 of the article ought to restrict the application of paragraph 1 to the facts of this case. (15) The authors submit the following facts to demonstrate that Mr. Madafferi has created links to Australia which possess the characteristics necessary to call Australia "his own country" within the meaning of article 12, paragraph 4: both of his parents in Italy have passed away; his grandfather arrived and settled in Australia in 1923 and remained there until he passed away; his father arrived in Australia in the 1950's and re-settled back in Italy on retirement, with an Australia pension; he has not returned to Italy; he holds an Australian driver's licence, a taxation file number, a national Medicare health card, and operates a retail business employing staff and paying taxes relevant to the business; he held an Italian passport which he allowed to expire, renounced his residency within his town of birth and is no longer registered as domiciled in Italy; the Italian authorities are aware and have noted that he is a resident of Australia; and Mr. Madafferi's brothers and sister have all formally renounced their Italian citizenship. In addition, the authors submit that Mr. Madafferi has committed no crimes in Australia. As to the allegation of "non-disclosure of offences imposed in absentia in Italy", the authors submit "were initially unbeknown to Mr. Madafferi at the time of the first interview with immigration officers who raised the issue."

6.10 On article 13, the authors argue that by refusing Mr. Madafferi a spouse visa, the Minister in part relied on the fact that an outstanding warrant for Mr. Madafferi's arrest existed in Italy. In June 2002, the warrant for his arrest was recalled following the extinguishment of the outstanding

sentences in Italy. The authors claim a violation of article 13, as the Minister refused to reconsider his decision in light of the changed circumstances, stating that he had no legal basis to do so.

6.11 As to alleged violations of articles 17, 23 and 24, (relating to all the authors), it is submitted that if Mr. Madafferi is removed from Australia, Mrs. Madafferi and the children will remain in Australia. Such a forced physical separation would be forced on them by the State party thus constituting an interference with the family life and/or unit of the family by the State party. There is no suggestion that the marriage and the family bond is not genuine and strong, and there is medical evidence demonstrating that all family members would be affected and saddened by separation.

6.12 As to the argument that Mrs. Madafferi and the children should follow Mr. Madafferi, the author's argue that this is an emotive argument, not a legal one. They are Australian nationals and are entitled to remain in Australia; their residency is protected by other articles of the Covenant. If they were to follow Mr. Madafferi to Italy, they would find it difficult to integrate. The children are already experiencing emotional and speech difficulties given their involvement in the present case. Such problems which will be compounded in Italy, where their ability to communicate is restricted. Mrs. Madafferi and the Madafferi children have never been to Italy; only Mrs. Madafferi speaks a little Italian. They have no extended family members in Italy.

6.13 It is argued that if the family remain in Australia without Mr. Madafferi, Mrs. Madafferi will be unable to cope with the children. In autumn 2003, she suffered an acute nervous breakdown and was admitted to Rosehill Hospital Essendon (Victoria) for five days. The pressure of the present case and the difficulties in raising and attending to 4 young children on her own has been and continues to be overwhelming.

6.14 The authors argue that Mr. Madafferi's removal to Italy would be for an indefinite period with no real prospect of return to Australia, even on a temporary visit. They argue that the "character" issue is an essential criterion to any spouse visa application whether made on or off shore. Inability to meet this criterion will result, in practical terms, in Mr. Madafferi being unsuccessful in every visa application to re enter Australia. It is submitted that no delegate will have the authority to overrule the Minister's personal ruling made in this case and that it may also be a factor dissuading the AAT from exercising its discretion, should an application be refused at first instance and the decision be appealed.

State party's supplementary comments

7.1 By submission of 6 April 2004, the State party submits that new counsel in the case has not been authorised by the authors and that therefore the communication is inadmissible *ratione personae*. It submits that it has no obligation, as argued by the authors, to procure home detention as an alternative form of detention, given Mr. Madafferi's medical condition and that alternative detention is only permitted in exceptional circumstances. As to the costs of home detention, it is argued that Mr. Madafferi accepted the costs of such detention and at all stages the State party took reasonable steps to provide him with appropriate care.

7.2 It submits that it has not received any evidence that any sentences or convictions have been extinguished or expunged from Mr. Madafferi's criminal record, and the fact that he had incurred criminal convictions and sentences would be relevant to any decision relating to the granting of a visa.

7.3 As to the author's claim under article 9 that Mr. Madafferi is a low flight risk, the State party refers to correspondence from DIMIA to Mr. Madafferi's migration agent, dated 25 June 2003 regarding the termination of home detention, in which it is stated that now domestic remedies have been exhausted the risk of flight is high. As to the claim that the Minister decided the matter afresh rather than to reconsider it as directed by the AAT in its decision of 7 June 2000, the State party acknowledges that the Minister was prima facie under an obligation to so reconsider. However, it reiterates that some decisions of the AAT may be set aside by the Minister under section 501A of the Migration Act 1958 (footnote 11), and that the decision of 18 October 2000 was valid.

7.4 As to the claim that Mr. Madafferi could have reasonably expected that the AAT would determine his application for a spouse visa, the State party submits that it is not within the jurisdiction of the AAT to determine his eligibility for such a visa, as its consideration was limited to the refusal of the spouse visa on character grounds and its direction on remittal related solely to character.

7.5 The State party denies that the Maribyrnong Immigration Detention Centre is classified as a short term facility. It was considered an appropriate facility in this case as it allowed easy access by Mr. Madafferi's family and lawyer. As to the claim that the State party should have consented to a more liberal form of home detention, the State party submits that Mr. Madafferi was free to receive any visitors in his family home, and special arrangements were made for him to attend a number of family functions including a wedding, the confirmation receptions for two of his children and a family engagement. As to the allegation that home detention was terminated with unreasonable force, it submits that an officer from DIMIA attended Mr. Madafferi's house with 8 Australian Federal Police Officers and 2 Australasian Corrections Management Officers. The visit was reported to have lasted eight minutes. Meeting Mr. Madafferi in the driveway, the DIMIA officer informed him that he was now in DIMIA's custody and required to return to the Maribyrnong Immigration Detention Centre Melbourne. Mr. Madafferi was escorted to a vehicle parked in the street. It is the recollection of the DIMIA officer that the AFP officers did not display arms. On 19 January 2004, the Deputy Director of Clinical Services at the Weeribee Mercy Mental Health Program reported that Mr. Madafferi is still not fit to be discharged from hospital.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee has ascertained, in accordance with article 5, paragraph (a), of the Optional Protocol, that the same matter is not being examined under another international procedure of international investigation or settlement.

8.3 On the question of standing and the State party's argument that the authors' counsel have no authorisation to represent them, the Committee notes that it has received written confirmation of one representative's authority to act on the authors' behalf, who in turn submitted further submissions prepared by the authors' domestic legal representatives. Thus, the Committee concludes that both of the authors' representatives have standing to act on their behalf and the communication is not considered inadmissible for this reason.

8.4 As to the State party's argument that domestic remedies have not been exhausted, as the administrative remedy of submitting a complaint to the Human Rights and Equal Opportunity Commission was not pursued by the authors, the Committee invokes its prior jurisprudence (16) that any decision handed down by this body would only have recommendatory, rather than binding, effect, and thus cannot be described as a remedy which would be effective within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

8.5 As to the claim that domestic remedies have not been exhausted, as Mr. Madafferi failed to apply for *habeas corpus* and that the appeals of the Full Federal Court and High Court on the lawfulness of the Minister's decision remained to be considered, the Committee notes that at the time of consideration of this communication, these remedies had been exhausted by the authors.

8.6 As to the claims under articles 2, 3, 12, paragraphs 1 to 3, 14, paragraphs 2 to 7, and 16, the Committee finds that the authors have failed to substantiate, for the purposes of admissibility, how any of their rights have in fact been violated under these provisions. These claims are therefore inadmissible under article 2 of the Optional Protocol. Furthermore, as article 5 of the Covenant does not give rise to any separate individual right, the claim made under that provision is incompatible with the Covenant and hence inadmissible under article 3 of the Optional Protocol.

8.7 As to the claims that the Minister did not afford Mr. Madafferi procedural fairness either in the application of his discretionary power or in his refusal to reconsider Mr. Madafferi's visa request, the Committee notes that the authors did not link these issues to any specific articles of the Covenant. In addition, the Committee notes that the lawfulness of the Minister's decision to invoke his discretionary powers was reviewed judicially both by the Federal Court and Full Federal Court, and that the issue of whether the Minister could revisit such a decision was similarly reviewed by the Federal Court. Thus, although the Committee is of the view that the application of this procedure may raise issues under articles 14, paragraph 1 and 13 of the Covenant, it finds that the authors have not sufficiently substantiated any such claims for the purposes of admissibility. Accordingly, the Committee finds this claim inadmissible, under article 2 of the Optional Protocol. However, the Committee does find that the claim of procedural unfairness in the application of the Minister's discretionary power does raise an issue under article 26 which has been sufficiently substantiated for the purposes of admissibility. The Committee concludes, therefore, that this claim is admissible in respect of article 26 of the Covenant.

8.8 As to any issues that may arise with respect to the period Mr. Madafferi was in home detention, including his obligation to pay for the security services provided by the State party and the State party's alleged failure to monitor his mental health during this period, it appears from the documentation provided that the terms of Mr. Madafferi's home detention were contractually based and approved by the authors. From a review of this agreement, it appears that the conditions included the authors' obligation to pay for medical costs, and that this was not a term of the agreement that was challenged in the domestic courts. In fact, the only issue arising from this contract that was challenged in the domestic courts related to the amount owed by the authors. The legality per se of the contract was not challenged. For this reason, any issues that may arise under the Covenant with respect to the matter of contractual terms on home detention are inadmissible, for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

8.9 The Committee considers that the authors' remaining claims under articles 9, 12, paragraph 4, 10, paragraph 1 and 7, as they relate to Mr. Madafferi only; and articles 17, 23 and 24, relating to all the authors, are admissible and proceeds to their examination on the merits.

Consideration of merits

9.1 The Human Rights Committee has considered the present communication in 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 claim of a violation of article 9, relating to the author's detention, the Committee notes that the author has been detained since 16 March 2001, albeit for part of the period at home. It recalls its jurisprudence that, although the detention of unauthorised arrivals is not per se arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant. It notes the reasons behind the State party's decision to detain Mr. Madafferi and cannot find that his detention was disproportionate to these reasons. It also notes that although Mr. Madafferi did begin to suffer from psychological difficulties while detained at the Maribyrnong Immigration Centre until March 2002, at which point and on the advice of doctors, the State party removed him to home detention, he had not displayed any signs of such psychological problems on arrival at the detention centre one year earlier. Thus, although it is a matter of concern to the Committee now, after the events, that the detention of Mr. Madafferi apparently greatly contributed to the deterioration of his mental health, it cannot expect the State party to have anticipated such an outcome. Accordingly, the Committee cannot find that the State party's decision to detain Mr. Madafferi from 16 March 2001 onwards, was arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

9.3 As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee notes the State party's argument that as Mr. Madafferi had by then exhausted domestic remedies, his detention would facilitate his removal, and that the flight risk had increased. It also observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

9.4 The Committee notes the authors' claim that Mr. Madafferi's rights were violated under articles 10, paragraph 1, and 7 also, on the grounds of his conditions of detention, while detained in the detention centre; his alleged ill-treatment including the events surrounding the birth of his child; and, in particular, the State party's failure to address the deterioration of his mental health and to take appropriate action. The Committee recalls that Mr. Madafferi spent a first period in the detention centre between 16 March 2001 and March 2002, and was released into home detention after a decision of the Minister in February 2002, on the basis of medical evidence. Although the Committee considers it unfortunate that the State party did not react more expeditiously in implementing the Minister's decision, which the State party has acknowledged took six weeks, it does not conclude that such delay in itself violated any of the provisions of the Covenant. Equally, the Committee does not find that the conditions of Mr. Madafferi's detention or the events

surrounding the birth of his child or return into detention, amount to a violation of any of the provisions of the Covenant beyond the finding already made in the previous paragraph.

9.6 As to whether Mr. Madafferi's rights under article 12, paragraph 4, of the Covenant were violated by being arbitrarily deprived of his right to leave his own country, the Committee must first consider whether Australia is indeed Mr. Madafferi's "own country" for the purposes of this provision. The Committee recalls its jurisprudence in the case of *Stewart v. Canada*, that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his "own country", when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arise in the present case, and neither are the other arguments advanced by the authors sufficient to trigger the exception. In the circumstances, the Committee concludes that Mr. Madafferi cannot claim that Australia is his "own country", for purposes of article 12, paragraph 4, of the Covenant. Consequently, there cannot be a violation of this provision in the current case.

9.7 As to a violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether other members of the Madafferi family will accompany Mr. Madafferi to Italy or remain in Australia, is an issue for the family and is not influenced by the State party's actions. The Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference. (17)

9.8 In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and thus contrary to article 17 of the Covenant. The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In the present case, the Committee notes that the State party justifies the removal of Mr. Madafferi by his illegal presence in Australia, his alleged dishonesty in his relations with the Department of Immigration and Multicultural Affairs, and his "bad character" stemming from criminal acts committed in Italy twenty years ago. The Committee also notes that Mr. Madafferi's outstanding sentences in Italy have been extinguished and that there is no outstanding warrant for his arrest. At the same time, it notes the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose language the children (two of whom are already 13 and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party. In these very specific circumstances, the Committee considers that the reasons advanced by the State party for the decision of the Minister overruling the Administrative

Appeals Tribunal, to remove Mr. Madafferi from Australia are not pressing enough to justify, in the present case, interference to this extent with the family and infringement of the right of the children to such measures of protection as are required by their status as minors. Thus, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

9.9 In the light of the Committee's finding of a violation of article 17 in conjunction with articles 23 and 24 of the Covenant, partly related to the Minister's decision to overrule the AAT, the Committee considers that it need not address separately the claim that the same decision was arbitrary, in violation of article 26 of the Covenant.

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 State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

12. Bearing in mind that, by becoming a State 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its 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.]

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, 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.

The texts of two separate individual opinions signed by Committee members, Mr. Nisuke Ando and Ms. Ruth Wedgwood are appended to the present document.

APPENDIX

Individual opinion of Committee member Mr. Nisuke Ando

I am not opposed to the adoption of the Committee's Views in this case. However, because of the irregularities I perceive in the procedure leading to its adoption, I do not participate in the consensus by which the Committee adopted the Views.

[Signed] Nisuke Ando

[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, Mrs. Ruth Wedgwood

In Australia, visa applications are judged against a statutory standard of "public interest". In this assessment, "the person's past criminal conduct" and "the person's general conduct" may be considered as evidence of a lack of "good character". Any visa denial by a lower-level official can be reviewed by an administrative appeals tribunal of the Department of Immigration and Multicultural Affairs.

Ultimately, however, the administrative appeals process is not dispositive. The Minister of Immigration retains independent statutory authority to set aside a favorable decision of a lower-level official or the tribunal. The Minister may do so when he "reasonably suspects that the person does not pass the character test", he is not satisfied to the contrary by the applicant, and he finds that the refusal of a visa is "in the national interest". This set-aside is not so subjective as it sounds, for a "substantial criminal record" is a statutory basis for finding a lack of good character, and any "term of imprisonment of 12 months or more" constitutes a "substantial criminal record".

The co-author of this communication, Mr. Francesco Madafferi, was subject to such visa disapproval by the Australian Minister of Immigration, based on his extensive criminal record. The Australian administrative appeals tribunal was inclined to accord him more leniency than did the Minister, but the appeals tribunal also reported a criminal record that goes well beyond what is noted by the Committee in its Views, *see footnote 2 supra*. (**see note**)

Invoking Article 17 of the Covenant on Civil and Political Rights, the Committee now seeks to preclude the Minister's decision to deport Francesco Madafferi. Article 17 forbids "arbitrary or unlawful interference" with family life. But the state party's ultimate decision in regard to Mr. Madafferi is neither arbitrary or unlawful. The human sympathy that may be felt for a visa applicant and his family does not create a license to disregard reasonable criteria for the grant or denial of visas. States are entitled to exclude persons who have a serious history of criminal conduct. Mr. Madafferi's prior convictions and jail sentences amply fulfill the statutory requirement for a "substantial criminal record" as a basis for the Australian Minister's decision.

The Committee has no evident warrant to assign its own chosen weight to the relative importance of protecting against recidivist criminal conduct versus minimizing family burdens. There are millions of immigration decisions each year, and we are not entitled to “reverse” state governments simply because we might weigh the balance differently. Nor does the record show any permanent hardship in Mr. Madafferi’s return to Italy. Italy was his home country until the age of 18. His family is entitled to reside in Italy with him. He has three sisters in Italy, according to the findings of the Australian administrative tribunal, and his relatively young children understand the Italian language, as used in the family home, although they speak English. Mr. Madafferi has the capacity to run a small business, as he did in Australia. Upon his return to Italy, Mr. Madafferi does not face incarceration or detention. Obviously, the state party could not deport him unless he is medically fit to travel at the time.

Australia follows the principle of *jus solis*, awarding citizenship to every child born on its territory. But the birth of a child does not, by itself, shield a parent from the consequences of his illegal entry, and a rule to the contrary would provide a significant challenge to the enforcement of immigration laws. Here there is no inevitable separation between members of a family, nor any demonstrated difficulty in sustaining Australian citizenship for the children. As noted by the several dissenters in *Winata v. Australia*, No. 930/2000, Article 17 of the Covenant is not identical to the European Convention on Human Rights, and the test of “substantial changes to long-settled family life” may not be suitable to a universal covenant that speaks of “arbitrary or unlawful interference” with family life.

[Signed] Ruth Wedgwood

(Note) In 1980, according to the appeals tribunal, Mr. Madafferi took part as a “bag man” in a violent extortion scheme -- unknown persons exploded a bomb in the home of three brothers and demanded payment, Mr. Madafferi went on their behalf to pick up the extortion payment of 3 million lire at a pre-arranged spot, and was promised 500,000 lire for his trouble. He received a suspended sentence of 22 months’ imprisonment. In another incident in 1980, he was found to have inflicted multiple stab wounds to the back and abdomen of a victim in Seregno, Italy, and was sentenced to 30 months’ imprisonment, though his sentence was later quashed as part of an amnesty. In 1982, he stabbed a man during a fight with the man’s older brother, and was convicted of causing malicious personal injuries with aggravating circumstances, with a sentence of eight months. In the same incident, he was found to have in his possession 321 milligrams of heroin, 45 milligrams of monoacetylmorphine, and 107 milligrams of cocaine, and he was sentenced to 40 months in jail, with a 5 million lire fine. In 1984, while the latter charges were pending, he again took part in an extortion scheme, demanding money and making threats by telephone against another victim. He was sentenced to 30 months’ imprisonment and a fine of 1.5 million lire. The sentence was later reduced to two years’ imprisonment and 1 million lire. All of these convictions were entered in Italy, in the presence of the defendant. In addition, he had two convictions for receipt of stolen property and assault of a fellow prisoner which were reached in absentia, which have since been set aside by Italian authorities.

[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.]

Notes

1. The authors had provided a psychological report, dated 4 July 2001, in which the psychiatrist expressed his “serious concern about [Mr. Madafferi’s] psychological state under conditions of continued detention. One might expect..... the dysfunctional symptoms of his stress disorder to be exacerbated by further detention....there will be serious issues not only about his being able to adequately instruct his legal advisers but also whether or not he will be so damaged psychologically that he will be unable to return to his previous capacity.....”

2. According to this decision, although the Deputy President initially remarked that Mr. Madafferi is not of good character he went on to say that, “There is no reliable evidence that he has committed any crime since the mid-1980’s. He was only 23 years old at the time of the second attempted extortion and 24 years old at the time of the fight in prison. He is now 39 years old.....I think it would be inappropriate to judge him by the crimes that he committed long ago in another country.” The Tribunal also pointed out that some of the convictions in Italy were conducted in absentia and possibly subject to appeal and reversal should he choose to pursue such remedies. In addition, it added that such convictions conducted in absentia are intolerable under Australian law and accordingly should not be given weight under Australian jurisprudence. Appropriate attention was also paid to Mr. Madafferi’ children who “....must be regarded as a primary consideration.” The weight attached to the interests of the children, is in accordance with the High Court’s decision in Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273. The presiding judge concluded that, “..... the factors weighting in favour of the granting of a visa, particularly the interests of the children, should predominate over the factors weighting in favour of refusing one”.

3. On 22 June 2002 the Italian Authorities notified Mr. Madafferi that they had extinguished his outstanding sentence and cancelled the outstanding warrant for his arrest.

4. (1992) 176 CLR 1.

5. Section 501A(2) of the Migration Act provides that where the Minister: reasonably suspects that a person does not pass the “character test”; and the person does not satisfy the Minister that the person passes the “character test”, then the Minister can: set aside a decision of a delegate or the AAT not to refuse to grant a visa to the person or to refuse to cancel a visa already issued to the person; and refuse to grant a visa to the person or cancel a visa that has been granted to the person, but only where the Minister is satisfied that the refusal or cancellation is in the national interest. Sub-section 501(6) provides that a person does not pass the character test if: “(a) the person has a substantial criminal record (as defined by subsection (7)); or (b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or (c) having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct; the person is not of good character; or (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would: (i) engage in criminal conduct in Australia; or (ii) harass, molest, intimidate or stalk another person in Australia; or (iii) vilify a segment of the Australian community; or (iv) incite discord in the Australian community or in a segment of that community; or (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way. Otherwise, the person passes the character test.”

“Substantial criminal record” is defined for the purposes of the character test in sub-section 501(7) to mean where: “(a) the person has been sentenced to death; or (b) the person has been sentenced to

imprisonment for life; or (c) the person has been sentenced to a term of imprisonment of 12 months or more; or (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.”

6. The State party explains that in addition to legislative provisions, a number of directions were made under section 499 of the Migration Act to ensure that the powers under that Act are exercised in a proper and consistent manner. The Minister tables such directions in Parliament. These directions do not limit the discretion of a decision maker or authorise improper decision making. At the time of the decision to deny Mr. Madafferri a visa, Direction 17 dealt with visa refusal and cancellation under section 501. It provided directions on, inter alia, the application of the character test in the Act.

7. Case No. 538/1993.

8. Case No. 112/81.

9. In relation to the nature of the rights in question the State party refers to the following cases of the ECHR to demonstrate that deportation proceedings are not “suits at law”. *Agee v. United Kingdom*, 7729/76, DR 7, 164, which related to the right to reside in a country and the removal of an alien; *X v. United Kingdom*, 7902/77, DR 9, 224, which concerned the termination of a residence permit granted to an alien and a decision to deport the alien; *Appal et al v. United Kingdom*, 8244/78 DR 17, 149, which concerned a request for a residence permit.

10. In this regard it refers to *Winata v. Australia*, Case No. 930/2000, in which the Committee decided that “the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves ... interference.” It also refers to several cases of the ECHR to support its argument that there is no legitimate expectation of continuing life in a State territory where a member of a family has been residing in a country unlawfully.

11. It refers to the ECHR case of *Moustaquim v Belgium* (1991) 13 EHRR 802, at page 814.

12. According to the authors, the Migration Agent, John Young, submitted a number of medical reports to DIMIA, including one by a Dr. Arduca, in which he stated that “In my opinion, this state of severe mental conflict puts Mr. Madafferri at significant risk of self harm. Removing him from his home and family and placing him in detention would profoundly compound this risk.”

13. Mr. Madafferri remained an involuntary patient for approximately six months. Since then he has been residing with his family and receiving psychiatric treatment. Apparently, he is still unfit to travel.

14. They state that Direction 17 has been the subject matter of judicial review and has subsequently been replaced by Direction 21.

15. No further argumentation is provided by the authors.

16. *C V. Australia*, Case No. 900/1999.

17. *Winata v. Australia*, Case No. 930/2000.



[TOP](#) | [HOME](#) | [INSTRUMENTS](#) | [DOCUMENTS](#) | [INDEX](#) | [SEARCH](#)

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