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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3665/2019 * , ** , ***

Communication submitted by: Huyen Thu Thi Tran (represented by counsel, Alison Battisson of Human Rights for All)

Alleged victims: The author and her daughter, I.L.P.L.

State Party: Australia

Date of communication: 14 November 2019 (initial submission)

Document references: Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State Party on 15 November 2019 (not issued in document form)

Date of adoption of Views: 25 March 2025

Subject matter: Removal to Viet Nam

Procedural issue: Admissibility – lack of substantiation

Substantive issues: Freedom from torture or cruel, inhuman or degrading treatment or punishment; arbitrary detention; interference with family life; lack of protection of a minor; non-discrimination

Articles of the Covenant: 7, 9, 17, 23, 24 and 26

Articles of the Optional Protocol: 2 and 5 (2)

1.1 The author of the communication is Huyen Thu Thi Tran, a national of Viet Nam, born on 10 April 1989. She submits the communication on her own behalf and on behalf of her daughter, I.L.P.L. stateless, born on 15 March 2018 in Australia. The author raises claims under articles 7, 9, 17, 23, 24 and 26 of the Covenant. The Optional Protocol entered into force for the State Party on 25 December 1991. The author and her daughter are represented by counsel.

1.2 On 15 November 2019, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, requested the State Party not to deport the author to her country of origin while her communication was being considered. The Committee also requested the State Party to take all measures necessary to prevent physical or psychological irreparable harm to the author and her daughter, given the latter's needs as a child.

1.3 On 13 March 2020, the State Party requested that the Committee lift the request for interim measures. On 16 March 2020, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to lift the interim measures request and to ask the State Party to grant the author the time and assistance necessary to apply for travel documents for her daughter, so that the author could take her daughter in the event that she was removed to Viet Nam. On 31 March 2020, the State Party confirmed that the author had been granted the opportunity and assistance to apply for the necessary travel documents for her daughter.

Facts as submitted by the author

2.1 On 19 March 2011, the author arrived in Australia, on Christmas Island, by boat, without a valid visa and requested asylum. She was detained upon arrival pursuant to the Migration Act 1958. On 13 July 2011, the author applied for her protection claims to be assessed, which was done in 2011 and 2012, but all her claims were rejected.

2.2 On 15 August 2012, the Minister for Immigration and Citizenship (Department of Home Affairs) approved the author's placement in community detention, requiring her to stay at a particular address. She commenced the residential placement in September 2012. On 19 June 2014, the author absconded, for fear of deportation, and lived unlawfully in the community in the State Party until 9 November 2017. During this period, the author married a national of Mauritius, who was legally residing in Australia on a temporary working visa, and became pregnant. On 13 April 2015, the Minister revoked the author's residence determination under section 197AD of the Migration Act.

2.3 On 9 November 2017, the author was found and again detained in closed immigration detention. The author was detained under the Migration Act, which provides that unlawful non-citizens must be detained until they are removed or granted a visa. As an "unauthorized maritime arrival", the author was excluded from refugee status determination with full review rights (Migration Act, sects. 46A and 494AA). Following her detention, the author applied for a safe haven enterprise visa and, on 14 November 2017, the application was found to be invalid. On 24 January 2018, the author submitted a ministerial request under section 46A of the Migration Act to allow her to apply for a protection visa. On 25 January 2018, the author was notified that her ministerial request had been rejected.

2.4 On 27 January 2018, seven months into her pregnancy, the Department of Home Affairs provided the author with a removal notice for 29 January 2018. The following day, she applied for judicial review by the Federal Circuit Court of an International Treaties Obligations Assessment decision. She also unsuccessfully requested a provisional deferral of her removal. Despite a medical opinion stating that her pregnancy-related

diabetes and psychiatric condition rendered her unfit for travel, the Department attempted to remove her to Viet Nam on 28 January 2018. She was removed from the plane before take-off and returned to detention.

2.5 On 9 March 2018, the author signed a form consenting for her unborn child to be held in immigration detention with her once she had given birth. On 15 March 2018, the author's daughter was born and the child was placed in detention with her. Under section 78 of the Migration Act, the author's daughter holds the same visa as her father (subclass 457) and has the right to remain in Australia with her father. The author submits that, immediately after the birth of her daughter, she had to decide, on the basis of the previously signed consent form, whether to be separated from her baby, who was entitled to stay with her father, or whether to agree for her daughter to be held in detention with her despite there being no indication of a possible release. It would have been practically impossible for the child to reside with her father at that time, since the author was breastfeeding her daughter. The author claims that her husband would be required to stop working in order to take care of their daughter, which would lead to breach of his visa conditions, and the eventual requirement for him to leave Australia. Although the author's daughter is not officially detained under the Act, she is in fact being subjected to open-ended administrative detention.

2.6 On 26 March 2018, the author and her daughter were transferred to Broadmeadows Residential Precinct (part of the Melbourne Immigration Transit Accommodation), defined as an "alternative place of detention", in accordance with the Migration Act. Later in 2018, the author was notified that she did not meet the criteria for referral to the Minister for Immigration and Citizenship under section 195A to be considered for a visa, despite having made a request to the Minister. The author submits that she has exhausted all available domestic remedies to secure her release to the community.

2.7 The author further submitted that her health has deteriorated since being returned to detention on 9 November 2017. She has been diagnosed with severe depression and has not received appropriate postnatal care and advice or adequate nutrition for breastfeeding. The author's daughter exhibited signs of attachment-related anxiety and risks developmental problems due to her mother's depression and prolonged detention. The unavailability of positive emotional interactions was also likely to affect the development of the author's daughter.

2.8 The author received a notice on 4 November 2019 that the Australian authorities intend to remove her to Viet Nam as of 25 November 2019. Since the notice did not concern the author's daughter, who was 18 months old at the time, the author expected to be removed without her daughter.

2.9 The author presented the factual background of the case and several of her claims by referring to opinion No. 2/2019 of the Working Group on Arbitrary Detention on her case, adopted on 24 April 2019.

Complaint

3.1 The author submits that her removal from Australia without her daughter will result in their separation and amount to a violation of the rights of the author and her daughter under articles 7, 17, 23, 24 and 26 of the Covenant. The author also claims that the State Party has violated its obligations under article 9 of the

Covenant, as it arbitrarily detained the author and her daughter in an immigration facility. The cause of the alleged breaches are the discriminatory laws and policies of the State Party.

3.2 The removal notice issued to the author on 4 November 2019 states that “there will likely be restrictions” on her eligibility to be granted a visa to Australia in the future. It is highly unlikely that she will ever meet the requirements for another visa to see her daughter. As she arrived by boat, she will not meet visa requirements of being “of good character”. She is unable to apply for a partner visa or any other visa without personal ministerial permission to do so. If the author’s husband could not take care of their daughter, as he is on a working visa, she might have to be placed in foster care. The author considers that she has been targeted by the State Party’s deterrent policy directed at people arriving by boat to seek asylum.

3.3 The author claims that, if she is removed, her daughter will face a prolonged period of separation from her mother, which might impact her childhood development. Such separation would amount to torture or other cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant, owing to the extreme and irreparable harm that the author and her daughter would face as a direct result of the actions of the State Party’s authorities. The author asserts that the State Party would knowingly and deliberately separate an 18-month-old child from her biological primary caregiver, disregarding the vulnerability of such a young minor and her best interests. The State Party has not taken any measures to prevent family separation.

3.4 The author also claims violations of the rights of her and her daughter under articles 9, 24 and 26 of the Covenant owing to their continued arbitrary detention in an immigration facility and the risk of separation of the author from her daughter through removal. The author refers to the opinion of the Working Group on Arbitrary Detention of 24 April 2019 on her case, in which the Working Group concluded that the detention of the author contravened articles 2, 9, 16 and 26 of the Covenant and that the detention of her daughter contravened article 9 of the Covenant.

3.5 As regards article 24, the author submits that her daughter would be deprived of protection of her childhood development and well-being by her family and the State. As the daughter was approximately 18 months old, she was in a very vulnerable position. The psychological trauma caused by separation from the author would likely have a long-term negative impact on her.

3.6 As regards article 26 of the Covenant, the author submits that her daughter is being discriminated against due to her statelessness and visa status, which precludes her from sponsoring her mother for a visa, despite being born in Australia, and due to the unlawful status of her mother. The author adds that she herself has also been discriminated against because she could not apply for a partner visa without the permission of the Minister and could not challenge the legality of the continued administrative detention.

3.7 The author further claims that the expected long-term separation of a mother from her child would amount to a violation of their rights under article 17, owing to arbitrary or unlawful interference with privacy and family, and article 23 of the Covenant, on account of the failure to protect the family.

Further information from the author

4.1 On 28 November 2019, the author updated the Committee on her medical status. She provided two medical reports by the attending psychologist, attesting to, inter alia, the loss of weight of the author and her daughter, inadequate paediatric care and vaccination of the author's daughter, and the lack of appropriate medical attention given to the author in the Melbourne Immigration Transit Accommodation. The reports also referred to additional risks posed by the author's refusal to take medication since she received a removal notice and asthma symptoms, requesting urgent psychological and medical treatment outside of the Melbourne Immigration Transit Accommodation in a specialized medical facility.

4.2 On 10 March 2020, another notice of removal on or after 3 April 2020 was issued. Again, the notice did not mention her daughter, who remained with her in detention at the time, as being subject to removal together with her.

4.3 On 12 March 2020, the author sent a letter to the State Party's Department of Home Affairs, referring to opinion No. 2/2019 of the Working Group on Arbitrary Detention and seeking an update on the outcomes of the State Party's investigation.

State Party's observations on admissibility and the merits

5.1 On 15 October 2020, the State Party submitted its observations, arguing that the author's allegations were not sufficiently substantiated and should be considered inadmissible or without merit.

5.2 Domestic authorities found that the author did not engage the protection obligations of Australia, there was no legal basis for her to remain in Australia and, hence, she was subject to removal. On 26 August 2020, the author was granted a bridging visa and since that date resides lawfully with her husband and her daughter. This represents a material change from the time of the submission of the initial communication.

5.3 While noting the conclusions of the Working Group on Arbitrary Detention, the State Party did not agree with its findings.

5.4 The State Party submits that it advised the author to select one of the following options on her removal from Australia: first, the author would take her daughter with her to Viet Nam, which would require the author to register her daughter for Vietnamese citizenship and obtain travel documents. Second, the author would let her daughter remain with her father and his family in Australia. After her removal to Viet Nam, the author could apply for a visa to return to Australia on a lawful basis. In the meantime, the author's daughter and the author's husband, as holders of visas (subclass 457), could travel between Viet Nam and Australia while the author's application was assessed. Third, the author, her daughter and her husband could explore the possibility of living together in Mauritius or Viet Nam. Of the three options, only the second would result in a temporary separation of the author from her daughter, as the author could apply for a visa to lawfully return to Australia to reunite with her family.

5.5 The author has had her claims of separation due to removal considered in domestic processes. She made two requests, on 30 April and 24 October 2018, for ministerial intervention under section 195A of the Migration Act. The authorities found that the family could pursue migration options to reunify the family. The author's claims were assessed as not meeting the guidelines of the Migration Act on 17 July 2018 and 26 July 2019, respectively. Her case was not referred to the Minister. The State Party also describes the consideration at the domestic level of the author's protection claims, between August 2011 and July 2019, including a protection obligations evaluation.

5.6 The author has not substantiated her claims under article 7 of the Covenant that Australia has subjected her and her daughter to torture or cruel, inhuman or degrading treatment or punishment resulting from their eventual separation. The facts demonstrate that separation is not a necessary consequence of removal, as the author continues to have options to remain with her daughter following removal. Even if the author decided to separate from her daughter, it would not represent irreparable harm, as it would not amount to pain or suffering that would meet the high threshold of article 7. The author's daughter can remain with her father in Australia and benefit from the support of her father's family and the option to visit her mother in Viet Nam.

5.7 The State Party objects to the claims of violations under articles 9, 24 and 26 being combined into a single allegation, arguing that the violations of the articles referred to were addressed in the opinion of the Working Group and noting the absence of further explanation or substantiation of the author's claims. The author has not substantiated that the State Party subjected her and her daughter to arbitrary detention. The author was detained under the Migration Act as an unlawful non-citizen who was found not to engage the protection obligations of Australia. The author's subsequent immigration detention was also based on her history of absconding from community detention pursuant to residence determination (section 197AB of the Migration Act). The author was released on 26 August 2020 and holds a bridging visa allowing her to reside lawfully in the community pending her removal. The author's detention was reasonable, necessary and proportionate in pursuit of the legitimate aim of border protection and migration management.

5.8 The State Party submits that the claims under article 9 are inadmissible, as the author's daughter was never detained pursuant to the Migration Act. She resided in immigration detention at the request and with the consent of her mother and also spent time in the community with her father. The author's daughter holds a valid visa, her parents could modify the arrangements and she could reside with her father. Moreover, the facts stated in the opinion of the Working Group on Arbitrary Detention are no longer accurate as the author was released from detention.

5.9 The State Party rejects the author's claim that its obligations under articles 17 and 23 have been violated by a threat to separate the mother and her daughter. First, the author has been briefed extensively and continues to be supported to pursue options that will allow her daughter to remain with the family. As the family can choose to remain together, separation is not a necessary consequence of the State Party's actions. The State Party considers such claims inadmissible owing to a lack of substantiation.

5.10 The State Party submits that none of the facts, as alleged, constitute a violation of article 24, as the daughter has received required protections by virtue of her status as a minor. The author's daughter can acquire the nationality of Mauritius and Viet Nam and has not done so owing to the inaction of her parents. In response to the author's argument that her daughter is being discriminated against due to her statelessness, the State Party submits that, while the daughter cannot sponsor her mother for a visa as she depends on her father's visa, the author's husband can sponsor the author.

5.11 The State Party considers the author's claims under article 26 to be unsubstantiated. First, article 26 does not create an obligation for States to provide the same rights to citizens and non-citizens. The capacity of Australia to govern who may enter its territory and the conditions of such entry is employed for the legitimate purpose of managing its borders and migration flows and is reasonable, proportionate and objective in the circumstances. Therefore, it does not amount to discrimination. Second, the author's claims to be owed protection obligations were assessed on three separate occasions. The author did not meet the requirements for referral under ministerial intervention not due to her maritime arrival, but because she absconded from community detention and remained in the community unlawfully for over three years.

5.12 On the merits, the State Party addressed the author's new claims under articles 7, 17, 23 and 24 of the Covenant. On article 7, the State Party reiterates that the author was not subjected to torture or cruel, inhuman or degrading treatment or punishment resulting from a risk of separation from her daughter. Her removal will not produce irreparable harm that would amount to torture or ill-treatment nor intentional infliction of severe pain and suffering. Whether the author will be able to live with her husband and her daughter, if she is removed, is within their control. The author has not specified what harm is expected to occur and the sources cited as to the impacts of separation do not substantiate that it would amount to torture or degrading or debasing treatment.

5.13 As to the merits of the claims under articles 17 and 23, the State Party submits that it has complied with its obligations to ensure protection of the family. It holds that article 23 (1) permits legitimate interference and that both articles are generally considered in conjunction, where arbitrary interference with the right to family life under article 17 has been found to have occurred. The State Party refutes the author's claim that the violation is clear from the threat to separate her from her daughter, repeating that it is a decision within her control. The author has been briefed and supported to pursue the option that will allow the author's daughter to remain with both her parents in Mauritius or Viet Nam, with her father and his family in Australia or with the author in Viet Nam where the author may pursue migration pathways to return to Australia. As lawful non-citizens, the daughter and her father can reside together in Australia and are able to travel between Australia and Viet Nam.

5.14 The State Party considers the claims under article 24 without merit, as the author's daughter enjoyed protection due to her status as a minor. The author's daughter has neither been discriminated against "due to her statelessness", the "status of her mother" or because she "cannot sponsor her mother for a visa". Article 24 does not require a State to give its nationality to every child born in its territory nor does it require that it give nationality to the parents of such children. The author has not made specific allegations of a lack of protection as required by a child's status as a minor under article 24. The State Party also notes that the author's daughter

can acquire the nationality of Mauritius or Viet Nam and has not done so due to inaction by her parents. Furthermore, the State Party argues that the opportunity for a child to sponsor the visa of a parent is not a “protective measure” required under article 24, particularly where one of the parents is able to be a sponsor for the other parent.

5.15 Addressing the author’s claims under articles 9 and 26, the State Party attached its reply of 26 November 2019 to opinion No. 2/2019 of the Working Group on Arbitrary Detention, objecting to the finding of the Working Group that the prohibition of detention of children in the context of migration had been circumvented and asserting that the author’s immigration detention was justifiable and that the author had consented to her child residing with her despite the availability of alternatives.

Author’s comments on the State Party’s observations

6.1 On 18 February 2021, the author submitted her comments on the State Party’s observations. The author confirms that, on 26 August 2020, she was granted a bridging visa and that she resides in the Australian community with her husband and her daughter.

6.2 The author rejects the State Party’s assertions, including that her daughter resided as a guest of the author in the immigration detention facility, with the author’s consent. As addressed by the Working Group on Arbitrary Detention in its opinion, the author signed the consent form under duress. As reiterated by the Working Group in its opinion, the author’s signature of the request to allow her child to remain with her as a “guest” was “an attempt by the authorities to circumvent the prohibition of detention of children in the context of migration”.

6.3 As to the options of return, in the event of her removal, the author retains her initial claim for protection from Viet Nam, owing to a risk of persecution based on her Catholic faith. The author does not wish to expose her daughter to the alleged risks in Viet Nam. She holds that none of her protection claims have been assessed through appropriate judicial or administrative remedies. As to the second option of return, separating from her daughter and her husband in Australia and travelling to Viet Nam alone, the author recalls that, as she previously absconded from immigration detention, it is unlikely that she will ever meet the requirements for another visa to Australia to visit her daughter. The author excludes the option of their return to Mauritius, as applying for citizenship in Mauritius may have adverse consequences for her daughter’s health and welfare, as her daughter is settling into a normal childhood in Australia.

6.4 As to article 7, the author recalls that she and her daughter will be subjected to torture or cruel, inhuman or degrading treatment or punishment if the author were to be removed from Australia, as a direct result of the actions of the State Party. The State Party has not explained why it did not accept the allegations of a risk of irreparable harm due to the separation, as forcible separation from even one parent, particularly the primary caregiver, can have negative effects on a child’s well-being and mental health. If the author’s daughter stayed with her father and his family in Australia, she would be separated from her mother for a protracted period and would not be able to visit and spend time with her mother during her formative years. In addition, the choice of the author to live with her husband and daughter if removed is not within their control, as asserted by the

State Party, as they are forced into deciding either to relocate to a different country together or to be separated. In addition, it is a government policy not to settle boat people, as a deterrent to others. As explained in the initial communication and as referred to by the State Party, such separation may lead to severe and long-lasting harm, including by disrupting a child's neurological development and causing susceptibility to chronic conditions, such as post-traumatic stress disorder.

6.5 As to article 9, the author adds that the Working Group on Arbitrary Detention in its opinion found that the State Party has arbitrarily detained the author from 19 March 2011 to 15 August 2012 (from the time of her arrival to her release into community detention), and from 9 November 2017 to 26 August 2020, in contravention of articles 3, 9, 16 and 26 of the Covenant; and the author's daughter from 15 March 2018 to 26 August 2020, in contravention of article 9 of the Covenant. While the author was released from immigration detention on 26 August 2020, this does not alter the fact that she and her daughter were arbitrarily detained during the specified periods.

6.6 As regards alleged violations of the obligations with respect to the family under articles 17 and 23, the author claims that the State Party has failed to identify as an option allowing the author to remain in Australia with her family, maintain the status quo and has instead identified options that constitute interference with the author's family. In this case, the person to be deported has been the primary caregiver since the child's birth and the effects of the author's removal on all members of the family would be disproportionate. The cases to which reference has been made have emphasized the importance of considering the best interests of the children involved, whose welfare had to be given primary, although not overwhelming, importance. The author has not committed any offence or criminal act. There is a clear link between the present case and the decision in *Winata, Li and Winata v. Australia*. The family situation in the present case can be considered as "long-settled family life", and the author's removal would constitute its "substantial change". The State Party has failed to demonstrate additional factors to justify the removal of the author that go beyond a simple enforcement of its immigration laws. Therefore, the interference in the author and her family's life is arbitrary.

6.7 As to article 24, the author admits that the opinion of the Working Group on Arbitrary Detention does not refer to it explicitly, but rather implicitly. The Working Group referred to general comments by the Committee on the Rights of the Child, stressing that the right of the child to have their best interests taken as primary consideration applies in the context of removals. The allegations of a lack of protection of the author's daughter have also been substantiated by the daughter's feelings of fear, a vulnerable position in terms of childhood development and the psychological trauma caused by separation from her mother with a likely long-term negative impact. The author reiterates that her daughter is stateless due to the threat of deportation to Viet Nam with her mother.

6.8 As to article 26, the author submits that, even if the State Party has followed its immigration laws, it does not mean that such law is in conformity with its obligations under international law, namely articles 7, 9, 17, 23 and 24 of the Covenant. Despite the assessment of the protection obligations of Australia, due consideration has not been given to a risk of violations of the author's rights as a result of her removal and separation from

the family. The author adds that the State Party's deterrent policy directed at people arriving by boat to seek asylum – a pillar of its immigration strategy, as set out in the Migration Act, referenced in parliamentary reports, and as manifested in the "Operation Sovereign Borders" – has discriminatory effects.

State Party's further observations

7.1 On 23 June 2021, the State Party submitted that the author's further comments did not contain any new information to alter the State Party's original assessments.

7.2 In addition, the State Party recalls that the author's protection claims have been comprehensively assessed as part of a statutory process with appropriate judicial or administrative review at four different instances, including merits assessment and judicial review by the Federal Circuit Court.

7.3 The State Party maintains that the daughter's presence in the detention facility was voluntary and that, with the bridging visa granted and travel arrangements available, any perceived risk of family separation is mitigated. The State Party further notes that various options exist for maintaining family unity, whether through temporary or permanent relocation, as previously discussed.

Author's further comments

8. On 26 November 2024, the author submitted that she and her daughter were still in Australia. The author has resided in the community on a temporary visa and has sought a permission to apply for a permanent visa. Such permission has not been granted to her yet.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 The Committee notes that the author's case has been examined by the Working Group on Arbitrary Detention, which rendered its opinion on 24 April 2019. The Committee recalls that, under article 5 (2) (a) of the Optional Protocol, it is required to ascertain that the same matter is not being examined under another procedure of international investigation or settlement. However, nothing precludes it from considering communications on cases previously dealt with by another international investigation or settlement body, unless the State Party has made a reservation explicitly prohibiting successive appeals, which is not the case here. In the present case, the Working Group completed its examination of the case before the present communication was considered by the Committee. Therefore, there is no obstacle to the admissibility of the present communication under that provision.

9.3 The Committee notes that the State Party has not challenged the exhaustion of all available effective domestic remedies by the author. Given that the author submitted several applications for assessment of her protection claims and requests for a protection visa, to no avail, the Committee considers that the author has

exhausted available domestic remedies, in accordance with the requirements of article 5 (2) (b) of the Optional Protocol.

9.4 The Committee notes the author's claim that enforcing the State Party's migration laws and policies by her removal would directly result in the author's separation from her daughter, which would constitute a violation of their rights under articles 7, 17, 23, 24 and 26 of the Covenant. The author has further alleged that her detention together with her minor daughter pending the author's removal also violated their rights under article 9 of the Covenant.

9.5 As to article 7 claims, the Committee notes the State Party's objection that the decision on the author's removal is a consequence of her unlawful arrival and stay in Australia; that the family could choose to stay together; and that, even if the author decided to separate from her daughter, it would not represent irreparable harm, as not amounting to pain or suffering that would meet the threshold of article 7. The Committee also notes the State Party's information that the author is not currently subject to removal. The Committee considers that the author's claims under article 7 have not been sufficiently substantiated and finds such claims inadmissible, pursuant to article 2 of the Optional Protocol.

9.6 Regarding the claims under article 9, the Committee notes the author's allegation that she and her daughter were held in continued immigration detention and notes that their situation was also addressed by the Working Group on Arbitrary Detention in opinion No. 2/2019. The Committee observes that the author was released from detention on 26 August 2020, was granted a visa and has been living in the community. Since the author was detained for extended periods, together with her daughter, at the time of submission of her initial communication, the Committee considers the author's claim under article 9 sufficiently substantiated for the purposes of admissibility.

9.7 Concerning the claim under article 17, the Committee notes that the author does not merely claim that she has a right of residence in Australia, but that, by forcing her to leave, the State Party would arbitrarily interfere with the family life of the author and her daughter. While noting the State Party's argument that unlawful residents do not have as such the right to reside in its territory, the Committee recalls that the State Party is obliged to respect and ensure all their rights under the Covenant. The claim that the State Party's actions would interfere arbitrarily with the author's family life relates to an alleged violation of a right that is guaranteed under the Covenant to all individuals under the State Party's jurisdiction (art. 2 (1)). The Committee observes that the removal of the author would certainly have an impact on the family, as acknowledged by the State Party (para. 5.4 above). The author has therefore sufficiently substantiated her claim under article 17 for the purposes of admissibility.

9.8 The Committee notes that the author's claims in relation to article 23 of the Covenant are closely tied to her claims under article 17. The Committee intends to consider the congruence of the articles referred to, given the intended removal of the author and her ensuing separation from her daughter and husband, at the merits stage. Accordingly, the Committee finds the author's claims under articles 17 and 23 sufficiently substantiated for the purposes of admissibility.

9.9 As concerns the claims under article 24, the Committee decides to consider them in conjunction with the claims under article 9, and articles 17 and 23 of the Covenant.

9.10 As to the claims under article 26, the Committee notes the State Party's arguments that the author's assertions refer to the application of the immigration laws, without demonstrating that the notice of her removal would be unreasonable, unobjective or not pursuing legitimate aims. The Committee observes that the author has raised the claims under article 26 only by referring to the opinion of the Working Group on Arbitrary Detention on her case, without supporting them with additional facts and evidence. The Committee thus considers that the author has not sufficiently substantiated the claims of discriminatory treatment of the author and her daughter before the Committee. The Committee therefore finds the claims under article 26 to be inadmissible, pursuant to article 2 of the Optional Protocol.

9.11 Accordingly, the Committee finds the author's claims under articles 9, 17, 23 and 24 of the Covenant admissible as sufficiently substantiated and proceeds with its consideration of the merits.

Consideration of the merits

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

10.2 As regards the claim of a violation of article 9, relating to the immigration detention of the author (from 19 March 2011 to 15 August 2012 and from 9 November 2017 to 26 August 2020) together with her daughter (since her birth on 15 March 2018 to 26 August 2020), the Committee notes the State Party's argument that the author is an unlawful non-citizen, without a title to reside in the territory, who has been awaiting removal. The Committee will consider the claim of a violation of article 9 separately for the author and her daughter.

Situation of the author

10.3 The Committee notes the State Party's argument that the author's detention was objective, necessary and proportionate to a legitimate aim, in accordance with the Migration Act. The Committee recalls its jurisprudence that, although the detention of unauthorized arrivals is not per se arbitrary, the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. The notion of arbitrariness is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability and due process of law. Asylum-seekers who unlawfully enter a State Party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. Decisions regarding the detention of migrants must also take into

account the effect of the detention on their physical or mental health. The Committee observes that the detention of refugees for lengthy and indefinite periods can be arbitrary.

10.4 The Committee notes the reasons behind the State Party's decision to detain the author, in particular as she was an unlawful non-citizen, who has been awaiting removal, and as she absconded in the past. The author was detained in immigration detention as of 9 November 2017 for two years and nine months, in part together with her daughter, until their release on 26 August 2020. Although the author's initial detention in 2011 and 2012 may have been justified by identification and processing needs, and the detention in 2017 by her absconding in June 2014, the State Party has not, in the Committee's view, demonstrated that the detention of the author was justified for such an extended period, including as the risk of absconding was low following the birth of her daughter. The Committee further notes that the author and her daughter were transferred to Broadmeadows Residential Precinct, as an alternative place of detention, on 26 March 2018 (para. 2.6 above). The Committee considers that 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, imposing reporting obligations, sureties or other conditions that would take into account the family's circumstances. Therefore, the Committee finds that the State Party's decision to detain the author for protracted periods, without appropriate justification, was arbitrary and unlawful within the meaning of article 9 (1) and (4) of the Covenant.

Situation of the author's daughter

10.5 As regards article 9 claims relating to the author's daughter, the Committee notes that the author signed a request to allow her daughter to stay with her as a "guest" and that her daughter lived with the author in the same detention facility after her birth. Since her daughter was detained because of the migratory status of her mother, the author argues that the daughter's detention was arbitrary and a consequence of the author's exercise of her right to seek asylum. The Committee notes the State Party's objection that the author's daughter is not detained and is in fact free to leave and live with her father and that her parents can withdraw the "request to stay as a guest" at any time. The Committee considers that the situation of the author's daughter qualifies as *de facto* detention, as the author had little choice if she was to look after her baby, whom she was breastfeeding. In this regard, the Committee recalls that children should not be detained due to the migratory status of their parents. In addition, the Committee considers that the author signed the request to allow her child to remain with her as a "guest" in detention under coercive circumstances. Furthermore, the Committee observes that the stay of the author's daughter in detention was never authorized by any judicial authority in Australia, nor has the detention of the author's daughter ever been reviewed by a judicial body, as required by article 9 (4) of the Covenant. The Committee therefore finds that the detention of the author's daughter after her birth was arbitrary, disproportionate and unlawful, in violation of article 9 (1) and (4) of the Covenant.

10.6 The Committee also emphasizes that article 24 of the Covenant mandates that the best interests of the child must be a primary consideration and that the State Party has an obligation to afford children special measures of protection. In that context, the Committee considers that, by detaining the author's daughter in

immigration facility because of the migratory status of her mother, the State Party did not duly take her best interests into account as a primary consideration. In the light of the above, the Committee concludes that the State Party violated article 24 (1), in conjunction with article 9 (1) and (4) of the Covenant.

Situation of the author and her daughter

10.7 As to the alleged violation of rights of the author and her daughter under article 17, read in conjunction with article 23, the Committee notes that the author fears being removed from Australia without her daughter, since the removal notice issued to the author states that “there will likely be restrictions” on her eligibility to be granted a visa to Australia in the future. The author argues that it is unlikely that she will ever meet the requirements for a visa to Australia to see her daughter. The Committee also notes the State Party’s argument that there is no “interference”, as the decision of whether the author and her family will remain together is an issue for the family and is not forced by the State’s actions. The Committee notes that there may indeed 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 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 such interference.

10.8 In the present case, the Committee considers that a decision of the State Party to deport the author, the primary caregiver for her young daughter, and to compel the family to choose whether the daughter, who was born in Australia but is stateless, remains with her father in the State Party or accompanies her mother to Mauritius or Viet Nam constitutes “interference” with the family. In the circumstances of the present case, the Committee considers that substantial changes to family life would follow in either case, given the emotional dependence of the daughter on both parents at such a young age, and possible severe consequences due to separation from one of the parents. The Committee has to determine whether such interference in the family life of the author and her daughter is arbitrary or unlawful.

10.9 It is established under international law, including the Covenant, that a State Party may regulate immigration into its territory and require, under its laws, the departure of persons who are considered unlawful non-citizens. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later point, sufficient of itself to make a proposed deportation of one or both parents arbitrary.

10.10 Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may occasionally be exercised arbitrarily in certain circumstances. The Committee recalls that “arbitrary interference” can also extend to interference provided for under the law. The concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should, in any event, be reasonable in the particular circumstances. The Committee also recalls that, in cases where one member of a family must leave the territory of the State Party while the other member or members would be entitled to remain, the relevant criteria for assessing whether or

not the specific interference in family life can be objectively justified must be considered in the light, on the one hand, of the significance of the State Party's reasons for the removal of the person concerned and, on the other hand, of the degree of hardship the family and its members (the author's daughter in this case) would encounter as a consequence of such removal.

10.11 In the present case, Committee observes that the author's intended removal pursued the State Party's stated objective to enforce its immigration law. It also observes that the author has been in Australia for over 13 years, while the author's husband, as the father of the child, has been a lawful non-citizen on a working visa gaining income for the family. The author's daughter has grown up in Australia from her birth over seven years ago, attending school as an ordinary child and developing the social relationships inherent in that. In view of the time spent in the State Party, the fact that the family lived only in Australia since their daughter's birth and the legal status of the daughter and her father, it is incumbent on the State Party to demonstrate additional factors justifying the removal of her mother that go beyond a mere enforcement of its immigration laws to avoid arbitrariness. The Committee observes that the State Party has not properly assessed the impact of disrupting the parental relationship between the author and her daughter. Accordingly, the Committee considers that the State Party has failed to demonstrate additional factors that justify the removal of the author that go beyond a mere enforcement of its immigration laws, in the light of the author's family ties and the best interests of the child, and that the State Party has not properly assessed the risks to the child's well-being and mental stability during her formative period in case of separation. In the present circumstances, therefore, the Committee considers that the removal by the State Party of the author would constitute, if implemented, arbitrary interference with the family, contrary to article 17 (1), in conjunction with articles 23 (1) and 24 of the Covenant.

11. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State Party has violated article 9 (1) and (4), read alone and in conjunction with article 24 (1), and that article 17 (1), in conjunction with articles 23 (1) and 24 of the Covenant would be violated, if the State Party decides to remove the author from Australia.

12. Pursuant to article 2 (3) (a) of the Covenant, the State Party is under an obligation to provide the author with an effective remedy, including by: (a) providing her and her daughter with compensation for the violations of their rights; and (b) refraining from removing the author from Australia while her application for a permanent visa is being examined, giving due consideration to the best interests of the author's daughter. The State Party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

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

State Party is also requested to publish the present Views and to have them widely disseminated in the language of the State Party.

Annex I

[Original: Spanish]

Individual opinion of Committee member Hernán Quezada Cabrera (concurring)

1. I fully endorse the Committee's general finding that the State Party has violated article 9 (1) and (4) of the Covenant, read alone and in conjunction with article 24 (1), and that article 17, in conjunction with article 23 (1) and 24 of the Covenant, would be violated if the State Party decided to remove the author from Australia (see Views, para. 11). However, referring specifically to the author's daughter, I believe that the finding of a violation of article 9 (1) and (4) of the Covenant is appropriate only if those provisions are read in conjunction with article 24 (1) of the Covenant, and not if read alone.
2. In that regard, I do not fully agree with the conclusions of paragraph 10.5 of the Views for the reasons that follow. Of course, the “de facto detention” of the author's daughter is a special situation, since it cannot be explained on its own, but rather is necessarily connected to the mother's detention.
3. According to the evidence, the author's daughter remained in a detention centre from 15 March 2018, the day of her birth, to 26 August 2020, the date of the author's release. The minor's situation was a consequence of the author's detention, which was related to the latter's immigration status. The author states that, on 9 March 2018, she signed a form giving her consent for her unborn daughter to be held with her, from the day of her birth, in an immigration detention centre. The author further submits that, immediately after the birth of her daughter, who has the right to remain in Australia with her father, she had to decide, on the basis of the previously signed consent form, whether to be separated from her child and allow her to live with her father or to have her daughter remain with her in detention despite there being no indication that she would be released. In addition, the author states that it would have been virtually impossible for the child to be sent to reside with her father at that time, because the author was breastfeeding her and, moreover, the father would have been forced to stop working to care for his daughter, which would have resulted in a breach of his visa conditions and a possible order to leave Australia.
4. While I fully agree with the finding in paragraph 10.4 of the Views that the State Party's decision to detain the author for protracted periods, without appropriate justification, was arbitrary and unlawful within the meaning of article 9 (1) and (4) of the Covenant, it does not seem to me that the same conclusion can simply be applied to the minor's situation.
5. As stated in the Committee's general comment No. 35 (2014) (para. 18 children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention; this has been reiterated in the Committee's jurisprudence, and is consistent with article 37 of the Convention on the Rights of the Child. On an exceptional basis, the Committee acknowledges that sometimes a particular

deprivation of liberty would itself be in the best interests of the child. Thus, the determining criterion, in the case of minors who suffer some form of deprivation of liberty, will always be the best interests of the child.

6. In the present case, the detention of the minor for more than two years, on account of her mother's detention, can be considered as a deprivation of liberty that was not a measure of last resort and did not take into consideration the criterion that such a measure should be as short as possible. The State Party could have satisfied this criterion simply by releasing the author as soon as possible after the birth of the child. Since the State Party granted a temporary visa to the author and she was released on 26 August 2020, it is not clear why such a decision could not have been taken in the first weeks or even in the first days of the child's life.

7. All of the above supports the conclusion that the deprivation of liberty of the author's daughter during the period indicated, which clearly affected her best interests and during which the State Party failed to adopt special measures of protection, clearly constitutes a violation of article 24 of the Covenant.

8. Consequently, I consider that a violation of article 9 (1) and (4) of the Covenant cannot be found if those provisions are read in isolation, but only if they are read in conjunction with article 24 (1) of the Covenant.

Annex II

Joint opinion by Committee members Bacre Waly Ndiaye and Hélène Tigroudja (concurring)

1. We agree with the substance of the Committee's decision and its overall conclusion. However, considering the extremely precarious situation migrants and asylum seekers arriving by boat face in Australia, we would like to share our views on some of the factual and legal questions raised by the present case, which is far from isolated.

2. First, regarding the discriminatory nature of the treatment inflicted on people arriving in Australia by boat, it is regrettable that neither the Working Group on Arbitrary Detention in its opinion dealing with the situation of the author and her daughter nor the author herself before the Committee elaborated more on the violation of article 26 of the Covenant (equality before the law). In her complaint before the Working Group (para. 30), it was clearly claimed that:

Ms. Tran has also been discriminated against, in contravention of article 26 of the International Covenant on Civil and Political Rights. As a person arriving by boat to seek asylum in Australia, she has not been granted the same legal rights and avenues of review as an asylum seeker who arrived by other means.

3. However, in its Opinion, the Working Group only referred to general comment No. 15 (1986) of the Committee and then focused its analysis on the detention of non-citizens, but without dwelling on the discrimination by the Australian migration policy and legal framework in the treatment of migrants and asylum seekers arriving by boat themselves. As indicated in the current Views (para. 9.10), in her complaint to the Committee, the author did not provide more arguments than referring to the Working Group's opinion. Therefore, the Committee could not but reject her claim. And yet, various reports on Australian policy applied

at least from 2014 could have been used to ground the discriminatory situation of people arriving by boat. Among them, Amnesty International mentioned that:

In 2014, the Abbott government introduced Temporary Protection Visas and Safe Haven Enterprise Visas, as well as the highly unfair ‘Fast Track’ process, which discriminated against a specific group who arrived by boat. Not only did the government remove the definition of refugee from the Migration Act, they also denied this group of asylum seekers arriving by boat permanent protection visas (only offering three or five year visas at most), keeping them in perpetual state of limbo, never to be reunited with their family. While the current government has allowed those on TPVs and SHEVs to apply for permanent visas, they still face issues reuniting with their family and thousands who were rejected under the unfair ‘Fast Track’ process now risk being returned to danger.

4. This kind of information could have been used by the author and her counsel to exemplify the discriminatory law and practice of Australia vis-à-vis asylum seekers arriving by boat.

5. The second element deeply concerning in the present complaint is the “choice rhetoric” used by Australia in its observations on the complaint. To paraphrase the Amnesty International report mentioned above, it is important to debunk this regressive type of rhetoric, which conveys the message that asylum seekers are fully free in their choice and the situation they created themselves by choosing to move and, therefore, they should be responsible for any consequence. In paragraph 5.9 of the Views on communication No. 3665/2019, the State affirmed for instance that since “the family can ... remain together, separation is not a necessary consequence of the State Party’s actions.” It added (para. 5.13) that “As lawful non-citizens, the daughter and her father [should they choose not to depart Australia with the author] can reside together in Australia and are able to travel between Australia and Viet Nam.”

6. The Australian authorities pushed even further the “choice rhetoric”: according to them, Ms. Tran signed a document when she was pregnant “consenting for her unborn child to be held in immigration detention with her once she had given birth” (para. 2.5). Therefore, *according* to Australia, the author’s daughter was not detained in breach of articles 9 and 24 of the Covenant but was a “guest” (sic) of her mother.

7. Unfortunately, such a level of *dehumanization* by migration policies, based on the “choice rhetoric”, is not isolated. On the contrary, it was also used by Spain – fully endorsed and interiorized by the Grand Chamber of the European Court of Human Rights – in the controversial judgment *N.D. and N.T. v. Spain*, dealing with collective pushbacks of migrants.

8. In the Views on communication No. 3665/2019, we are satisfied that, contrary to the European Court, the Human Rights Committee unequivocally rejected this type of discourse and reaffirmed its firm position regarding the State’s international obligations under the Covenant when deciding and applying migratory measures and policies.