

Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions

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Abstract

Under Australian law, the children of refugee parents executively assessed as national security risks can be indefinitely held in administrative detention without effective judicial safeguards. This article examines the international human rights law impacts of adverse security assessments affecting refugee parents, children and families in Australian immigration detention centres. It argues that the Australian approach involves arbitrary interference in family life under the *International Covenant on Civil and Political Rights* ('ICCPR') art 17(1) and a related failure to protect family life under the ICCPR art 23(1); a failure to take into account the best interests of the child under art 3(1) of the *Convention on the Rights of the Child* ('CRC') and art 24(1) of the ICCPR; and arbitrary detention of children under art 9 of the ICCPR and art 37(b) of the CRC. In doing so it indicates the procedural reforms necessary to bring Australian law and practice into conformity with its international obligations.

I Introduction

Before a protection visa can be granted in Australia, a refugee must be assessed by the Australian Security Intelligence Organisation ('ASIO') as not posing a risk to security,¹ as defined in the *ASIO Act 1979* (Cth).² The requirement applies to applicants who are lawfully present in Australia and entitled to apply for a visa, as well as those who entered as 'offshore entry persons' and are 'unlawful non-citizens'.³ Normally security assessment takes place after a person has been determined to be a refugee. The security criteria are additional to the grounds for exclusion from refugee status under art 1F of the *Convention Relating to the Status of Refugees*⁴ art 1F and the exception to non-*refoulement* under art 33(2) of that Convention, which are also part of Australian law.⁵

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¹ *Migration Regulations 1994* (Cth) sch 4, (Public Interest Criteria 4002), in conjunction with the *Migration Act 1958* (Cth) ss 36 (protection visas), 65 (prescribed criteria); *ASIO Act 1979* (Cth) ss 4 (definition of security), 35 (ASIO power to make assessments).

² *ASIO Act 1979* (Cth) s 4.

³ The latter are statutorily barred from applying for refugee status but an administrative discretion exists to lift the bar and permit them to apply for a visa: *Migration Act 1958* (Cth) s 46A.

⁴ Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), as modified by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 257 (entered into force 4 October 1967) ('*Refugee Convention*').

⁵ *Migration Act 1958* (Cth) ss 36(2)(a) (it is implicit that protection is not owed to a person coming within art 1F of the *Refugee Convention*), 501 (arts 32 and 33(2) of the *Refugee Convention* are 'subsumed' within the character test: *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372, 1390 [37], 1391 [42] (French CJ)).

There has been much attention to the manifest procedural unfairness in the ASIO security assessment process of non-citizens,⁶ which can deny people the opportunity to know the case against them and thus prevent them from effectively challenging the allegations. Merits review is precluded altogether and judicial review may be practically ineffective in the absence of the ability to know and challenge the adverse evidence. Unlike many other democracies,⁷ Australia has not introduced special procedures such as a Special Advocate to help balance the competing interests in security and fairness. At most, a non-statutory, administrative review process was established in 2012, but with no power to bind ASIO.

The usual consequence of an adverse security assessment is that a refugee is refused entry to the Australian community and held in indefinite immigration detention. Such people are ostensibly detained on the basis that they are being held pending removal from Australia, despite Australia agreeing that, as refugees, they cannot be sent back to home countries of persecution, and despite the practical difficulty that no other safe country has agreed to admit them. Between 2010 and mid-2013, around 60 refugees found themselves in this predicament, with some detained for almost four years, and many for three years. Sustained criticism of their indefinite detention,⁸ including its adverse mental health effects, has failed to move the government to change the legal regime. Since 2011, 51 refugees have complained to the United Nations Human Rights Committee alleging violations of Australia's obligations under the *International Covenant on Civil and Political Rights*.⁹ The Committee resolved two complaints in favour of 46 refugees in mid-2013,¹⁰ while a third complaint (covering five refugees) is pending.

This article focuses on a specific aspect of the above regime which has not thus far received as much scholarly attention: the international human rights law implications for refugee children and families affected by adverse security assessments and consequent detention. So far, children have seldom received adverse security assessments of their own, although in some cases their refugee claims depend on those of their parents. However, children have been squarely affected by the process in two distinct ways: they have lived

⁶ See, eg, *Sagar v O'Sullivan* (2011) 193 FCR 311; *Parkin v O'Sullivan* (2009) 260 ALR 503; *Leghaei v Director General of Security* (2007) 241 ALR 141; Australian Law Reform Commission ('ALRC'), *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, 2004) 408; Ben Saul, 'Security and Fairness in Administrative Law' in Matthew Groves (ed), *The Cambridge Companion to Australian Administrative Law* (Cambridge University Press, forthcoming); Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685; Ben Saul, "'Fair Shake of the Sauce Bottle': Reform Options for Making ASIO Security Assessments of Refugees Fairer' (2012) 37 *Alternative Law Journal* 221; Keiran Hardy, 'Adverse Security Assessments, and a Denial of Procedural Fairness' (2009) 17(1) *Australian Journal of Administrative Law* 39; Caroline Bush, 'National Security and Natural Justice' (2008) 57 *ALAL Forum* 78.

⁷ See, eg, *Immigration and Refugee Protection Act* (Can) s 85; *Special Immigration Appeals Commission Act 1997* (UK) s 6; *Immigration Act 2009* (NZ) s 263.

⁸ See, eg, Australian Human Rights Commission ('AHRC'), 'Submission to the Independent Review of the Intelligence Community' (April 2011); Joint Select Committee on Australia's Immigration Detention Network, *Final Report* (March 2012); United Nations High Commissioner for Refugees ('UNHCR'), Chair's Summary, Expert Roundtable on National Security Assessments for Refugees, Asylum Seekers and Stateless Persons in Australia, (Canberra, 3 May 2012); see also *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372; *Plaintiff S138/2012 v Australian Security Intelligence Organisation* (filed 28 May 2012).

⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

¹⁰ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013); *MMM v Australia*. UNHRC Communication No 2136/2012 (25 July 2013).

either in detention alongside detained parents, or have lived in the community separated from a detained parent. In total thus far, at least two families with children have been detained, while at least one family was separated by the detention of a parent when a child lived in the community. Of course, many other refugees are single men who are typically separated from close family members overseas (who are not in the physical jurisdiction of Australia). It should be emphasised, however, that as refugees (and despite their security assessments) such detainees enjoy an international legal right of family reunion. There are accordingly still obligations on Australia as the country of asylum to facilitate reunification.

Both of these detention situations involving families raise interrelated issues under the ICCPR and the *Convention the Rights of the Child*,¹¹ which are the focus of this analysis. Specifically, such situations raise questions of arbitrary interference in family life under art 17(1) of the ICCPR and the related failures to protect family life under art 23(1) of the ICCPR; failure to take into account the best interests of the child under art 3(1) of the CRC and art 24(1) of the ICCPR; and arbitrary detention of children under art 9 of the ICCPR and art 37(b) of the CRC. This article will examine these issues by reference to two refugee families affected by the ASIO security assessment and detention regime and whose situations are on the public record.¹² One family was detained as a group, while the other case involved a child in the community separated from a detained parent.¹³

II Does Detention ‘Interfere’ in Family Life?

Article 17(1) of the ICCPR provides that ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’. A preliminary question is whether detention ‘interferes’ with family life, before consideration of when such interference may be justified.

The legal issues are well illustrated by the jurisprudence of the UN Human Rights Committee and arguments made by states before it in individual complaints brought under the First Optional Protocol to the ICCPR. In its submissions to the UN Committee, the Australian government has maintained that there may be ‘interference’ in the family where family members are separated by government action, but not where action merely produces ‘substantial changes to long-settled family life’.¹⁴ Thus the removal of some family members from a state may interfere in family life, as was the case on the facts in *Bakhtiyari v Australia*.¹⁵ However, on this view there is no interference where all family

¹¹ *Convention on the Rights of the Child*, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’).

¹² See *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013).

¹³ *Ibid* [3.14]–[3.17].

¹⁴ Australian Government Response on Admissibility and Merits to UNHRC Communication No 2094/2011, 5 December 2012 (on file with the author) [192]–[201], [212]–[217].

¹⁵ *Ibid* [212]–[213]. The Committee observed in *Bakhtiyari v Australia*, UNHRC Communication No 1069/2002 (29 October 2003) [9.6] that ‘to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant’. That case involved the removal from Australia of a mother and child, separating them from a lawfully resident husband and father, pending final determination of the father’s status. For cases involving the balancing of family and /or children’s interests with state security interests in deportation cases, see also *Byaburanga v Denmark*, UNHRC Communication No 1222/2003 (9 December 2004); *Amie v Bulgaria*, Application No 58149/08, ECtHR Judgment (12 February 2013) (under art 8 of the ECHR); *Al Mansuri v Canada* [2007] FC 22; *Amrita Singh v Canada* [2012] CanLII 92776; *Saidi v*

members are detained together and their ‘ordinary’ family life is merely altered by detention. Nor is there interference where some family members are detained and separated from others not in detention, where those outside detention are able to visit those in detention periodically.

The position articulated by Australia explicitly rejects the UN Human Rights Committee’s view in *Winata v Australia*. In that case, there was an ‘interference’ when Australia decided to deport two parents and thereby compelled the family to choose whether a 13-year-old Australian citizen child, who had lived in Australia for 10 years, remained alone in Australia or accompanied his parents, and where this would involve ‘substantial changes to long-settled family life’.¹⁶ Instead, Australia prefers the dissenting view of four Committee members in *Winata v Australia*, who suggested that family separation was not ‘inevitable’ in that case and challenged the majority’s test of ‘substantial changes to long-settled family life’:

While this term does appear in the jurisprudence of the European Court of Human Rights, the Committee fails to examine whether it is an appropriate concept in the context of article 17 of the Covenant, which refers to interference in the family, rather than to respect for family life mentioned in article 8 of the European Convention. It is not at all evident that actions of a State party that result in changes to long-settled family life involve interference in the family, when there is no obstacle to maintaining the family’s unity.¹⁷

The dissenting members saw ‘no need to express a final opinion on this question’ on the facts because they believed that any interference would not, in any case, be arbitrary.

The majority’s view is more protective of the family and is to be preferred. The family is described as the ‘the natural and fundamental group unit of society’ in art 23(1) of the ICCPR and art 10(1) of the *International Covenant on Economic, Social and Cultural Rights*.¹⁸ Disruption of the family is accordingly not to be lightly presumed under the twin Covenants. The language of art 17 is not limited to safeguarding the family against ‘separation’ or ‘disunity’, but against ‘interference’, which on an ordinary interpretation connotes a wide spectrum of measures that may impede or obstruct the ordinary course of family life.

European regional human rights jurisprudence on family rights supports this approach. Under art 8 of the *European Convention on Human Rights*,¹⁹ a central feature of ‘respect’ for family life is the right to live together so that family relationships may ‘develop normally’²⁰ and so that family members can ‘enjoy each other’s company’.²¹

Canada [2011] CanLII 88104 (IRB); *Secretary of State for the Home Department v Respondent* [2010] UKUT B1 (10 December 2010).

¹⁶ *Winata v Australia*, UNHRC Communication No 930/2000 (26 July 2001) [7.2].

¹⁷ Australia has invoked the dissenting view in *Winata v Australia*, UNHRC Communication No 930/2000 (26 July 2001) Individual Opinion by four Committee members (Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden) [3].

¹⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

¹⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’).

²⁰ *Marckx v Belgium* A 31 (1979) 2 EHRR 330 [31] (PC) (concerning the protection against arbitrary interference in family life under art 8 of the ECHR).

²¹ *Olsson v Sweden* A 130 (1988) 11 EHRR 259 [59] (PC).

Aside from the deportation context, which involves a particularly acute form of interference, detention is arguably an area of government action that potentially interferes in the family. Thus the AHRC has criticised the ‘difficulties of trying to maintain a “normal family life”’ in situations of protracted detention.²² Where families or family members are detained, there is interference in the normal life of the family, including its ability to determine its own place of residence, living conditions, choice of cohabitants, family activities outside the home, relationships in the community, and so on. All of these aspects of family life are curtailed by detention, which disrupts the interactions, freedoms and relationships that are ordinarily guaranteed in a democratic society.

These are not trivial infringements, as evidenced by the effect on families affected by detention in security assessment cases. In the case of a Tamil father and husband detained for four years from July 2009 to the present (mid-2013), his separation from his wife and child in the community has caused severe stress and anxiety for the family, including chronic uncertainty about the prospects of family reunification where detention is indefinite and non-reviewable. The husband’s detention at Villawood has left his wife alone as a single mother in a foreign country, facing difficulty in integrating into the community and feeling isolated and lonely. In a letter to the Minister for Immigration and Citizenship of March 2011, she wrote as follows of the adverse impact of family separation on her family:

Sir, we took a dangerous sea journey to come to your country because we could not live peacefully, safely and happily in our country. We did not want to separate from each other — that is the reason we took this dangerous journey together. The boat journey was really dangerous. But because we wanted to live peacefully as a family we made this journey to your country. But now you have separated our family. We do not have any relations or friends here. We only had each other. But now you have separated one of us. I can’t live without my husband. My son can’t live without his father. Please let my family be together ... I pray and beg you to let us live as a family in your country ... We have been very patient over these last 19 months, hoping the three of us would receive good news. But the decision we got has left me in darkness. I was happier when I was in detention because my family was together. I am not happy getting this visa that has separated my family. Please join my son and me with my husband. Please give us our family life back.²³

The separation of the family has had particularly distressing effects on the author’s minor child, as the mother further explains in her letter to the Minister:

I feel very upset to see my son so sad. He is always calling for his dad. When I try to feed him he asks for his dad. Even in the middle of the night in his dreams he calls his dad, asking him to come home and then starts to cry. I wake him up by wiping his face with a wet towel. He wakes up and starts crying again saying ‘I love my dad, I want him, come we will go to him’. In the day time he will go to the door and will call me saying mum, dad is here. My son used to eat with his dad, play with him and wanted his dad to bathe him. My husband used to do everything for my son. My son understands things now. I am feeling very scared that this may affect him mentally.

²² AHRC, *Immigration Detention at Villawood 2011*, 17.

²³ Letter to the Minister for Immigration and Citizenship, 11 March 2011, quoted in the author’s submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [324].

Please give me back my son and my husband to me. My son is getting scared very easily now. Even for a small noise he hides in a corner and says mum I am scared. Before when I go to have a bath, he used to play with his dad. Now there is no one so he sits outside the bathroom door and keeps calling me to come out. At night, if he hears a noise he is too scared to cry out loud. He will be closing his mouth and tears would be running down from his eyes. I don't think any mother, father or son should be in this situation.

When we go to visit my husband at the detention centre and when it's time to leave, my son will want to take his dad back home with him. At times, he has told the officer there 'I take my father my home'. He will be very upset on our way back home wanting to bring his dad back with him. I know parents should not lie to their children, but I keep telling my son lies about why his father is not living with us. I do not know what sin I did to suffer this pain of not living with my husband and seeing my son suffering by not being with his father. There can't be a bigger punishment than this. We do not deserve this punishment.

Please sir, join our family back together. Please give us our life back. I beg you to let us live as a family. Please.²⁴

Interference to the family arguably cannot be neutralised by periodic visits to the father in detention, since occasional visits, under strict, time-limited and monitored conditions, do not enable the maintenance of ordinary family life. The wife and child are housed a significant distance from detention, making their daily visits onerous, time-consuming and expensive. As discussed below, even where a child 'chooses' to be released into the community and thus separate from a family,²⁵ there will still be an arguable interference in the family where the state has failed to properly consider the child's best interests in its decision to detain the parent.

The different case of a whole family detained together at Villawood provides a striking example of how detention arguably 'interferes' with the family even when it remains physically unified. The Rahavan family, Sri Lankan Tamils, comprises two parents and three minor children, all detained at Villawood in Sydney for various periods between July 2009 and June 2013.²⁶ An expert psychiatric assessment of the family found that protracted detention was a partial cause of the mother's serious depression and was impairing the normal development of the children. In particular, detention affected the mother's parenting abilities: '[s]he felt that she could not respond to her daughter properly. She reported difficulty or incapacity in regard to feeding her infant son.'²⁷ The family was also restricted in contacting other family members outside detention. Detention also disrupted the children's and family's broader social life, as evidenced in a psychiatric report detailing the mother's concerns:

²⁴ Ibid.

²⁵ Australian Government Response, above n 14 [215]–[217].

²⁶ Three family members were detained from December 2009 (three and a half years), another since July 2009 (four years), and another was born in detention in September 2010 (detained for the child's first two years and nine months of life).

²⁷ Report of Psychiatrist Geoffrey Bradshaw FRANZCP FACHAM, 1 November 2010, quoted in the authors' submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [308]–[310].

She said that the situation at Villawood was ‘no good for children.’ She was particularly concerned about her three year old son, Abinayan. She said that for two years he has only known life in camps or detention. She said that ‘he does not know normal life ... such as going to a park or walking along a road or going shopping.’ She said that they have to ask the detention centre officers for everything. She said that her son does not have the opportunity to play with other children or go to a ‘playschool,’ and that he is ‘very sad ... he doesn’t see the world.’ She added that he was not eating properly, could not drink milk, was crying often, and was often lonely, for instance when his sister went to school. ... She expressed distress that her daughter [aged six] cannot go to school with her parents like other children, but ‘only with officers.’ Sometimes her daughter was distressed at school, when she was not permitted to do things that the other children at school did, such as going to ‘swimming school.’ She said that other parents can buy stuff for their children, such as an ice cream, but this kind of thing was not possible for them. She spoke with much distress, and tearfulness, about the predicament of her children, saying that they were ‘missing out.’ She said that her children have a ‘jail life.’ She said that they have even considered the possibility of getting their children adopted so they do not have to go back to Christmas Island.²⁸

The Australian government has argued that its measures of support for families in detention means that there is no ‘interference’ in the family.²⁹ For example, the Rahavans were detained in a separate ‘residential housing facility’ for families at Villawood, which is clearly preferable to residence in the main Villawood compound. However, it is ‘still a closed detention facility from which children and their families are not free to come and go’.³⁰

Unless such measures are able to eliminate the adverse effects of detention altogether there is still ‘interference’ in the family because of its confinement. The better legal view is that such residence is still ‘interference’ in the family, even if it may be slightly less intense than that caused by regular detention. The nature of their accommodation does not affect whether there is an interference, but may be relevant to the proportionality of the interference. In this regard, wherever there is interference in a family, the more critical question will usually be whether such interference is necessary and proportionate, or arbitrary or excessive.

The unsettled legal issue of whether and when detention may constitute ‘interference’ in the family arose in an individual complaint brought against Australia in 2011, and decided by the Committee in 2013. The case of *FKAG v Australia* involved the two families already mentioned (along with many other refugees): the Rahavans detained together as a family, and the detained Tamil father separated from his wife and child in the community. Somewhat surprisingly in the light of its previous jurisprudence on interference in the family, the UN Committee gave short shrift to the families’ complaints, by finding them unsubstantiated and therefore inadmissible:

8.7 Concerning the claims of authors belonging to the R family that their detention constitutes a violation of articles 17, paragraph 1 and 23, paragraph 1, as well as article 24, paragraph 1, with respect to their three children, the Committee notes that

²⁸ Ibid.

²⁹ Australian Government Response, above n 14, [196]–[200].

³⁰ AHRC, *Immigration Detention at Villawood 2011*, 24.

the family has been given the possibility to stay together, has been provided with special residential housing and that educational, recreational and other programs, including outside the facility are provided, in particular to the children. Notwithstanding the difficulties that living in detention entails, the Committee considers that, in the circumstances, the authors' claims have been insufficiently substantiated and declares them inadmissible under article 2 of the Optional Protocol.

12 As for author S.S. claims under the same articles, given the arrangements made by the State party to facilitate the contacts between Mr. S.S. and his wife and child living in the community, the Committee also considers that, in the circumstances, the author's claims have been insufficiently substantiated for purposes of admissibility.³¹

In finding this aspect of the complaint unsubstantiated, the Committee treated the acknowledged 'difficulties' faced by the families as not even in the ballpark of 'interference', rendering that argument inadmissible. It was thus unnecessary to consider if any interference was justified. With respect, the Committee mischaracterised what was really a discussion of the merits as an assessment of admissibility. An unsubstantiated complaint is normally one where there is no evidence on the issue. In contrast, the Committee's reasoning shows that it in fact engaged in an evaluation of the evidence submitted by the parties as to the impact of detention on family life.

In such circumstances, the Committee should have given the party making the allegation the benefit of the doubt, by accepting that there was enough evidence for the limited purpose of admissibility and proceeding to the merits. The Committee could then have properly assessed whether the evidence established 'interference', or merely lesser 'difficulties'. Instead, the Committee entirely foreclosed the question whether detention may interfere in the family, as long as the state does something to make life in detention more bearable. This was particularly puzzling, given that the complainants had presented evidence that, for instance, detention was impairing children's development and jeopardizing parent/child relationships — surely the stuff of 'interference'. Recall too that the ICCPR uses the concept of 'interference' in the family, not a more restrictive test requiring permanent physical separation.

III Lawfulness of Interference: Detention on Arrival

Refugee families who are ultimately affected by ASIO security assessments are, like other asylum seekers who enter Australia without domestic legal authority, mandatorily and automatically detained on arrival. Whether interference in families resulting from their detention is unlawful or arbitrary will foremost depend on whether their detention per se is unlawful or arbitrary. In other words, the assessment of the ICCPR art 17 in a detention context requires analysis of the freedom from arbitrary detention in art 9(1) of the ICCPR, as it applies to irregular asylum seekers.

In *FKAG v Australia*, the dismissal of the art 17 claim on admissibility grounds meant that the Committee did not need to consider the linkage between arts 17 and 9, finding only a violation of the latter. It is nonetheless arguable that unlawful detention may still establish 'interference' in the family on the facts of other cases (or if it is accepted that the

³¹ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [8.7].

United Nations Human Rights Committee ('UNHRC') got it wrong in *FKAG v Australia*). Basing a breach of art 17 on a violation of art 9 is also not redundant just because detention has already been found lawful. A finding that both provisions have been violated may affect the types and extent of remedies ordered, including the quantum of compensation and remedial measures to restore family life.

A different issue is whether even *lawful* detention can still involve unlawful interference in the family where detention conditions are inadequate to protect the family. Again, as noted in the finding on admissibility in *FKAG v Australia*, the UNHRC appears to have accepted that the state's measures to protect family life in detention, on the facts of that case, raised no issue under art 17. But such finding was inconsequential in that case because the UNHRC separately found the detention conditions to be cruel, inhuman or degrading, contrary to the ICCPR art 7.³² Article 17 may be most significant where the detention of a family is lawful under art 9, and detention conditions are not inhuman contrary to art 7, but the circumstances of detention nonetheless fail to protect the family from undue interference.

In establishing a breach of art 17 based on a breach of art 9, the issue of the unlawfulness of mandatory immigration detention under art 9 of the ICCPR is relatively straightforward in the international jurisprudence. The incompatibility of Australia's mandatory immigration detention laws with art 9(1) of the ICCPR is well established by the numerous complaints upheld against Australia by the UN Human Rights Committee.³³ In the leading case of *A v Australia*, the UNHRC accepted that it is not per se arbitrary to detain asylum seekers,³⁴ but held that

... every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.³⁵

Despite the numerous *Views* of the UNHRC finding breaches of art 9, Australia has maintained mandatory detention and even challenged the Committee's interpretation of the ICCPR.³⁶ In its 2009 *Concluding Observations* on Australia the UNHRC criticised Australia's mandatory use of detention in all cases of illegal entry, the retention of the excise zone, as well as the non-statutory decision-making process for people who arrive by

³² *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.8]; see further below.

³³ See, eg, *Shafiq v Australia*, UNHRC Communication No 1324/2004 (13 November 2006) [7.2]–[7.3]; *Shams v Australia*, UNHRC Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007) [7.2]; *C v Australia*, UNHRC Communication No 900/1999 (13 November 2002) [8.2]; *Baban v Australia*, UNHRC Communication No 1014/2001 (18 September 2003) [7.2]; *Bakhtiyari v Australia*, UNHRC Communication No 1069/2002 (6 November 2003) [9.3].

³⁴ *A v Australia*, UNHRC Communication No 560/1993 (30 April 1997) [9.3].

³⁵ *Ibid* [9.4].

³⁶ Human Rights Law Centre, 'Australia's Compliance with the International Covenant on Civil and Political Rights', Submission to UN Human Rights Committee (1 August 2012) 24 <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HRLC_Australia106.pdf>.

boat, and called for the abolition of mandatory detention.³⁷ In *FKAG v Australia*, the UNHRC specifically addressed the issue of detention on security grounds:

9.3 The Committee recalls that 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, lack of predictability, and due process of law. Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. *To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or 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. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.³⁸

Australia’s mandatory detention policy remains problematic principally because there is no preliminary assessment of whether it is necessary to detain a participation person, and consideration of less invasive alternatives to detention³⁹ (such as ‘the imposition of reporting obligations, sureties or other conditions’⁴⁰) is not legally required. In addition, the duration of detention is often protracted and initially justified detention can soon become disproportionate over time.

In principle, it is well accepted that the detention of irregular asylum seekers may be justified for security purposes in exceptional circumstances. However, while Australia *eventually* conducts security assessments of asylum seekers, there is no preliminary security screening of asylum seekers upon arrival, to determine whether grounds of suspicion exist to warrant detention pending further investigation, or release into the community pending further investigation,⁴¹ or release into the community because a person has been cleared. The mere fact that a person has come from a conflict zone is not sufficient to trigger suspicion. The Australian regime automatically and indiscriminately detains all who arrive irregularly.

International law is also straightforward where children are concerned: children should be detained only as a measure of last resort and for the shortest possible appropriate period of time,⁴² and in the absence of less restrictive alternatives (such as community release). While children may present security risks, thus far few children have been so identified in

³⁷ Human Rights Committee, *Concluding Observations: Australia*, 95th sess, Agenda Item 8, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 5–6 [23].

³⁸ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.3] (emphasis added).

³⁹ *Shams v Australia*, UNHRC Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007) [7.2].

⁴⁰ *Baban v Australia*, UNHRC Communication No 1014/2001 (18 September 2003) [7.2].

⁴¹ AHRC, Submission to the Independent Review of the Intelligence Community (April 2011) 3.

⁴² CRC art 37(b).

Australia. Instead, children have tended to be collaterally detained as a result of the security assessments of their parents; in such cases, the very young ages of many children would rule them out as security concerns. The incidental detention of children on account of their parents' migration status is generally unlawful under the CRC, according to the authoritative and quasi-judicial interpretive view of the Committee on the Rights of the Child.⁴³ In *FKAG v Australia*, the UNHRC found that any decision to detain under art 9 of the ICCPR 'must also take into account the needs of children'.⁴⁴ The detention of children on arrival will normally amount to an unlawful interference in the family under art 17 of the ICCPR because it is arbitrary and contrary to arts 9(1) and 9(4).

Internationally, the most common circumstance in which children have raised security issues is in relation to past activities as child soldiers, and then principally under the 'exclusion' clauses in art 1F of the *Refugee Convention*.⁴⁵ Such cases require very careful assessment in view of a range of factors recognising the vulnerability of the child. More importantly, past combatancy in a foreign war would seldom imply that the child presents a continuing risk to the country of asylum, given the radically different circumstances.

Judicial review of detention

In addition to the requirements for lawful detention under art 9(1) of the ICCPR, art 9(4) further requires a state to guarantee judicial review of detention. Numerous UNHRC decisions have found that the nature of judicial review available to immigration detainees generally in Australia does not meet this requirement. In *A v Australia* it was held that judicial review of detention must be 'real' and not limited to a 'merely formal' assessment of whether a person falls into a self-evident factual category under domestic law; the court must also be empowered to order the release of a person.⁴⁶

On the facts, the UNHRC found that the Australian courts were 'limited to a formal assessment of the self-evident fact' of whether a person was a 'designated person' under the domestic legislation, but had no power to review detention or to order a person's release. Subsequent cases have found similarly in respect of Australia's amended laws concerning whether a person is an 'unlawful non-citizen'.⁴⁷ The UNHRC has maintained its position despite a continuing refusal by Australia to accept, in good faith, the UNHRC's interpretation of the ICCPR as the authoritative body entrusted to do so under treaty law.⁴⁸ In *FKAG v Australia*, the UNHRC reiterated its view in relation to security detention cases,

⁴³ Committee on the Rights of the Child, 'The Rights of All Children in the Context of International Migration: Report of the 2012 Day of General Discussion' (2012) [32].

⁴⁴ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.3].

⁴⁵ See, eg, UN Committee on the Rights of the Child, 'General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin' (1 September 2005) [56]–[57]; UNHCR EXCOM Conclusion No 107 (LVIII) on Children At Risk (2007) (h)(vi); UNHCR, 'Guidelines on International Protection: Child Asylum Claims' (22 December 2009) [22]–[24]; *Mr N*, No 10004872 (20 December 2010) National Asylum Court of France.

⁴⁶ *A v Australia*, UNHRC Communication No 560/1993 (30 April 1997) [9.5].

⁴⁷ *C v Australia*, UNHRC Communication No 900/1999 (13 November 2002) [7.4]; *Shafiq v Australia*, UNHRC Communication No 1324/2004 (13 November 2006) [7.3]–[7.4]; *Shams v Australia*, UNHRC Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007) [7.3]; *Baban v Australia*, UNHRC Communication No 1014/2001 (18 September 2003) [7.2].

⁴⁸ UNHRC, 'General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights', CCPR/C/GC/33 (5 November 2008) [11]–[15].

including because Australia's highest court had confirmed the domestic lawfulness of indefinite detention. The UNHRC thus stated:

9.6 Regarding the offshore entry authors' claim that their detention cannot be challenged under Australian law and that no court has jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors can seek judicial review before the High Court of the legality of their detention and the adverse security assessment before the High Court. In view of the High Court's 2004 precedent in *Al-Kateb v Godwin* declaring the lawfulness of indefinite immigration detention and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar situations, the Committee is not convinced that it is open to the Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15 Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.⁴⁹

It may be noted that the UNHRC sees a lack of effective judicial review as relevant to the assessment under both arts 9(1) and 9(4), though individual Committee members have occasionally dissented and opposed the relevance of review to the art 9(1) analysis.⁵⁰

IV Lawfulness: Detention after security assessment

After an adverse security assessment is issued, there may then exist an individualised basis for suspecting that a person is a security risk that might justify detention. The more complicated legal question under the ICCPR is then whether family members, including children, can be lawfully detained or lawfully separated from one another, thus rendering the interference in the family non-arbitrary. The starting point is whether the detention of the person with an adverse security assessment is lawful, followed by an assessment of additional factors pertaining to children and families; the latter considerations can also affect the legal assessment of the former.

A Parents with Adverse Security Assessments and Consequences for Children

As already noted, the legal position of detained or separated children in national security cases in Australia is typically determined by the legal position of their refugee parents. The fact of receiving an adverse security assessment is not determinative of whether a person's detention is lawful under art 9(1). In the usual way, less invasive alternatives to detention must first be considered. However, under the Australian legal regime, once a person receives a security assessment from ASIO, there is no legal requirement on the Department

⁴⁹ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.6]–[9.7].

⁵⁰ *Ibid* (partly dissenting opinion of UNHRC member Sir Nigel Rodley).

of Immigration and Border Protection ('DIABP') to consider whether alternatives to detention would address the security concerns raised by the person.

Because an adverse security assessment means a person is not eligible for a visa, DIABP keeps the person in detention, now ostensibly pending removal from Australia. The DIABP also appears to treat the ASIO assessment as determinative of a substantive need to detain the person on account of the presumed risk they present, even though ASIO itself does not assert that its assessment also requires the person to be detained; that is not part of ASIO's consideration. In *FKAG v Australia*, the UNHRC found that a state party is required to substantiate the basis for any purported need to detain a person on security grounds individually:

9.4 The Committee observes that the authors have been kept in immigration detention since 2009-2010, first under mandatory detention upon arrival and then as a result of adverse security assessments Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. 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 need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors have been kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. For all these reasons, the Committee concludes that the detention of both groups of authors is arbitrary and contrary to article 9, paragraph 1, of the Covenant. This conclusion extends to the three minor children, as their situation, irrespective of their legal status as lawful non-citizens, cannot be disassociated from that of their parents.⁵¹

What alternatives to detention may address a state's legitimate security concerns? Under existing Australian immigration law, these include administrative 'residence determinations' by the Minister that a person may reside in 'community' detention and subject to any specified 'conditions'.⁵² Such conditions are not defined in the *Migration Act 1958* (Cth), thus providing ample scope to impose security-related measures. Apart from requiring a person to reside in a particular location, these could conceivably include regular reporting to DIABP or law-enforcement authorities; restrictions on communication and association; the payment of bonds, assurances, or guarantees, to be forfeited on breach; or wearing GPS-tracker devices.

Elsewhere in Australian law, control orders to prevent a person engaging in terrorism may be imposed by a court on application by the Australian Federal Police.⁵³ Criminal prosecution may be available in respect of the many extensive, extraterritorial offences concerning terrorism, war crimes, crimes against humanity, genocide and torture.⁵⁴ Many

⁵¹ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013); *MMM v Australia*. UNHRC Communication No 2136/2012 (25 July 2013) [9.4].

⁵² *Migration Act 1958* (Cth) s 198AB (known as a 'residence determination').

⁵³ *Criminal Code Act 1995* (Cth) sch 1, div 104 ('*Criminal Code*').

⁵⁴ *Ibid* div 268.

of those offences are accompanied by extensive inchoate, preparatory, or organisational offences.⁵⁵ Surveillance, too, is a tool that is always available to mitigate security concerns.

Australia does not administratively detain Australian citizens or permanent residents whom it believes are a threat to national security, and indeed there is no law authorising their indefinite or protracted detention without a criminal conviction.⁵⁶ This strongly suggests that Australian law generally accepts that existing security laws are sufficient to meet pressing security needs, including where citizens are ‘terrorists’ and the like.

Apart from the question of alternative measures, the detention of those with adverse security assessments is also inconsistent with the ICCPR for lack of the required procedural safeguards. It was noted already that immigration detention cannot be substantively reviewed by the Australian courts. The problem is compounded by the further inability of the courts to review the substantive basis of a person’s adverse security assessment effectively, which triggers the decision to detain the person pending removal.

In particular, ASIO is not required to provide a person with reasons for the assessment; a person cannot compel ASIO to produce the evidence where ASIO believes this would prejudice security (thus reducing procedural fairness to ‘nothingness’);⁵⁷ and public interest immunity may preclude the admission of relevant evidence. In addition, merits review is precluded altogether by statute. In such circumstances, a person may be entirely unable to know the case against them or to challenge it effectively, and the court itself may have little evidence before it on which to base its review.

In these circumstances, there may be no effective, substantive judicial review of the basis of detention as required by art 9(4) of the ICCPR. A mere claim by the state that a person is a security risk, without any particularisation or evidence, is not sufficient to enable a proper assessment to be made (by a court under art 9(4) of the ICCPR, or the UNHRC under the *Optional Protocol*) of the arbitrariness of detention under art 9(1). Otherwise a state could simply invoke un-testable concerns to mask arbitrary or indiscriminate detention. While restrictions on security sensitive information may be necessary, and special procedures to deal with it may be warranted, it is not permissible to severely disadvantage one party and disrupt the ordinary expectation of equality between the parties in a fair hearing.

It is well established that detention may also be arbitrary under art 9(1) of the ICCPR, not only where it is against the law, but where it involves elements of inappropriateness, injustice, lack of predictability or due process of law.⁵⁸ Australia’s failure to disclose the *essential substance* of any security concerns it may have had about any refugee denies that refugee ‘due process’ of law (in the sense of a fair hearing); is unjust; and is, therefore, additionally arbitrary or unlawful under art 9(1).

⁵⁵ Ibid div 101.

⁵⁶ At most, there are anti-terrorism preventive detention powers enjoyed by ASIO and the Australian Federal Police that are strictly time-limited to short periods and subject to judicial safeguards.

⁵⁷ In some cases, a person may be put on notice of the allegations during ASIO interviews, as was the case in *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372.

⁵⁸ *A v Australia*, UNHRC Communication No 560/1993 (30 April 1997) [9.2]; *Gorji-Dinka v Cameroon*, UNHRC Communication No 1134/2002 (10 May 2005) [5.1]; *Van Alphen v The Netherlands*, UNHRC Communication No 305/1988 (15 August 1990) [5.8]; *Mukong v Cameroon*, UNHRC Communication No 458/1991 (10 August 1994) [9.8]. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd revised ed, 2005) 172.

Article 9 also requires that ‘every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed’.⁵⁹ Periodic review is a vital safeguard of individual liberty against arbitrary executive detention. Under current Australian law, the duration of the refugees’ detention is not subject to periodic review of the grounds for detention. Detention persists until a person is removed from Australia or granted a visa and may be indefinite. There is no periodic review between either of those events occurring.

While the Independent Reviewer process established in October 2012 includes 12 monthly periodic reviews of security assessments in parallel with ASIO’s own reviews, such reviews consider only the assessments themselves and not the necessity of detention as such (in relation to which the Reviewer has no jurisdiction). More importantly, the reviews themselves are non-binding and Australian law thus does not provide any legally enforceable mechanism for the periodic review of the grounds and necessity of detention.

Even where grounds for detention are properly made out, the UNHRC has also indicated that initially lawful detention may become arbitrary under art 9 where a ‘reasonable prospect’ or likelihood of expelling a person no longer exists and detention is not terminated.⁶⁰ Detention for the limited purpose of removal cannot spiral into a licence to detain indefinitely.

B Children Affected by Parents’ Security Assessments and Detention

Additional considerations apply where children and families are affected by detention resulting from the adverse security assessment of one or both parents. A state is required to make the ‘best interests’ of a child a ‘primary’ consideration in making decisions about her or him.⁶¹ The requirement extends to migration and detention decisions affecting children and their parents, as the UN Committee on the Rights of the Child explains:

States should conduct individual assessments and evaluations of the best interests of the child at all stages of and decisions on any migration process affecting children, and with the involvement of child protection professionals, the judiciary as well as children themselves. In particular, primary consideration should be given to the best interests of the child in any proceeding resulting in the child’s or their parents’ detention, return or deportation.⁶²

In the immigration context, the incidental detention of children as a result of their parents’ migration status is not generally considered in the best interests of the child:

Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their

⁵⁹ *A v Australia*, UNHRC Communication No 560/1993 (30 April 1997) [9.4]. See also *Shafiq v Australia*, UNHRC Communication No 1324/2004 (13 November 2006) [7.2].

⁶⁰ *Jalloh v Netherlands*, HRC Communication No 794/1998 (15 April 2002) [8.2]; see also *Baban v Australia*, UNHRC Communication No 1014/2001 (18 September 2003) [7.2] (where the UNHRC affirmed that detention should not continue beyond the period for which the State party can provide appropriate justification).

⁶¹ See generally Committee on the Rights of Child, ‘General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3(1))’, CRC/C/GC/14 (29 May 2013).

⁶² Committee on the Rights of the Child, ‘The Rights of All Children in the Context of International Migration: Report of the 2012 Day of General Discussion’ (2012) [72].

parent's migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.⁶³

At the same time, however, children should never be separated from their parents against their will except when 'necessary in the best interests of the child'.⁶⁴ Under art 37(d) of the CRC, every child has the right to challenge the legality of their detention before a court, reinforcing the similar general guarantee they enjoy under art 9(4) of the ICCPR.

It is clear that Australia has not properly considered the best interests of refugee children in making detention decisions concerning families affected by security assessments. As noted by the UNHRC in *FKAG v Australia*, the lawfulness of the detention of children collaterally detained because of their parents' security status 'cannot be disassociated from that of their parents',⁶⁵ even where the children themselves have a formal right to leave detention and live in the community without their parents.

The starting points are the principles that children should not normally be detained, that families should not normally be separated, and that a state has a right to detain certain persons for security or removal reasons. Where a parent receives an adverse security assessment, these principles come into tension.

The current Australian regime resolves the tension by automatically subordinating all competing principles to what it sees as the overriding necessity of detaining the parent, and regardless of the collateral harm to children (whether detained or in the community). This is precisely the style of reasoning sought to be avoided by the international law principle of making the 'best interests' of the child a 'primary' consideration. As the South African Constitutional Court observed in *S v M* of a domestic iteration of that 'best interests of the child' standard in the CRC:

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 [of the South African Constitution] presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.⁶⁶

Under international law, the state is *not* required to prioritise the child's best interests above all other factors, but must regard it as a 'primary' consideration in balancing the competing interests. There may indeed be individual cases where the security threat posed by a parent is so grave that her or his detention is warranted and some interference in the family is justified, as long as adequate steps are taken to mitigate the adverse effects of the interference.

⁶³ Ibid [78].

⁶⁴ CRC art 9(1).

⁶⁵ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.4].

⁶⁶ *S v M* (2008) 3 SA 232 (CC) [18] (Sachs J) (The domestic constitutional standard of according the best interests of the child 'paramount importance' was considered by reference to international standards and acknowledged legitimate competing interests.)

However, the central difficulty with the Australian regime is not that security interests may override the interests of children or families in a given case, *but rather that Australia procedurally fails properly to consider the competing interests in the manner required by international law.* Most critically, the current legal and administrative regime makes no assessment of whether, and under what conditions, it would be possible to preserve family unity *and* meet security concerns by releasing a parent into the community, subject to security conditions as necessary. Administrative consideration is instead limited to whether the family as a whole should be detained as a consequence of a parent's adverse assessment, or whether some family members can be released while one or more remain detained.

In *Sri Lankan Refugees v Commonwealth of Australia*, the President of the Australian Human Rights Commission decided that Australia's failure to consider the possibility of releasing the Rahavan family *as a whole* from detention into the community, including on security conditions, constituted a failure to consider the best interests of the children:

I consider that it is in the best interests of Atputha, Abinyan and Vahisan Rahavan to be released with their parents into the community pursuant to a visa or a residence determination, potentially with conditions attached. It may be that these interests are outweighed by other considerations. However, it does not appear that the Commonwealth has given any separate or specific consideration to whether the children could be released with their parents into the community. In particular, it does not appear that there has been any assessment of the specific security risk of alternatives to closed detention for the family and how any risk could be mitigated. Rather, it appears that the Commonwealth made a decision about the detention of the adult complainants based on advice from ASIO that they not be granted a permanent visa which resulted in the consequential detention of the children.

I find that there has been a failure fully to consider available alternatives to closed detention for the whole family in a way that would be consistent with the best interests of each of the children. As a result, I find that the detention of the children has also been arbitrary in breach of article 37(b) of the CRC.⁶⁷

While that finding related to art 37(b) of the CRC, the same reasoning applies to the comparable requirements under arts 9, 17(1), 23(1) and 24(1) of the ICCPR to consider the best interests of the child in decision-making related to detention and families. A UNHCR Expert Roundtable has also called for a 'best interests' determination for children affected by adverse security assessments.⁶⁸

While the 'best interests' principle requires an assessment of whether a parent can be safely released into the community, such assessment is also mandated by a proper application of the ICCPR art 9 in respect of the parent him or herself. In particular, the necessity and proportionality of detaining a person is necessarily contextual and affected by the person's status as a parent; family ties and the responsibility of caring for a child may normally be seen as a factor mitigating the risk posed by a parent. Particularly where the need for detention is equivocal, the child's best interests, and parenting responsibilities, may be seen as factors 'tipping the balance' in favour of the parent's release.

⁶⁷ *Sri Lankan Refugees v Commonwealth of Australia* [2012] AusHRC 56; see also UNICEF, Submission to the National Inquiry into Children in Immigration Detention from UNICEF Australia (April 2002).

⁶⁸ UNHCR, above n 8, [37].

Where a parent is detained and a child or spouse has ‘chosen’ to be released into the community, rather than remain united in detention, it cannot be said that their purported choice negatives an unlawful interference in family life under art 17. This is because where the state fails to consider the best interests of the child, including the possibility of releasing the whole family, the necessary procedural antecedent to the state’s offer of release is missing. The state has thus ‘forced’ the child to ‘choose’ separation from the parent.

Such an offer would only be valid where the best interests have been weighed and it is then decided that it is unsafe to release the parent, in which case the next step would be to offer the ‘innocent’ family members a choice to stay or be released. In such cases, decision-making about release or continued detention must take into account the views of the child, consistent with their age and maturity, as required generally by art 12 of the CRC and specifically in cases of separation by art 9(2) of the CRC. Other relevant factors will include the respective quality of detention arrangements for children, the quality of community care arrangements (particularly whether it involves care by another parent, close relatives, or foster care), and the accessibility of visiting a detained parent.

C Relevance of Children’s Mental Health in Detention

In weighing the best interests of children in security detention cases, and in assessing the proportionality of detention, a particularly important consideration is the adverse mental health and developmental effects of detention on children. In *FKAG v Australia*, the UNHRC found that a decision to detain must take into account ‘the mental health condition of those detained’.⁶⁹ It may also be noted that initially lawful detention may become unlawful as a result of the adverse health effects of detention over time and a state’s failure to take adequate measures in response.

It is now well accepted that protracted detention of children generally brings a ‘high risk of serious mental harm’⁷⁰ and long-term negative effects on child development and psychological and emotional health.⁷¹ Such impacts arise from the ‘multiple stressors’ of detention on children, including exposure to behavioural and psychological distress in adults; dislocation from protective social groups and structures; witnessing violence and self-harm; separation from attachment figures; and particularly separation from parents or carers.⁷² These stressors may combine with a refugee child’s earlier exposure to conflict, community breakdown, and cultural dislocation to bring risks of post-traumatic stress disorder. The impacts on mental health are more acute, and take longer to recover from, the longer that detention endures.⁷³

In cases involving adverse security assessments issued against one or both of a child’s parents, additional stressors exist which may affect the child’s mental health. First, children may be aware that their parents are stigmatised as national security risks, resulting in feelings of bewilderment or shame amongst their peers (for instance, in school, or among

⁶⁹ *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [9.3].

⁷⁰ AHRC, *Immigration Detention at Villawood 2011*, 31; see also Human Rights and Equal Opportunity Commission, *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (13 May 2004).

⁷¹ Alliance of Health Professionals concerned about the Health of Asylum Seekers and their Children, Submission to the Human Rights and Equal Opportunity Commission (May 2002) vii.

⁷² *Ibid.*

⁷³ *Ibid.*

other detainees). Thus the Rahavan's daughter was 'aware that they are seen as "bad" people'⁷⁴ and the family as a whole did not want 'to be treated as criminals'.⁷⁵ The stigma is amplified by the mystery surrounding the allegations and thus how 'bad' the family really is, leading others to potentially view them with suspicion and fear.

Second, like their parents, children may feel helplessly unable to control their family's fate because the allegations remain unknown and as such, they are unable to help their parents in refuting the allegations or otherwise corroborating the parents' evidence. This undermines the cardinal principle that a child's views should be taken into account in decisions affecting them.

Third, the indefinite duration of detention to which they are exposed, and the uncertainty surrounding their ultimate fate — which might include return to persecution — generate stress and anxiety in children. Under the CRC, children have the right to enjoy, to the maximum extent possible, development and recovery from past trauma,⁷⁶ and asylum seeker children are entitled to appropriate protection and assistance.⁷⁷ The ability of children to recover from past trauma is severely impaired where their status remains uncertain, they or their parents remain detained, and there is no guarantee of a normal future in a safe country.

The combined effect of these various stressors is exemplified by the Rahavans' experience. A psychiatric report on the family identified serious mental health and developmental concerns affecting the mother and her children:

My assessment regarding Mrs Rahavan is that she is seriously depressed and would fulfil standard criteria for Major Depressive Disorder. She also has some features of Post Traumatic Stress Disorder.

The second family member I am most concerned about is Abinayan, the three year old son. The history and brief observation of him indicate that he may be abnormally sad and anxious and could be malnourished. I am certainly concerned that his normal development has been seriously disrupted and continues to be.

I am also concerned for the six year old daughter Aputha. She appears to be functioning well enough at present, but there must be serious concerns about her future development if she continues to live in detention (albeit in residential housing), with restraints on friendships when she is not at school, on contact with extended family and on extra-curricular activities at school.

These serious concerns apply to the future development of all three children, should they continue to live in a detention centre.

... Mrs Rahavan is seriously depressed at present, but her premorbid functioning, prior to the last two and a half years, was good, and there was no history of previous depressive or other psychiatric illness. Her depressive state can be appropriately

⁷⁴ Email from Saraswathi Griffiths-Chandran, Lecturer in Education, Faculty of Education, Health and Science, Charles Darwin University, and adviser to then Department of Immigration and Citizenship's Northern Immigration Detention Community Engagement Committee (23 August 2011) (on file with the author).

⁷⁵ Report of Psychiatrist Geoffrey Bradshaw FRANZCP FChAM (1 November 2010) quoted in the author's submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [309]–[312].

⁷⁶ CRC arts 6(2), 39.

⁷⁷ CRC art 22(1).

understood in terms of the severe stressors she and her family have been experiencing during the last two and a half years, and the major uncertainty about what will happen to them.⁷⁸

Observations by visitors of the family corroborate these findings.⁷⁹ The psychiatrist found that only release of the whole family from detention into the community would adequately address these mental health and developmental concerns.⁸⁰ Such problems may be exacerbated where there are inadequate policies and procedures in immigration detention in relation to child protection arrangements with state government authorities.⁸¹

The UNHRC has previously found that adverse effects of arbitrary detention on children may involve a breach of the state's obligation under art 24(1) of the ICCPR to take adequate measures to protect children,⁸² specifically where measures taken are not guided by the children's best interests. Thus in *Bakhtiyari v Australia* the UNHRC stated:

Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.⁸³

The fact that a state has offered to release a child into the community (including where such offer is declined by a child who wishes to remain with their parents),⁸⁴ or that the state allows a released child to visit detained parents,⁸⁵ does not of itself demonstrate that the state has considered the child's best interests. As noted earlier, attention must also be

⁷⁸ Report of Psychiatrist Geoffrey Bradshaw FRANZCP FACHAM (1 November 2010) quoted in the author's submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [309]–[312].

⁷⁹ Saraswathi Griffiths-Chandran, Lecturer in Education, Faculty of Education, Health and Science, Charles Darwin University, and adviser to the Department of Immigration and Citizenship's Northern Immigration Detention Community Engagement Committee (23 August 2011) quoted in authors' submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [312].

⁸⁰ Report of Psychiatrist Geoffrey Bradshaw FRANZCP FACHAM (1 November 2010) quoted in the author's submissions in *FKAG v Australia*, UNHRC Communication No 2094/2011 (26 July 2013) [309]–[312].

⁸¹ AHRC, *Immigration Detention at Villawood 2011*, 25.

⁸² ICCPR, art 24(1) provides: 'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.' Article 23(1) provides: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

⁸³ *Bakhtiyari v Australia*, HRC Communication No. 1069/2002 (29 October 2003), para. 9.7. The High Court later denied the Federal Court's welfare jurisdiction in such circumstances.

⁸⁴ Australian Government Response, above n 14, [236]–[242].

⁸⁵ *Ibid* [244].

given to whether the parents may reside in the community with the child. The principle is not discharged by the state's offer of alternatives neither of which is in the child's best interests: separation from parents by living in the community, or residing in detention with them.

In *FKAG v Australia*, the UNHRC found that the grave adverse mental health effects of prolonged indefinite detention on refugees held on security grounds amounted to cruel, inhuman or degrading treatment contrary to art 7 of the ICCPR. The UNHRC accepted that such harm could not be adequately mitigated by the state's provision of healthcare services as long as detention remained arbitrary and indefinite, the detainees remained unapprised of the security grounds against them, and the conditions of detention remained difficult. The UNHRC thus accepted the violation of art 9 partly grounded a violation of art 7. The UNHRC found:

9.8 The Committee takes note of the authors' claims under articles 7 and 10, paragraph 1 and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding the Committee will not examine the same claims under article 10, paragraph 1 of the Covenant.

V Conclusion

The number of children affected by the ASIO security assessment and consequent immigration detention regime has been small, but its impact upon those children has been grave. International law does not forbid the detention of dangerous non-citizen parents in certain well-defined circumstances. But it does impose important procedural safeguards for children and families in the decision-making process. Australian law has failed properly to consider the best interests of children in decisions affecting them, or to accord adequate weight to those interests. Instead, collateral damage to children has been accepted as a by-product of security measures imposed on parents, without adequate consideration being given to less invasive, alternative means of achieving security objectives while maintaining family unity or ordinary family life. Measures to mitigate the adverse mental health and developmental effects on children in detention, or separated from parents in detention, are not sufficient to bring Australia into compliance with its international obligations where Australia has failed to properly assess the best interests of children in initial decisions to detain. This kind of security absolutism unnecessarily endangers the well-being of children and unlawfully disrupts the sanctity of the family as the fundamental unit of society under international human rights law.