

RESPONSE OF THE AUSTRALIAN GOVERNMENT
TO THE VIEWS OF THE COMMITTEE IN
COMMUNICATION NO. 1324/2004 SHAFIQ V AUSTRALIA

1. The Australian Government presents its compliments to the members of the Human Rights Committee.
2. The Australian Government has given careful consideration to the Views of the Committee expressed in Communication No. 1324/2004 Shafiq v Australia, dated 31 October 2006. These views have been published on the website of the Attorney-General's Department.¹ The Australian Government provides the following information in response to the Committee's Views.
3. On 21 March 2007, the Minister for Immigration and Citizenship granted Mr Shafiq a Removal Pending Bridging Visa (RPBV) and he was released from detention.
4. The RPBV was introduced by the Australian Government in May 2005. This visa provides for the release from detention, pending removal from Australia, of persons in immigration detention whose removal is not reasonably practicable at the time. A RPBV may be granted using the non-delegable power of the Minister for Immigration to grant a visa to a person in immigration detention if the Minister thinks it is in the public interest to do so. This power is provided for in section 195A of the *Migration Act 1958* (Migration Act).
5. As a RPBV holder, Mr Shafiq is entitled to a range of social support benefits:
 - work rights and job matching through Centrelink
 - access to certain Centrelink benefits, such as Special Benefit and Rent Assistance
 - access to Medicare benefits
 - access to the Early Health Assessment and Intervention services

¹ <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrightscommunications>.

- eligibility for torture and trauma counselling.²

6. Since the grant of the RPBV, Mr Shafiq is no longer in any form of immigration detention. [REDACTED]

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7. The Australian Government notes the Committee's view that there was a breach of article 9(4) of the Covenant, but submits with respect that the Committee's interpretation of article 9(4) is not correct. Under article 9(4), the obligation on State parties is to provide for review of the lawfulness of detention. In the view of the Australian Government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. Mr Shafiq had the opportunity, as a person in immigration detention in Australia, to take proceedings before the High Court of Australia to determine the legality of the decision to detain him under the Migration Act. He could have sought to invoke the original jurisdiction of the High Court under section 75 of the Australian Constitution to obtain a writ of mandamus or other appropriate remedy to enable him to be released from detention. He could have also sought this remedy in the Federal Magistrates Court pursuant to section 476 of the Migration Act. Mr Shafiq could have also sought the remedy of *habeas corpus* in the High Court or the Federal Court. *Habeas corpus* is a prerogative writ issued to challenge the detention of a person in custody under criminal or civil law. If the court is satisfied that the detention is *prima facie* unlawful, the custodian is ordered to appear and justify the detention. The court will order the release of a person when the custodian is not able to justify the detention.⁴ Accordingly, the Australian Government does not accept the Committee's view that Australia has breached article 9(4).
8. The Australian Government welcomes the finding by the Committee that the claims under articles 7 and 10 of the International Covenant on Civil and Political Rights (Covenant) were inadmissible on the basis that Mr Shafiq was awaiting the outcome of a request under section 501J for the Minister to grant a visa to

² See the Department of Immigration and Citizenship fact sheet: < <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm>>.

³ Blanked out to protect Mr Shafiq's privacy.

⁴ *The Laws of Australia*, ¶ 166, 241 – 166, 242 and cases cited there.

him on public interest grounds. As indicated above, Mr Shafiq was granted a RPBV by the Minister on public interest grounds under section 195A.

9. Having given careful consideration to the Committee's views, and in light of the factors explained in the above paragraphs, including the fact that Mr Shafiq now has an RPBV and is no longer in immigration detention, the Australian Government does not accept the Committee's view recommending that Mr Shafiq be paid compensation pursuant to article 2(3)(a).
10. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.