

*D and E v Australia*, HRC, Communication No 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (25 July 2006).

The UN Human Rights Committee ('the Committee') handed down its latest in a string of decisions concerning Australia's policy of mandatory immigration detention. The authors of the complaint were two Iranian nationals who, together with their two children, arrived in Australia by boat in November 2000. Pursuant to Australia's policy, the four were held in immigration detention for a total of three years and two months. During their period of mandatory detention, the relevant provisions of the *Migration Act 1958* (Cth) effectively precluded judicial review of the lawfulness of their detention, while their applications for asylum were rejected. The four were ultimately granted Global Special Humanitarian visas on 13 March 2006.

The authors made two primary claims:

- that their prolonged detention was 'arbitrary' and in breach of art 9 of the *ICCPR*;
- that the prolonged detention of their two young children additionally violated *ICCPR* art 24(1), which provides that every child shall have the right to such measures of protection as are required by his or her status as a minor.

The Australian Government argued that the claim was inadmissible because it was insufficiently substantiated and because the claimants did not exhaust all domestic remedies available to them. Both of these arguments were based on Australia's position that the claimants could have pursued a writ of *habeus corpus* or other remedy under s 75 of the *Australian Constitution*. The Committee rejected these arguments, reiterating its prior observations that a *habeus corpus* application would be legally futile in light of the High Court's ruling as to the constitutionality of the mandatory indefinite detention provisions.

With regard to the merits of the art 9 claim, the Committee reaffirmed its earlier jurisprudence that, although immigration detention for administrative purposes is not arbitrary *per se*, prolonged detention for such purposes may be arbitrary where it continues 'beyond the period for which a State party can provide appropriate justification'. The Committee went on to reject Australia's arguments that the detention was proportionate to the State's objective of processing the parties' asylum claim, noting that Australia 'has not demonstrated that other, less intrusive, measures could not have achieved the same end ... for example, the imposition of reporting obligations, sureties or other conditions ...'. Having determined that the prolonged detention was 'arbitrary', contrary to art 9(1), the Committee affirmed that Australia was obliged to provide the authors with an effective remedy, including 'appropriate compensation', and 'to take measures to prevent similar violations in the future'.

In relation to the art 24 claim, all parties invoked the Committee's *General Comment 17 (Rights of the Child)*, which states that art 24 requires 'the adoption of special measures to protect children'. The authors argued that the best interests of their children were not served by keeping them in prolonged immigration detention. Australia responded by arguing that nothing in the *ICCPR* requires the best interests of the child to be taken into account, and that Australia's obligations to do so under the *Convention on the Rights of the Child* ('*CRC*') are not justiciable by the Committee. Further, Australia argued that by providing appropriate educational and recreational

programs for detained children it had fulfilled its obligation to take 'special measures' for their protection.

In a surprisingly brief paragraph the Committee appeared to defer to Australia's arguments, holding that the authors' claim had not been sufficiently substantiated for the purposes of admissibility, thus precluding an examination of the merits of the claim. This decision is most curious, as it appears from the Committee's Report that Australia did not seek to challenge the *admissibility* of the art 24 claim (at least not by any arguments made in addition to those in relation to the art 9 claim, which the Committee rejected). The Committee therefore appeared to go out of its way to avoid dealing with the more complex substantive issues raised by both parties in relation to art 24. In particular, Australia's assertion that a consideration of the best interests of the child is irrelevant to its *ICCPR* obligations does not necessarily hold water. Though it is true that art 24, unlike the *CRC*, does not strictly require states parties to consider the 'best interests of the child', it does not necessarily follow that such a consideration should not *inform* the state's obligation to provide special 'measures of protection' under art 24. In this way, Australia's *CRC* obligations might legitimately have been invoked by the Committee as an *interpretive tool*, informing the content of Australia's obligations under *ICCPR* art 24, thus overcoming the justiciability argument raised by Australia. In any case, *General Comment 17*, which provides that 'the paramount interest of the children' should be considered upon, for example, the dissolution of marriage, suggests that the Committee itself has been willing to invoke the 'best interests of the child' test when elucidating other *ICCPR* obligations. Accordingly, the Committee's cursory treatment of the art 24 claim in this case does not appear to do justice to the complexity of the substantive arguments involved in an analysis of art 24.

On the one hand, human rights activists should welcome the Committee's decision as further confirmation of the inhumanity of Australia's mandatory detention regime. However, the victory is likely to be pyrrhic. Jurisprudentially, the decision adds nothing new in relation to arbitrary detention — the Committee merely reiterated its prior views on the issue of 'arbitrariness'. Moreover, in holding the art 24 claim to be inadmissible, the Committee has adopted a posture of deference towards Australia's authority to determine appropriate 'special measures' for protecting children. In this way, the decision would appear to undermine the interdependence of human rights and to shield Australia from international scrutiny over its controversial policy of keeping children with their detained parents.