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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 2926/2017*,**,***

Communication submitted by:	Imran Ali and Bakhtaware Ali (represented by counsels, Dr. Eirik Bjorge and Professor Mads Andenas)
Alleged victims:	Wahaj Ali, Imran Ali and Bakhtaware Ali
State party:	Norway
Date of communication:	4 January 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 5 January 2017 (not issued in document form)
Date of adoption of Views:	14 July 2022
Subject matter:	Pre-removal detention
Procedural issue:	Admissibility – exhaustion of domestic remedies
Substantive issues:	Arbitrary arrest – detention; conditions of detention; children's rights; torture; family rights
Articles of the Covenant:	7, 9, 17(1), 24
Article of the Optional Protocol:	5 (2) (b)

1.1 The authors of the communication are Imran Ali, born in 1980, and Bakhtaware Ali, born in 1983, both nationals of Afghanistan. They claim that the State party has violated the rights of their son, Wahaj Ali, a national of Afghanistan born in 2012, and of themselves under articles 7, 9 and 17 (1) of the Covenant, and the rights of their son under article 24 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The authors are represented by counsels.

* Adopted by the Committee at its 135th session (27 June – 27 July 2022.

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Carlos Gomez Martinez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernan Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Chongrok Soh, Kobaujah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** The texts of individual opinions by Committee members Arif Bulkan, José Manuel Santos Pais, Hélène Tigroudja, Imeru Tamerat Yigezu (partially dissenting) and Shuichi Furuya, Marcia V.J. Kran, Duncan Laki Muhumuza (concurring) are annexed to the present decision.

1.2 On 2 February 2018, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to deny the State party's request for the admissibility of the communication to be examined separately from the merits.

Facts as submitted by the authors

2.1 The communication concerns the detention of the authors and their son, who was 1-2 years old at the time, in the Norwegian Police Immigration Detention Centre at Trandum for 76 consecutive days. The authors note that on 18 July 2012, the Directorate of Immigration rejected their asylum application. The Immigration Appeals Board rejected their appeal on 5 February 2013. They were ordered to leave Norway by 13 March 2013. Fearing for their lives in Afghanistan, they appealed this decision, but received adverse decisions on 18 and 22 March 2013.[1] On 17 March 2014, the authors were deported to Afghanistan, however on arrival in Kabul they claimed to be Pakistani nationals, resulting in a refusal by the Afghan authorities to admit them. On 18 March 2014, the authors and their son were detained at the Police Immigration Detention Centre at Trandum.

2.2 By decision dated 19 March 2014, the Oslo District Court ordered the family's detention until 2 April 2014. The Court considered that the fact that the family had not left Norway for more than one year after the deadline constituted a real possibility that they might abscond, especially as when initially deported to Afghanistan they had claimed to be Pakistani nationals. They were hence returned to Norway, where they confirmed their Afghan nationality and strong wish to remain there. The Court concluded that they would not return to Afghanistan voluntarily and that due to the risk of absconding, there were no alternatives to detention. The Court referred to article 99 of the Immigration Act on the use of coercive measures and the Convention on the Rights of the Child and considered the authors' argument that detention would be disproportionate as they had an infant born in May 2012. However, it found that, in the circumstances, detention was not disproportionate. The family was to be detained in the family unit at the Trandum centre, where their son would have access to outdoor playing areas. The Court noted, in this regard, that the Child Welfare Services had no objections to the son staying at the family unit. The family would be taken to the Afghan embassy with a view to obtaining travel documents.

2.3 The Court's decision was upheld by the Borgarting High Court on 25 March 2014 and in twin decisions by the Supreme Court on 1 April 2014. The Oslo District Court took subsequent decisions ordering the family's detention on 2 April 2014 (four weeks of detention), 30 April 2014 (two weeks), 14 May 2014 (two weeks; upheld by the Borgarting High Court on 16 May 2014) and 28 May 2014 (two weeks). The reasoning in the decision of 19 March 2014 was repeated in all subsequent decisions. Although all decisions also concerned the authors' son, he was not treated as a party. The family was removed to Afghanistan on 2 June 2014.

2.4 The authors comment that the facilities at the Trandum centre are badly equipped to accommodate families with small children for more than one night, and most do not stay there for longer. The family was accommodated in a small cell that was locked at night. The authors' son was frightened of the police presence and feverish. He was unable to eat the "inferior" food, which caused him an allergic reaction and made him lose weight.[2] Initially, the police refused to let him play outside of the cell, saying this would breach the rules. The situation made him cry. In her despair, Ms. Ali hit her head on the cell door. Finally, a police officer allowed their son to be outside of the cell until 22:00. When he fell ill later, it took a week before they saw a doctor. Although the authorities claim the family unit is shielded from the rest of the centre, they were exposed to the cries and shouts of detainees, including whenever they went to the outdoor area, or to consult the doctor or their legal adviser, and saw attempts at self-harm and suicide. This profoundly impacted their son, who cried during

[1] The authors do not state which institution issued these decisions on appeal.

[2] The authors refer to a report by the Child Welfare Services dated 25 April 2014, stating that Mr. Ali showed that his son had a rash over large parts of his body and had lost weight possibly due to an allergic reaction to Norwegian food. The authors were therefore allowed to cook food, but complained of the frequency of access to fresh ingredients. The police indicated that the family had access to a skilled doctor who took his skin problems seriously.

the nights. By 22 March 2014, the family had not been visited by the Child Welfare Services. They felt utterly dejected.

2.5 The authors' son's sleep pattern became disturbed and he would be awake during the nights, which the Child Welfare Services attributed to a lack of activities during the day. He became increasingly ill, showing signs of aggressive fever, particularly after 22:00. On one evening when he was in a particularly bad state, the authors requested unsuccessfully that they be allowed to go to the playing room and to see a doctor, leading them to look for items with which they could commit suicide. When the Child Welfare Services took them out of the centre for the son to play, numerous uniformed police officers attended, making them feel like criminals. Seeing other children come and leave the centre added to his feeling of dejection.

2.6 According to the authors, a report by the Human Rights Committee of the Norwegian Psychological Association states that the Trandum centre is not suited for children, it functions like a "prison", and hardly any psychologists or psychiatrists are allowed access. The reports describe that the family unit does not allow for close physical contact that children may need, and tall barbed wire fences are visible from the outdoor playing area. Children are not allowed to retain their toys, stuffed animals or clothes and parents cannot regulate the lives of their children. The environment is characterised by stress and instability. In December 2015, the Ombudsperson of the Norwegian Parliament and the National Preventive Mechanism against Torture and Ill-Treatment criticised the centre as being unsuitable for children due to the level of noise coming from the country's biggest airport nearby; and because the family unit is not shielded from other units, which exposes children to riots, self-harm and attempted suicides. The head of the Norwegian Union of Social Educators and Social Workers has argued that detention of children in Norway is unlawful, that the centre is not a satisfactory psycho-social environment for children and that current practices breach the Convention on the Rights of the Child.

2.7 The authority responsible for the centre, the National Police Immigration Service, has acknowledged that the centre is not "an optimal place for a child". The centre is the only prison that is not part of the National Prison Service and is therefore not subject to the normal system of authority in the Norwegian police. Similarly, the National Police Immigration Service is directly responsible to the Ministers of Justice and Immigration and is thus politically directed. According to the authors, the public prosecution service would not request the detention of children, which is in breach of Norwegian criminal law.

2.8 The authors submit that they have exhausted domestic remedies as they took their case through all levels of the State party's court system. The leading decision of the Supreme Court, in HR-2016-00619-U of 18 March 2016, shows that they had no reasonable prospect of success in engaging further remedies.

2.9 In a letter dated 29 January 2017, the authors indicate that they are living in Pakistan. They attach a medical report prescribing medication for their son's "phobias".

The complaint

3.1 The authors claim that the family's detention was arbitrary and unlawful under article 9 of the Covenant. The detention of a child based on the parents' migration status is always unlawful under article 9 of the Covenant and a violation of the child's rights.[3] In the present case, this is all the more so given the length of the family's detention and the authorities' failure to conduct a proper proportionality analysis and to demonstrate the inadequacy of less

[3] Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court*, A/HRC/30/37, paras. 113-114; Report of the UN Special Rapporteur on Torture to the Human Rights Council, A/HRC/28/68, 5 March 2015, para. 80; European Court of Human Rights, *Popov v. France*, judgment (merits and just satisfaction), application Nos. 39472/07 and 39474/07, 19 January 2012; *A.B. and Others v. France*, judgment, application No. 11593/12; *A.M. and Others v. France*, judgment, application No. 24587/12; *R.C. v. France*, judgment, application No. 76491/14; *R.K. and Others v. France*, judgment, application No. 68264/14; *R.M. and Others v. France*, judgment, application No. 33201/11.

intrusive measures. A real review would not have authorised the detention of an infant for 76 days. According to UN experts, there is never a justification to place children in immigration detention, such detention is never in their best interest and constitutes a clear child rights violation.[4] Likewise, the Committee on the Rights of the Child and the UN High Commissioner for Refugees have stated that detention of children has devastating effects on their physical, emotional and psychological development.[5] In the present case, the family's detention necessarily provoked anxiety in their son. He was made to come to interviews and court proceedings and was accompanied by police officers when taken out of the centre. The fact that the family was locked up at night was deeply detrimental to him, directly and indirectly, as he had to endure the suffering of his parents. The family zone is separated from the adult zone in an unsatisfactory manner, with strong impressions being imposed on young children.

3.2 The authors claim an additional breach of article 9 of the Covenant as Norwegian legislation does not satisfy the Covenant's requirements concerning the quality and clarity of the legislative regime allowing for deprivation of liberty. Section 106(1)(b) of the Immigration Act provides that "A foreign national may be arrested and remanded in custody if (…) there are specific grounds for suspecting that the foreign national may evade the implementation of an administrative decision entailing that he or she is obliged to leave the realm". According to section 106(3), "Sections 174 to 191 of the Criminal Procedure Act shall apply insofar as appropriate". The formulation "insofar as appropriate" has been criticised by the Husabø Commission. According to the authors, it is not clear which of the sections 174 to 191, such as section 185(2) establishing a maximum of two weeks' detention, apply to children. They argue that some of the decisions in the present case seem to have assumed the applicability of section 185(2), but others not. The courts tend to prescribe two weeks of detention and to prolong it multiple times. Section 184 of the Criminal Procedure Act requires that detention of children be a last resort only, but according to the Husabø Commission, this standard is mentioned in only half of the cases.

3.3 The authors also claim a violation of articles 7 and 9 of the Covenant, as the arbitrary character of the family's detention, its protracted character and the difficult detention conditions, including exposure to unrest, witnessing or fearing incidents of self-harm or suicide and inadequate physical and mental health services, cumulatively inflicted serious, irreversible harm on the family.

3.4 The authors also claim a breach of their son's rights under article 24 of the Covenant, and a breach of article 17 (1) of the Covenant concerning the whole family. The authorities did hardly anything to find other, less intrusive measures than detention, such as placing the family in another kind of accommodation or obliging them to report on their whereabouts, which the authors had indicated they would accept. Further, in its decision of 25 March 2014, the Borgarting High Court dismissed alternatives to detention on the ground that the authors had not stated where they would reside other than at the Trandum centre, even though their counsel had suggested they stay at an asylum centre. The authorities and courts did not consider alternatives to detention, did not provide reasons showing that the proportionality of the detention was considered and did not properly consider the son's situation.

3.5 The authors request that the State party acknowledge the violations of the Covenant; that it apologise to the family; that it provide them adequate compensation, including for their mental distress and psychological suffering in the amount of $50,000 to each of the family members, and $10,000 for legal representation. They request that the State party give assurances that it will cease to detain children at the Trandum centre and that, where its authorities consider immigration detention necessary, it must provide a proper and individual assessment of the necessity; consider less intrusive alternatives; provide a procedure for independent periodic review of the necessity of continued detention; and provide for effective

[4] OHCHR, "Children and families should never be in immigration detention – UN experts", <https://www.ohchr.org/en/press-releases/2016/12/children-and-families-should-never-be-immigration-detention-un-experts>.]

[5] UNHCR, "Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees", p. 5.

judicial review. They further request that Norwegian law be amended to eliminate any form of detention of children on the ground of their or their parents' immigration status or immigration-related offenses.

State party's observations on admissibility

4.1 In its observations dated 14 March 2017,[6] the State party submits that the communication is inadmissible due to the non-exhaustion of domestic remedies, as the authors did not appeal against the decisions of the District Court of 2 April, 30 April and 28 May 2014, or against the Borgarting High Court's decision of 16 May 2014. The State party notes that they were entitled to free legal aid and that they had two highly skilled counsels.

4.2 The State party observes that the authors did not, under the final subsection of section 184 of the Criminal Procedure Act and section 106 of the Immigration Act, request a reversal of the detention orders concerning them. They also never requested the court for release under the final subsection of section 185 of the Criminal Procedure Act, which the court may grant "at any time" if it finds that the police "is not proceeding as quickly as it should" in its endeavours to obtain identification papers necessary for removal, and that "continued remand in custody is not reasonable". Finally, the authors did not request a release pursuant to section 187(a) of the Criminal Procedure Act, according to which a person remanded in custody "shall be released as soon as the court or the prosecuting authority finds that the grounds for remand in custody no longer apply".

4.3 The State party submits that the domestic remedies were available and effective. First, the Supreme Court's judgment in HR-2016-00619-U postdates the family's detention by two years and thus did not eliminate any prospect of success of an appeal against the courts' decisions. Second, that judgment concerned the detention of a family for 8 days with a view to removal in another 10 days, as opposed to 76 days in the present case, and the Supreme Court has held that courts must assess petitions for continued detention more stringently as time progresses (Rt. 2007, p. 797). Therefore, the Supreme Court's judgments of 1 April 2014, rendered after 14 days of detention, did not eliminate any prospect of success of future appeals. The authors could reasonably have expected another assessment from the Supreme Court at a later stage of their detention. Third, the claim of a lack of reasonable prospects of success is contradicted by the close scrutiny to which the courts at different levels subject petitions for detention under section 106 of the Immigration Act and order release if detention is not proportionate or does not comply with Norway's international obligations. The State party refers to the decision of the Oslo District Court of 1 October 2014 to release a mother and her three year old daughter and to the decision of the Borgarting High Court of 12 August 2016 to release a family with four children.

4.4 Further, the authors did not raise articles 7, 9, 17 (1) or 24 of the Covenant nor claim, in substance, the violation of articles 7, 17 or 24 of the Covenant before the Supreme Court. They also did not raise that it was unclear which of the guarantees in sections 174-191 of the Criminal Procedure Act apply to children in detention. They could have put this to the Supreme Court, which can review the application of the law to the facts of a case.

Authors' comments on the State party's observations on admissibility

5.1 In their comments of 10 April 2017, the authors argue that the State party has not disputed that they have exhausted domestic remedies by appealing to the Supreme Court for their first period of detention, until 2 April 2014. They also argue that they exhausted all effective domestic remedies with a reasonable prospect of success concerning the whole period of their detention. The Supreme Court's judgments of 1 April 2014 were among the first in which it pronounced itself on the detention of child migrants. It was clear, henceforth, that the Court would approve of such detention, except if the authors' circumstances were to change dramatically. The Court also rejected the next appeal brought to it against child detention, in 2016, and has never declared the detention of families with infant children at the Trandum centre illegal.

[6] The State party encloses a 15-page background note on the procedures under Norwegian law for exhausting domestic remedies in asylum and detention cases.

5.2 The authors dispute that the final subsections of sections 184 and 185 and section 187 of the Criminal Procedure Act would have been effective, as it would have made no sense to request the end of the family's detention beyond the Oslo District Court's reviews of the legality of the detention at the beginning of each new period. Moreover, sections 185 and 187 are designed for criminal proceedings, which was not in issue.

5.3 The authors argue that the State party tries to postpone the Committee's consideration of the communication to extend the detention of migrant children, in the context of the 2017 general elections. They note that "wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies".[7] They also note that according to international jurisprudence, "it is sufficient if the claimant has brought his suit up to the highest instance of the national authority", and it is not necessary to engage further remedies "if the result must be the repetition of a decision already given".[8] The expertise of their counsels underlines that they knew what they were doing when they did not appeal all decisions.

5.4 Additionally, the authors argue that the Supreme Court has a limited competence of review. In its decisions of 1 April 2014, the Supreme Court observed that its competence was limited to reviewing the case management and the High Court's legal interpretation, in accordance with section 388 (1) of the Criminal Procedure Act and the Court's jurisprudence (Rt. 1998 p. 1599). Thus, the Court disregarded the authors' invocations of article 3 of the Convention on the Rights of the Child and article 5 of the European Convention on Human Rights. It was also barred from reviewing the proportionality and necessity of the detention and any new facts. Further, the Supreme Court's decision in Rt. 2007, p. 797 has no relevance, as the Court did not take the same approach in their case. The State party has never before argued that the Supreme Court can review the compatibility of detention with the State party's obligations arising from human rights treaties.

5.5 Further, the decision of the Borgarting High Court of 16 May 2014 upheld the family's detention, which had lasted for eight weeks by then, showing that no appeal jurisdiction would have found the detention illegal at any earlier point or in respect of the Oslo District Court's decision of 28 May 2014.

5.6 On 23 June 2017, the authors provided a copy of a judgment of the Borgarting High Court of 31 May 2017 declaring the detention of a family with children in the Trandum centre for a "much shorter period" in 2014 to be illegal. On 22 August 2017, the authors informed that the judgment had become final.[9]

State party's observations on admissibility and the merits

6.1 In its observations of 6 June 2018, the State party notes the reasoning of the courts in ordering and confirming the family's detention, including with respect to their son's rights. The communication omits those parts of the decision of the Borgarting High Court of 25 March 2014 that considered his situation in the Trandum centre; alternatives to detention; and information regarding the plan of the police to present the family at the Afghan embassy to obtain documentation. The State party also notes that, in its petition of 28 March 2014, the police informed the Oslo District Court that the Child Welfare Service had advised that it would be better for the authors' son to stay with his parents and to spend more time at a playground outdoors. The Service had also suggested bringing him more or different toys and announced its intention to visit the family once per week. The police also informed that the family was no longer locked in at night from 24 March 2014 and was moved to a suitable

[7] *Imari Länsman and Others v. Finland* (CCPR/C/52/D/511/1992), para. 6.2.

[8] *Salem Case (Egypt, USA)* (1932) 2 RIAA 1161, 1189; Permanent Court of International Justice, *Panevezys-Saldutiskis* (1939), Series A/B No. 76, p. 18; European Commission of Human Rights, *X. v. Austria* (1960), 30 ILR 268, 271, para. 202; *Interpretation of Article 24 of the Treaty of Finance and* Compensation *of 27 November 1961 (Austria v. Federal Republic of Germany)* (1972) 19 RIAA 3, 16; Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur (A/CN.4/523), para. 42.

[9] The authors refer to a publication on the judgment: https://idcoalition.org/news/historic-norway-ruling-detention-of-children-is-inhumane/.

room near the playroom. The next day, they were taken to an activity centre where they had the opportunity to cook and play. As their son had had a cold since their arrival, he had been examined by a nurse every day from Monday to Friday. The police further informed that the family unit was staffed with qualified personnel used to the target group and that arrangements were made so that the family could decide more for itself.

6.2 Subsequently, the police informed the District Court that the Child Welfare Service had visited the family on 25 April 2014 and found that despite the crisis situation, their son did not seem very affected by what was going on around him, even though it would be good for him to spend time outdoors outside of the centre. On 30 April 2014, the Oslo District Court granted the request to prolong the detention but set the period to two weeks instead of four as requested, in the interest of the son. The District Court found that a child of his age should not live at the Trandum centre, at least not for a prolonged period. It noted that the Child Welfare Service would visit the family twice weekly and that plans had been made to take him out on activities three times in the four-week period.

6.3 In its ruling of 14 May 2014, the District Court again ordered the family's remand in custody for two weeks rather than the four requested, ruling, "with some doubt", that continued remand was not disproportionate. On 16 May 2014, the Borgarting High Court rejected the authors' appeal, emphasising the progress of the police's work in returning the family to Afghanistan and considering that, given his very young age, the son was likely not experiencing his detention as older children would. On 28 May 2014, the Oslo District Court again ordered the family's detention for two weeks instead of the four weeks requested.

6.4 The State party argues that the authors' description of the Trandum centre contains inaccuracies. It notes that the National Police Immigration Service answers to the Police Directorate. The centre was equipped to cater for families with children, including with a shared living room, a kitchen, a yard and an activity area. The 2016 report of the centre's supervisory council states that the family unit is well organised and staffed, does not resemble a prison and the outdoor area is adapted to children. Personnel at the unit is mostly female, with experience of working with families. Sufficient options and amounts of food and beverages are available. Health services are broader than for most foreigners in Norway. Families with children are shielded from contact with other detainees as far as practically possible. There were no riots in 2014. The only incident of self-harm in 2014 was that of Ms. Ali. In December 2017, the family unit at the Trandum centre was moved to a new location. In March 2018, the Norwegian parliament adopted legislation stipulating that children can only be detained as a last resort and setting new limits on the duration of detention.

6.5 The State party notes that the family unit was staffed with extra personnel to ensure the family would receive sufficient support. The State party refers to the UTSYS log of incidents concerning supervision, medicine allotment and doctor appointments concerning the family.[10] Due to a change in routine, the family had their door locked at night only until 24 March 2014. Routines were practised with flexibility; to a large extent, the authors decided when they wanted to make use of the yard or the activity hall. Nurses and a doctor attended to them almost daily, and assessed that the son was doing well overall. The personnel offered the family to visit a playground outside of the centre. Guards accompanied them as Mr. Ali had previously tried to escape. The National Police Immigration Service cooperated closely with the Child Welfare Service, including on his interest in being placed in an emergency home. The State party cannot assess the content of the medical report concerning his phobias, issued more than two years after their stay in the centre.

6.6 The State party disputes that the authors exhausted domestic remedies for the first period of their detention, as they did not invoke the present claims before the courts. Alternatively, they have not exhausted remedies concerning articles 7 and 17 for the whole period of their detention, and concerning articles 9 and 24 of the Covenant for the period after 2 April 2014. The doubts expressed by the courts (paragraphs 6.2-6.3) show that their assessments were not static.

[10] The State party notes that the log system was down from 28 until 31 March 2014, but that the police indicated that the same routine was followed during this period, with air and activities beyond the set schedule being offered.

6.7 The State party notes that in its judgment of 31 May 2017 on the detention of another family, the Borgarting High Court considered that the Immigration Act allows for detaining children with their parents, that the reference in the Immigration Act to the Criminal Procedure Act is sufficiently clear to prevent arbitrary detentions and that sections 184 and 187 of the Criminal Procedure Act apply in immigration cases.[11] However, the Court considered continued detention disproportionate, and found violations of articles 3, 5 (1) and 8 of the European Convention of Human Rights, articles 3 and 37 (a) and (b) of the Convention on the Rights of the Child and articles 93, second sentence, and 94, second sentence of the Constitution. According to the State party, this shows that domestic remedies had a reasonable prospect of being effective.

6.8 The State party notes that the competence of the Supreme Court is limited to reviewing how the High Court handled a case and its interpretation of the law, including whether it provided sufficient reasons for its proportionality assessment. However, the competence of the Supreme Court is not limited concerning the High Court's application of the human rights set forth in the Constitution or the Human Rights Act.

6.9 The State party submits that the circumstances at the family unit of the Trandum centre did not breach the family's rights under article 7 of the Covenant, as the facilities and access to activities, medical services and the Child Welfare Services sufficed to ensure their physical and psychological integrity and human dignity (paragraphs 6.1-6.5).

6.10 Concerning the claim under article 9 of the Covenant, the State party submits that the family's detention had a basis in law and refers to the decisions of the courts. Section 106 of the Immigration Act provides for the detention of "foreigners", comprising adults and children below the age of 15. The reference in the Immigration Act to the Criminal Procedure Act provides sufficient clarity on the conditions of detention of families with children. The discretion left to the police and courts is sufficiently narrow to preclude arbitrary detention. Further, the European Court of Human Rights did not find a breach of article 5 of the European Convention on Human Rights in all cases invoked by the authors and the passage of the Husabø report they cite concerns children applying for asylum on their own.

6.11 The State party submits that that the Covenant does not provide for "such a fine-grained proportionality assessment" as advanced by the authors and that the courts provided reasonable grounds concerning the necessity and proportionality of the detention. The Human Rights Committee and the Committee on the Rights of the Child have not ruled out detention of children.[12] While the Working Group on Arbitrary Detention and the Committee on the Rights of the Child consider the detention of children exclusively because of their parents' migration status as unacceptable, such is not provided by Norwegian legislation. Families are only detained if they do not cooperate concerning their return and there is a real risk that they will abscond, as in the present case. The best interests of the child must be assessed concretely. This was also done in the case of the authors' son, including as time progressed. In case of sufficient grounds to detain parents, it is regularly in the child's interest to be together with them. The National Police Immigration Service and the courts considered that less intrusive measures were inadequate given the risk of absconding. Therefore, the detention was not disproportionate. The length of the detention, while undesirable, resulted from the parents' refusal to cooperate, and was regularly reviewed.

6.12 On the same grounds, the State party considers that the family's detention was reasonable, necessary and proportionate. There was consequently no violation of articles 17 or 24 of the Covenant.

[11] The State party notes that this understanding of the Criminal Procedure Act was confirmed in a proposal for a new regulation of the Ministry of Justice (Prop. 126 L (2016-2017)), pp. 37 and 42, and is now reflected in the amended section 106 b § 6 of the Criminal Procedure Act. The Ministry acknowledged that section 185 § 6 of that Act is not suited for application in immigration cases.

[12] The State party refers to General Comment No. 6 of the Committee on the Rights of the Child on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6), paras. 61-63.

6.13 The State party observes that the Covenant does not explicitly mandate the Committee to deliver opinions about remedies in the event of a violation of the Covenant. In any case, the State party does not consider the Committee's views to be legally binding. If the Committee finds a violation, this would constitute sufficient reparation. There is no reason to deviate from the Committee's rule not to specify sums of money. Notwithstanding its views, the State party has decided to award a compensation of NOK 70,000[13] to the son given the unique features of his stay at the Trandum centre. The State party submits that this constitutes sufficient reparation in case of a finding of a violation. The request for legislative amendments goes beyond the requirements of non-repetition. A request for non-repetition would be obsolete (see paragraph 6.4).

Authors' comments on the State party's observations on admissibility and the merits

7.1 In their comments dated 19 June 2018, the authors argue that the compensation offered does not provide ground for a friendly settlement or constitute satisfactory reparation (paragraph 3.5). The amount of the compensation offered is insufficient given international and Norwegian precedents.[14]

7.2 In their comments dated 18 August 2018, the authors argue that the State party's offer of compensation amounts to a recognition of a breach of the Covenant. They disagree with the State party's presentation of the facts. They argue that it is impossible for them to prove the breaches that occurred during their detention and that the burden is on the State party to prove that the breaches did not occur.[15] The State party's observation that the same regime was followed from 28 until 31 March 2014 when the UTSYS log at the Trandum centre was down is no more than an assertion. No credence can be attached to it or to the UTSYS log. The door to the cell was locked every night of their stay. No doctor was made available to them. The State party's observation that nurses attended to them almost daily shows how difficult their stay was for them.

7.3 The authors argue that the judgment on damages of the Borgarting High Court of 31 May 2017 departed from constant jurisprudence and concerned a family that had also challenged their detention unsuccessfully. Further, the judgment was rendered three years after the present family's deportation.

State party's additional observations

8.1 In its additional observations of 19 September 2018, the State party observes that it has awarded NOK 70,000 to the son. The State party argues that the authors' reference to the reasoning on the burden of proof in the judgment of the International Court of Justice in *Diallo* cannot stand, as that case concerned procedural guarantees, in contrast to the allegations in the present case. As a starting point, it is for the authors to prove their allegations. The State party considers that it has complied with its obligation to produce relevant evidence where it is in a better position to acquire relevant evidence than the other party.

8.2 The State party refers to the decision of the European Court of Human Rights in *I.F. v. Norway and I.F.F. v. Norway*, concerning an Afghan family with a one year old daughter who complained of their detention at the Trandum centre in 2016.[16] The Court declared the applications inadmissible for a failure to exhaust domestic remedies based on the judgment of the Borgarting High Court of 31 May 2017.

[13] Approximately €7350 at the time of the State party's observations.

[14] The authors refer to the sum of $85,000 awarded by the International Court of Justice for the detention of one person in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012, p. 324* and to the award of NOK 40,000 by the Oslo Court of Appeal to each of the children in the case of another family detained at the Trandum centre.

[15] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, 660-1, para. 55.

[16] Decision of 28 June 2018 (application Nos. 62363/16 and 62803/16).

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 claim is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's observation that the communication is inadmissible for a lack of exhaustion of domestic remedies as the authors did not appeal the decisions of the District Court of 2 April, 30 April and 28 May 2014, or the Borgarting High Court's decision of 16 May 2014. The Committee further notes the authors' contention that they exhausted all effective domestic remedies with a reasonable prospect of success, given the judgments of the Supreme Court of 1 April 2014, the limited scope of the Court's review and its lack of express consideration for the grounds invoked by the authors concerning their human rights. The Committee also notes their argument that the judgment of the Borgarting High Court of 16 May 2014 shows that no appeal jurisdiction would have found the detention illegal at any earlier point in time. The Committee further notes their argument that the Oslo District Court's decision of 28 May 2014 shows the ineffectiveness of engaging any further remedies, as they had already been detained for eight weeks by then. Nevertheless, the Committee notes that the doubts expressed by the Oslo District Court concerning the proportionality of the continued detention in its decisions of 30 April 2014 and 14 May 2014 are consistent with the State party's observation that, according to the jurisprudence of the Supreme Court, the courts must assess petitions for continued detention more stringently as time progresses. Therefore, the Committee considers that the Supreme Court's judgments of 1 April 2014 did not eliminate any prospect of success of future appeals. In this light, the Committee considers that the authors' argument of the futility of engaging further remedies did not absolve them from doing so, given that the domestic courts had to make a factual assessment in their case. The Committee concludes that the authors have not exhausted all available domestic remedies concerning their detention after 2 April 2014.

9.4 Noting the State party's observation that the authors did not use the procedures under the final subsection of section 184 of the Criminal Procedure Act and section 106 of the Immigration Act or the final subsection of sections 185 and 187(a) of the Criminal Procedure Act, the Committee observes that the State party has not explained whether those procedures would have offered the authors any better chance of securing their release than the remedies that they engaged. In light of the above, the Committee considers that the authors have exhausted all available domestic remedies insofar as their detention from 19 March 2014 until 2 April 2014 is concerned.

9.5 The Committee notes the State party's argument that the authors did not raise articles 7, 9, 17 (1) or 24 of the Covenant, or the substance of articles 7, 17 or 24 of the Covenant before the Supreme Court. The Committee notes, however, that in their appeal before the Supreme Court, the authors referred to their appeal before the Borgarting High Court, in which they had invoked article 5 of the European Convention on Human Rights and article 3 of the Convention on the Rights of the Child. The Committee is satisfied, therefore, that the authors raised the substance of their claims under articles 9 and 24 of the Covenant before the domestic courts, but cannot ascertain that they raised the substance of their claims under articles 7 and 17 (1) of the Covenant. Therefore, the Committee concludes that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication insofar as the claims under articles 9 and 24 of the Covenant are concerned. Therefore, the Committee declares the communication admissible as raising issues under these articles with respect to the family's detention from 19 March 2014 until 2 April 2014, and proceeds with its consideration on the merits.

Consideration of the merits

10.1 The Committee has examined the present communication in the light of all the information provided by the parties.

10.2 The Committee notes the authors' argument that the family's detention was arbitrary and unlawful under article 9 of the Covenant, as the basis of the Norwegian legislative regime of deprivation of liberty is not sufficiently clear; no proper substantiation for the detention as a necessary, proportionate and least invasive measure was proffered; and the detention of a child based on the parents' migration status is always unlawful.

10.3 The Committee recalls that 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 the light of the circumstances and reassessed as it extends in time.[17] The Committee also recalls that detention decisions 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.[18] The Committee further recalls that 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, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[19]

10.4 In the present case, the Committee notes that the family was detained pursuant to an order thereto by the Oslo District Court of 19 March 2014, based on section 106(1)(b) of the Immigration Act, which provides that "A foreign national may be arrested and remanded in custody if (…) there are specific grounds for suspecting that the foreign national may evade the implementation of an administrative decision entailing that he or she is obliged to leave the realm". The Committee notes that the relevant preparatory works confirm the State party's observation that the term "a foreign national" was intended as covering adults and children.[20] The Committee therefore finds that the family's detention from 19 March 2014 until 2 April 2014 had a basis in domestic law.

10.5 The Committee recalls that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary.[21] 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, as well as elements of reasonableness, necessity and proportionality.[22] In this regard, the Committee notes that the decisions of the District Court of Oslo of 19 March 2014 and of the Borgarting High Court of 25 March 2014 were not based on a mandatory rule for a broad category, but on an assessment of the family's detention in light of the specific circumstances of their case. This included the finding that alternatives to detention were, according to the courts' assessments, not suitable given the existence of concrete grounds for suspecting that the family would abscond, as they had exceeded the deadline for leaving Norway for more than a year and had not cooperated with their return, including by denying their Afghan nationality upon an earlier removal to Afghanistan.

10.6 The Committee further notes the authors' arguments concerning the conditions of the detention (paragraphs 2.4-2.7). The Committee recalls that although conditions of detention are addressed primarily by articles 7 and 10 of the Covenant, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.[23] Further, decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.[24] Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and

[17] General comment No. 35 (CCPR/C/GC/35), para. 18.
[18] Ibid.
[19] Ibid., paras. 18, 62.
[20] Proposition to the Norwegian Parliament No. 3 L (2010-2011), p. 55; Proposition to the Norwegian Parliament No. 138 L. (2010-2011), p. 54.
[21] General Comment No. 35 (CCPR/C/GC/35), para. 12.
[22] Ibid.
[23] Ibid., para. 14.
[24] Ibid., para. 18.

should not take place in prisons.[25] Based on the information on file, the Committee considers that the authors have not shown that their treatment in detention did not relate to the purpose for which they were detained. In light of the foregoing, the Committee cannot conclude that the family's detention from 19 March 2014 until 2 April 2014 breached their rights under article 9 of the Covenant.

10.7 The Committee however further notes the authors' claim of a breach of their son's rights under article 24 of the Covenant. The Committee reiterates that the principle of the best interests of the child 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 (1) of the Covenant.[26] The Committee further notes the joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, which stipulates that the detention of any child on the basis of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child, given the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, and that the possibility of detaining children as a measure of last resort should not apply in immigration proceedings.[27] The Committee also notes the jurisprudence of the European Court of Human Rights in which the Court has assessed the existence of a violation of article 3 of the European Convention on Human Rights based on three factors in the context of the placement of children in immigration detention, namely the age of the child, the suitability of the premises in which they are detained, and the length of the detention.[28] It notes that the Court has also emphasized that the particular vulnerability of a minor child is a decisive factor in the assessment, which takes precedence over their parents' immigration status[29].

10.8 In the present case the Committee notes the authors' claims that the facilities at the Trandum centre were badly equipped to accommodate families with small children for more than one night, and their information that most families do not stay at the centre for longer than one night. The Committee further notes the authors' claims that the family was accommodated in a small cell that, at least initially, was locked at night and their claim that their son was frightened due the police presence. It also notes their claims that the family unit was not shielded from the rest of the centre, exposing their son to the cries and shouts of other detainees, including whenever they went to the outdoor area, or to consult the doctor or their legal adviser. The Committee also notes the authors' claim that their son's sleep pattern became disturbed and that he was awake during the nights, which the Child Welfare Services attributed to a lack of activities during the day. The Committee further notes the author's information that a report by the Human Rights Committee of the Norwegian Psychological Association found that the Trandum centre was not suited for children as it functioned like a prison, with limited access by psychologists or psychiatrists. It notes their information that according to the report the family unit did not allow for close physical contact that children may need, that tall barbed wire fences were visible from the outdoor play area, that children were not allowed to retain their toys, stuffed animals or clothes and that parents could not regulate the lives of their children. The Committee also notes the authors' information that the Ombudsperson of the Norwegian Parliament in its function as the National Preventive Mechanism against Torture and Ill-Treatment has criticised the centre as being unsuitable for children due to the level of noise coming from the nearby airport and because the family unit was not shielded from other units, thereby exposing children to riots, self-harm and attempted

[25] Ibid.

[26] *Maalem v.* Uzbekistan (CCPR/C/123/D/2371/2014), para. 11.8; *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002), para. 9.7.

[27] CMW/C/GC/4-CRC/C/GC/23, paras. 5, 9 and 10.

[28] European Court of Human Rights, *N.B and others v. France*, application No. 49775/20, 31 March 2022, para. 46; *M. and others v. France*, application No. no 33201/11, 12 July 2016, para. 70; *S.F. and others v. Bulgaria*, application no. 8138/16, 7 December 2017, paras. 78-83.

[29] *N.B and others v. France*, para. 47.

suicides. The Committee also notes the authors' information that the head of the Norwegian Union of Social Educators and Social Workers has found that the centre is not a satisfactory psycho-social environment for children. The Committee finally notes the authors' claims that the State party authorities did not make any attempt to find other, less intrusive measures than detention, such as placing the family in another kind of accommodation and that they did not properly consider their son's situation. In this connection the Committee also notes that in a letter dated 6 June 2018, the Ministry of Justice and Public Security informed the authors that it "on its own motion has considered the particular circumstances of Mr. Wahaj Ali's 76 days' stay at the Trandum facility. The Ministry has decided to award him NOK 70,000 in compensation". The Committee also notes the parties' information (see paras. 5.6 and 6.7) that on 31 May 2017, the Borgarting High Court, in a case concerning the detention of another family with children in the Trandum centre, considered the continued detention of that family to be disproportionate, and found violations of articles 3, 5 (1) and 8 of the European Convention on Human Rights, articles 3 and 37 (a) and (b) of the Convention on the Rights of the Child and articles 93 and 94, of the Constitution.

10.9 The Committee also notes the State party's argument that the detention of the family at the Trandum centre was considered to be a measure of last resort due to the assessed risk of them absconding before the deportation order could be executed. However, the Committee specifically takes note of the author's claims regarding the nature and conditions of the Trandum centre and its unsuitability for children, as detailed in the preceding paragraph, and considers that a reasonable assessment of all the circumstances would have militated against the detention of the child for such an extended period as occurred here. The Committee therefore considers that, by detaining the authors' son in such conditions as those present at the centre and by failing to adequately consider possible alternatives to the detention, the State party did not duly take his best interests into account as a primary consideration, in violation of his rights under article 24 of the Covenant.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the authors' son's rights under article 24 of the Covenant.

12. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author's son with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the authors' son with adequate compensation for the violations of his rights. It should also prevent the recurrence of such violations 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 for all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable 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 official language of the State party.

Annex I:

Joint opinions by Committee members José Santos Pais and Imeru Tamrat Yigezu (partially dissenting)

1. We regret not being able to fully agree with the majority of the Committee in the present Views. We consider instead there was also a violation of the authors' and their son's rights under article 9 of the Covenant.

2. The authors have exhausted all effective domestic remedies with a reasonable prospect of success as regards the full time of their detention, given the judgments of the Supreme Court of 1 April 2014, the limited scope of the Court's review and its lack of express consideration for the grounds invoked by the authors concerning their human rights. Unlike the majority's reasoning (para 9.3), in our view, not just, for rather questionable and formal reasons, the detention period from 18 March until 2 April 2014 should have been considered, but the whole period of the detention of the authors and their son. There is in fact no evidence an appeal jurisdiction would have found the detention of the authors illegal at any earlier or later point in time as of April 2014.

3. By a decision dated 19 March 2014, the Oslo District Court ordered the detention of the family until 2 April 2014, considering it had not left Norway for more than one year after the imparted deadline and there was a real possibility they might abscond. The Court concluded the family would not return to Afghanistan voluntarily, there were no alternatives to detention and the detention was not disproportionate. The family was to be detained at Trandum centre (para 2.2).

4. This decision was upheld by the Borgarting High Court on 25 March 2014 and in twin decisions by the Supreme Court on 1 April 2014 (para 2.3). Supreme Court stated, in this regard:

"The Supreme Court, sitting in a three-judge formation, observes that its competence is limited to reviewing the case management and the legal interpretation of the High Court: Criminal Procedure s Act 388(1), finds unanimously that it is clear that the appeal cannot succeed. The appeal is refused pursuant to the Criminal Procedure Act s 387(a)(1)." No further arguments were provided.

5. The Oslo District Court took subsequent decisions extending the family's detention on 2 April, 30 April, 14 May (upheld by Borgarting High Court on 16 May) and 28 May 2014. The reasoning in the first decision of 19 March was the same in all subsequent decisions (para 2.3), meaning the detention of the authors and their son, which lasted for 76 consecutive days, continued to be held proportionate by domestic courts during this whole period.

6. Detention of the authors at Trandum centre profoundly impacted them and their son (paras 2.4-2.5, 7.2) and even the State party acknowledges difficulties (paras 6.1-6.5). This centre was considered not to be suited for children by the Human Rights Committee of the Norwegian Psychological Associations, as well as by the Ombudsperson of the Norwegian Parliament and National Preventive Mechanism. The head of the Norwegian Union of Social Educators and Social Workers also argued detention of children in Norway to be unlawful and the centre not to be a satisfactory psycho-social environment (para 2.6). Even the authority responsible for the centre, the National Police Immigration Service, acknowledged the centre was not "*an optimal place for a child*" (para 2.7).

7. The authors considered they had no reasonable prospect of success in engaging further remedies for successive prorogations of their detention (para 2.8). In this regard, the State party notes the Supreme Court has held that courts must assess petitions for continued detention more stringently as time progresses (Rt. 2007, p. 797) (para 4.3). However, domestic courts continued to extend the family's detention, holding it proportionate each time. Supreme Court's judgments of 1 April 2014 (supra, 4) were among the first in which it pronounced itself on the detention of child migrants. The Supreme Court, however, even two years after the authors and their son were removed to Pakistan in June 2014, still rejected an

appeal brought to it against child detention in 2016 (a detention of a family for 8 days as opposed to detention for 76 days in the present case – para 4.3). Moreover, it has never declared detention of families with infant children at Trandum centre to be illegal (paras 2.8, 5.1). It also considered itself barred from reviewing proportionality and necessity of detention and any new facts (para 5.4), argument the State party acknowledges (para 6.8).

8. Judicial decisions of 30 April and 14 May 2014, even with doubts on the disproportionate nature of the remand, still extended it with the same justification (paras 6.2, 6.3), although courts should have assessed petitions for continued detention more stringently as time progressed (supra, 7). Moreover, domestic courts have not seriously considered the best interests of the child. Although detention may have been held lawful and proportionate at the outset of the family's detention, it became arbitrary and disproportionate with its successive prorogations as regards both the authors and their child. Probably for similar reasons, by a judgment of 31 May 2017, three years after the removal of the authors, the Borgarting High Court finally declared the detention in 2014 of a family with children at Trandum centre, for a "*much shorter period*", to be illegal (para 5.6).

9. Even the rationale for ordering the family's detention remains questionable. In its decision of 25 March 2014, Borgarting High Court dismissed alternatives to detention since the authors had not stated where they would reside other than at Trandum centre. However, their counsel clearly suggested at the time they were willing to stay at an asylum centre instead (paras 3.1, 3.4).

10. We therefore fail to see which effective remedies with a reasonable prospect of success the authors would need to have pursued to challenge the whole duration of the family's detention. Such detention, from 19 March until 2 June 2014, was therefore arbitrary and disproportionate, entailing a violation of article 9 of the Covenant as regards the whole family.

Annex II

Joint opinion by Committee members Arif Bulkan and Hélène Tigroudja (partially dissenting)

1. We agree with the conclusion of the majority on the violation of Article 24 of the Covenant regarding the rights of the authors' child due to his detention – a violation that was implicitly acknowledged by the State Party itself with the *ex gratia* payment of "compensation" (sic) for his 76-day detention. As clearly stressed by many universal and regional human rights organs, such as the Committee on the Rights of the Child (CRC), the Committee on Migrant Workers (CMW), the Working Group on Arbitrary Detention, the Inter-American Court of Human Rights and the European Court of Human Rights, the deprivation of liberty of a child *exclusively* based on the migratory status of their parents is at odds with the special protection their condition of childhood demands. In its Advisory Opinion No. 21 (2014), the Inter-American Court of Human Rights clearly drew the distinction between the deprivation of liberty for criminal purposes (juvenile criminal system) and detention in migration proceedings. The same standards cannot apply to both, and in the latter context, the San José Tribunal highlighted that "the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order […][1] Endorsing this position and the joint General Comment issued in 2017 by the CRC and the CMW on the same topic,[2] the majority of the Committee found a violation of Article 24 based on the failure of the State party's authorities to provide special protection to the 2-year old child of the authors.

2. However, quite oddly, the majority of the Committee simultaneously concludes that there was no violation of Article 9 (individual liberty) for the authors and their child. This conclusion is factually and legally inconsistent with its finding that Article 24 was breached. Factually, it is impossible to respect the best interests of a 2-year-old child in the context of immigration proceedings while ignoring the corresponding necessities of the parental role. There is no way for any State party to respect its obligations in respect of a minor child while detaining his or her parents, as children of such tender years cannot function independently. Accordingly, detention of parents in such a context is arbitrary and a violation of Article 9; alternatively, the majority's position sets an unattainable standard. More critically, this approach is fraught with danger as it could encourage States Parties to separate children from their parents.

3. The majority of the Committee missed one of the main claims of the authors, i.e. the arbitrariness of the *family* deprivation of liberty (see para. 3.1), and artificially examined the situation of the 2-year child under Article 24 separately from the detention issue under Article 9 of the Covenant. Our position is that these two claims cannot be examined separately: for the reasons above-mentioned, the 2-year child should *under no circumstance* have been placed in detention and the explanation of the State on the nature of the facilities is irrelevant. Therefore, the necessity test to deprive the parents of their own liberty should have figured more prominently: it was not enough, as the State migration authorities indicated, to mention that they had "sufficient grounds" to detain the parents (see para. 6.11). The special vulnerability of the 2-year-old child should have compelled them to find *alternative measures* to the deprivation of liberty of the family.

4. In the face of the authors' claim, the State party's reliance on the "family unit" principle (para 6.11) was both cynical and insensitive to evolving notions of children's rights. The position that children must stay with their parents, included when these latter are

[1] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 154 (original footnote omitted).

[2] For the relevant reference, see para. 10.7 of the present Views.

deprived of liberty, cannot be used as a shield. As stressed by the European Court of Human Rights in *Popov v. France*, "whilst mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life […], it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained."[3] This means that States cannot use the "family unit" principle to breach the best interest of the child. In addition, the State Party's arguments illustrate a concerning disregard of the child's mental, emotional and physical development. In their submission to the Committee, the State party argues that the child was very young and thus unappreciative of the stressful environment of the detention facilities. (see esp. para. 6.3). However, such reasoning ignores the special vulnerabilities of children, including even very young children. States cannot justify the detention of a family with infants by the mere fact that all that is needed for them is to be with their parents. Children - including very young ones - are extremely fragile and their mental, emotional and physical development should be an important factor in considering the necessity test for the deprivation of liberty of the family.

5. In the present case, the State's authorities have taken the parents' migratory situation as the starting point of the analysis of the necessity and proportionality of the family deprivation of liberty. Instead, given the very young age of the child and his extreme vulnerability, they should have taken the child's rights as the starting point and given it due weight in the decision-making process regarding the *family* as a whole. By not doing so, we consider that the facts disclose not only a violation of Article 24 but also of Article 9 for the family.

6. To conclude, we would like to welcome the implicit acknowledgment by the State party of the violation of the authors' son's rights, as indicated by its *ex gratia* payment to the authors. However, the gravity of the facts and the vulnerability of the child should have led the State Party to more clearly and unequivocally recognize the wrongdoings of its authorities and the breaches of the Covenant in order to provide guarantees of non-repetition.

[3] Eur. Court H.R. *Popov v. France*. Judgement of 19 January 2012. Applications No. 39472/07 et al. para. 134.

Annex III

Joint opinion by Committee members Shuichi Furuya and Marcia V. J. Kran (dissenting)

1. We have come to a different conclusion from the majority of the Committee and would not find a violation of the rights of the authors' son under article 24 of the Covenant.

2. The issue in this case is whether the authors have demonstrated that the State party failed to adequately protect their son as required under article 24 of the Covenant by detaining him in Trandum centre between 19 March 2014 and 2 April 2014.

3. Among the problems the authors specify regarding the Trandum centre, their main allegations are that, while detained: a) they were housed in a small cell that was locked at night b) there was a lack of daytime activities for their one -two year old son c) their son had no access to toys and d) he had no access to psychological care. In addition, the authors also argued that the State party did not consider less intrusive measures than detention in the Trandum centre.

4. The State party has rebutted each claim, noting that the recommendations of the Norwegian Child Welfare Service were implemented to ensure physical and psychological integrity and human dignity for the authors' son. After five days, on 24 March 2014, the family's room was not locked at night, the family was moved to a more suitable room near the children's playroom, and their son was examined by qualified medical personnel to take care of the cold he had developed. The State party also submits that the Borgarting High Court did consider less intrusive measures on 25 March 2014.

5. Consequently, the authors and the State party have differing perspectives on whether the authors' detention at the Trandum centre met the requirements for the detention of a child in the immigration context.

6. As the majority opinion notes, the period of detention for which all domestic remedies have been exhausted is the 15 day-period from 19 March 2014 to 2 April 2014. Accordingly, the conditions in the Trandum centre must be measured against the prevailing requirements for the detention of children in the immigration context in March and April 2014. The majority's reference to heightened standards for detention of children that were later developed holds the State party to a standard that did not exist at the time, contrary to the general principle against retroactive application of law.

7. The requirements with respect to detention of children in the immigration context in March and April 2014 can be found in relevant international documents and guidelines from this time period. First, the jurisprudence of this Committee and General Comment 14 of the Committee on the Rights of the Children specify that the primary consideration for any action involving minors is the best interests of the child. Second, the Report of the Convention on the Rights of the Child and the Special Rapporteur on the human rights of migrants note that the child should not be separated from their family. Third, the United Nations High Commissioner for Refugees (UNHCR) guidelines for the detention of asylum seekers requires that all asylum seekers must be treated in a humane and dignified manner. The applicable standards also specify that detention should not be punitive; family accommodation must be found; appropriate medical treatment must be given, physical recreational activities must be allowed; and the detention of children should be considered a last resort.

8. Applying the 2014 standard to the present case, the evidence demonstrates that the State party undertook an ongoing assessment of the best interests of the child and concluded that he should not be separated from his parents. The State party submitted that their Child Welfare Service recommended the family's detention room not be locked, the family be moved closer to the children's play area, and the child have access to recreational activities, all of which were immediately implemented. The Child Welfare Service visited the family at different times during their detention to ensure the child was being treated adequately. Medical services were provided for the child. Moreover, the State party has indicated that

less intrusive measures were, in fact, considered by the Borgarting High Court of 25 March 2014 but detention at the Trandum centre was determined to be necessary due to the risk of the family absconding as they had not cooperated with their initial return to Afghanistan. In sum, the evidence before the Committee shows the State party acted in consonance with the requirements regarding the detention of children in the immigration context that existed in 2014. As these detention standards have since developed, the outcome may be different were today's standards applied to the same facts, however this communication relates to an earlier period of time.

9. The State party indicated that, due to problems with the Trandum centre, the family unit was moved to a new location in 2017. This later modification along with the 2018 legislative amendments to domestic law on children in an immigration context demonstrate the responsiveness of the State party to evolving standards on child detention in the immigration context.

10. In light of the foregoing, there is insufficient basis on which to find the State party did not adequately meet the requirements for child detention in March and April 2014. As such, we are unable to find a violation of article 24 of the Covenant.

Annex IV

Individual opinion by Committee member Duncan Laki Muhumuza (concurring)

1. I am glad to associate with the majority view with the following additions.

2. In my view, there is a violation by the State Party under Art. 24 of the Covenant.

3. The communication concerns the detention of the authors and their son, who was 1-2 years old at the time, in the Norwegian Police Immigration Detention Centre at Trandum for 76 consecutive days. The authors note that on 18 July 2012, the Directorate of Immigration rejected their asylum application. The Immigration Appeals Board rejected their appeal on 5 February 2013, and ordered them to leave Norway by 13 March 2013. Fearing for their lives in Afghanistan, they appealed this decision, but they did not get favourable decisions on 18th and 22nd of March 2013. On the 17th of March 2014, the Authors were deported to Afghanistan. However, on arrival in Kabul the Authors claimed to be Pakistani nationals, resulting in a refusal by the Afghan authorities to admit them. Upon being returned to Norway on 18 March 2014, the Authors and their son were detained at the Police Immigration Detention Centre.

4. The next day on 19th March 2014, the Oslo District Court ordered the family's detention until 2nd April 2014. The Court considered because the Authors had not left Norway for more than one year after the deadline, this constituted a real possibility that they might abscond. This, together with the false claim to Pakistani nationality, led to the unfavourable Court decision. The Court concluded that they would not return to Afghanistan voluntarily and that due to the risk of absconding, there were no alternatives to detention. My considered view is that all this should have pointed the Court to decide in favour of the Authors. Indeed, they cannot voluntarily return to Afghanistan where their lives would be at great risk.

5. I therefore opine that the state party was in violation on the following grounds;

The treatment of the infant was cruel and inhumane, and the status of the author's son as a minor was completely ignored. He was treated as an adult and subjected to conditions that were deemed unfavourable even for adults. The child's rights under the Covenant are not conditional on his parent's status.

6. The claims by Norway that the authors' son had access to outdoor playing areas is a minimalistic approach to the State Party obligations towards the right of a child. Having separated the child from his parents, the state party, as the primary duty bearer, ought to have found appropriate alternatives for the best interests of the child, other than detention in a facility that is prison-like[1].

7. "A report by the Human Rights Committee of the Norwegian Psychological Association states that the facility at Trandum is not suited for children. It functions like a "prison", and hardly any psychologists or psychiatrists are allowed access. The reports describe that the family unit does not allow for close physical contact that children may need, and tall barbed wire fences are visible from the outdoor playing area. Children are not allowed to retain their toys, stuffed animals or clothes and parents cannot regulate the lives of their children. The environment is characterised by stress and instability. In December 2015, the Ombudsperson of the Norwegian Parliament and the National Preventive Mechanism against Torture and Ill-Treatment criticised the centre as being unsuitable for children due to the level of noise coming from the country's biggest airport nearby; and because the family unit is not shielded from other units, which exposes children to riots, self-harm and attempted suicides. The head of the Norwegian Union of Social Educators and Social Workers has argued that detention of children in Norway is unlawful, that the centre is not a satisfactory psycho-social environment for children and that current practices breach the Convention on the Rights of the Child." The authors' son's sleep pattern got so distorted that he would be awake during the nights. The Child Welfare Services attributed this phenomenon to lack of activities during

[1] As described in Paragraph 2.6 of the Communication

the day. The authors' son became increasingly ill, showing signs of aggressive behaviour, particularly after 22:00 hours. On one evening when he was in a particularly bad state, the authors requested unsuccessfully that they be allowed to go to the playing room, and to see a doctor, leading them to look for items with which they could commit suicide. When the Child Welfare Services took them out of the centre for the son to play, numerous uniformed police officers attended, making them feel like criminals.[2]

8. In my opinion, this treatment of the authors' son amounts to cruel 'punishment' arising from the actions of his parents, that the State Party thought they were seeking to remedy. The separation of the child from his parents, contrary to Art.9 of the Convention of the Rights of a Child. This separation was initiated by the State Party and direct contact with his parents was not maintained. It was therefore a disproportionate measure by the state in handling the matter because they breached the authors' rights to enforce the decision of the courts.

9. There was indeed a failure by the State Party in recognising that the child is an independent individual, with unique rights accruing to him by virtue of his status as a minor. "The authorities did hardly anything to find other, less intrusive measures than detention, such as placing the family in another kind of accommodation or obliging them to report on their whereabouts, which the authors had indicated they would accept."[3]

10. I therefore agree with the finding of a violation of the authors' sons' rights under Art. 24 of the Covenant owing to the disproportionate measures taken during pre-removal detention. Moreover, considering the situation in Afghanistan, as reported in the mainstream media, and in Official reports by various monitoring agencies, the Committee ought to take judicial notice that to deport anyone back in such circumstances is to put their lives into jeopardy and to constitute a human rights violation.

[2] Paragraph 2.5 of the Communiication

[3] Paragraph 3.4 of the Communication