Advance Edited Version

Distr.: General
12 May 2022

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022

Opinion No. 28/2022 concerning Mr. A., whose name is known to the Working Group on Arbitrary Detention (Australia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,[1] on 30 November 2021 the Working Group transmitted to the Government of Australia a communication concerning Mr. A. The Government submitted a late response on 7 March 2022. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the case.

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Mr. A. is an Iraqi citizen born in 1982. He holds an Iraqi national identity card.

a. Arrest and detention

5. According to the source, Mr. A. arrived in Australia by boat, on 24 December 2012, to seek asylum. As an unauthorized maritime arrival and an unlawful non-citizen, he was immediately detained upon arrival by the Department of Home Affairs in Australia.

6. While the source assumes that a warrant or other decision by a public authority was shown to Mr. A. upon his arrest, it notes that no document is available. The source refers to the Migration Act 1958, which provides that unlawful non-citizens must be detained and kept in detention until they are removed or deported from Australia or are granted a visa (sects. 189 (1), 196 (1) and 196 (3)). Mr. A. was refused a visa and, as an unlawful non-citizen, was automatically detained and placed in administrative detention. On 11 January 2013, Mr. A. was transferred to Nauru. He is reported to have applied for asylum through the status resolution process in Nauru.

7. The source explains that, following a fire in Nauru on 18 August 2013, Mr. A.'s records were destroyed, and he was afforded the possibility of recommencing his status resolution process in Australia, which he accepted. He was then transferred to Australia.

8. On 18 April 2016, bars under sections 46A and 46B of the Migration Act 1958 were lifted and Mr. A. was invited to apply for a protection visa. He submitted his protection visa application to the Department of Home Affairs, dated 23 August 2016 and received on 9 September 2016. His application was rejected on 21 April 2017 and the Department referred its decision to the Immigration Assessment Authority, which upheld the Department's decision on 31 May 2017. On 20 June 2017, Mr. A. requested a judicial review of the Immigration Assessment Authority's decision by the Federal Circuit Court. A request for ministerial intervention on Mr. A.'s behalf under section 48B of the Migration Act 1958 was rejected on 20 August 2019.

9. The source notes that, on 18 December 2019, the Federal Circuit Court postponed the final hearing date for the judicial review of the Immigration Assessment Authority's decision and rescheduled it to a later date, to be confirmed.

10. According to the source, in his original visa application, Mr. A. claimed that he had fled Iraq because of his Sunni background, which put him at imminent danger of persecution in a Shia-majority country.

11. The source indicates that hospital records proved that he was attacked, as per his claims, but that these records were lost in the fire in Nauru, in mid-2013. After seven years of detention and severe mental health issues (including self-harm, inter alia involving him sewing his lips together), and with the support of his partner, Mr. A. disclosed that he had fled Iraq owing to his sexual orientation.

12. The source explains that, on 7 November 2019, Mr. A. submitted new information to the Department of Home Affairs, setting out his claim of same-sex attraction and relationship, which the Department classifies as a request for ministerial intervention. On 16 December 2019, the request was refused under section 195A of the Migration Act.

13. The source explains that Mr. A. did not originally disclose his sexual orientation as he was unaware of the general acceptance in Australia of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community. As he was held in male-only shared accommodation in Nauru and in Australia, he did not initially feel comfortable disclosing his sexual orientation while in detention, even to officials of the Department of Home Affairs with obligations of confidentiality. He was reportedly worried that he might be harmed by other detainees and guards while in detention. In this regard, the source stresses that LGBTQI asylum seekers experience more and worse harassment and abuse than other detainees in detention centres. Further, it is noted that detention staff can fail to protect LGBTQI asylum

seekers from abuse as they often lack understanding of LGBTQI issues and can display discriminatory and biased behaviour towards them.

14. In the view of the source, Mr. A.'s situation highlights the difficulties faced by LGBTQI asylum seekers, who are initially too afraid to disclose their LGBTQI status in their protection visa applications and are then found not to be credible when they subsequently do so. The source also notes that during interviews, LGBTQI individuals are often asked extremely personal and sexual questions, which equates LGBTQI attraction with sex, as opposed to love, care or other types of attraction. Accordingly, the source stresses that it is almost impossible to prove a protection claim based on persecution relating to a person's LBGTQI status, to the satisfaction of the Department of Home Affairs.

15. The source notes that the High Court of Australia ruled that the mandatory detention of non-citizens is not contrary to the Constitution.[2] As such, the source alleges that Mr. A. has no chance of his detention being subject to real judicial review. The source also stresses the Human Rights Committee's finding that there is no effective remedy for people subject to mandatory detention in Australia.[3]

16. According to the source, Mr. A. was first detained for approximately two and a half weeks, from 24 December 2012 until 11 January 2013, in Nauru. He was then transferred to Australia, where he was detained for seven months, from 11 January to 18 August 2013. From 18 August 2013, he was detained in Melbourne Immigration Transit Accommodation in Victoria, Australia, for a period of approximately six and a half years. The source submits that the Department of Home Affairs is responsible for all periods of detention, as the Government of Australia is responsible for the detention in Nauru of persons seeking asylum in Australia.

17. The source recalls that the majority of transferees from Nauru and Manus Island, Papua New Guinea, have been granted bridging visas, including the right to work, or residence placements. The source also notes the release from detention of almost all, if not all, others in Mr. A.'s situation, who recommenced their status resolution process in Australia, following the fire in Nauru. Mr. A. is allegedly one of the last transferees to remain in detention, regardless of the reason for the transfer.

18. The source notes that despite the fact that almost three years have passed since Mr. A. filed an appeal before the Federal Circuit Court, no court date has been set for the final hearing. The source recalls that section 196 (3) of the Migration Act 1958 specifically provides that a court cannot release an unlawful non-citizen unless the person has been granted a visa.

19. Reportedly, Mr. A. is currently detained in Yongah Hill Immigration Detention Centre, located in a fairly remote part of Western Australia. Following the outbreak of the global coronavirus disease (COVID-19) pandemic, Western Australia has not yet reopened its borders to the rest of Australia and no visitors are allowed in the detention centre owing to COVID-19 restrictions. As such, Mr. A. has had no external visitors for almost two years. Mr. A. is reportedly able to speak to his legal counsel over the phone.

20. According to the source, in January 2021, Mr. A. filed an unlawful detention claim with the Federal Court. However, it had not been heard by the time the High Court overturned the judgment of the Federal Court in *AJL20 v. Commonwealth of Australia*, in which the Federal Court had found that an asylum seeker had been unlawfully held in immigration detention for more than two years.[4] The source informed the Working Group that Mr. A.'s legal team is currently in the process of discontinuing his case.

21. The source reports that Mr. A.'s claim has been "finally determined" and that the Department of Home Affairs refuses to reopen his protection claim process to examine his sexual orientation claims. As such, Mr. A. faces the risk of being deported back to Iraq.

[2] High Court of Australia, *Al-Kateb v. Godwin*, (2004) 219 CLR 562, Order, 6 August 2004.

[3] The source refers to Human Rights Committee, *C. v. Australia* (CCPR/C/76/D/900/1999).

[4] Federal Court of Australia, *AJL20 v. Commonwealth of Australia*, [2020] FCA 1305, Judgment, 11 September 2020.

b. Legal analysis

22. The source submits that Mr. A.'s detention is arbitrary under categories I, II, III, IV and V.

i. Category I

23. The source argues that Mr. A.'s detention is mandated under section 189 of the Migration Act 1958, which provides that unlawful non-citizens must be detained. This position is also supported by case law.

24. The source submits that Mr. A. did not originally disclose his sexual orientation as a basis for his asylum request because he was unaware of the general acceptance in Australia of the LGBTQI community, that he was uncomfortable disclosing his sexual orientation while in detention in male-only shared accommodation, and that he was worried that he might be harmed by other detainees and guards. After seven years of detention and severe mental health issues, and with the support of his partner, Mr. A. finally disclosed that he had fled Iraq owing to his sexual orientation.

25. The source reports that Mr. A.'s situation highlights the difficulties faced by other LGBTQI asylum seekers, who are initially too afraid to disclose their LGBTQI status in their protection visa applications and are then found not to be credible when they eventually do so. The source reiterates that it is extremely difficult for LGBTQI asylum seekers to prove a protection claim based on persecution relating to a person's LBGTQI status, to the satisfaction of the Department of Home Affairs.

26. Further, the source affirms that Mr. A. has no chance of his detention being subject to real judicial review, given that the High Court has ruled that the mandatory detention of non-citizens is not contrary to the Constitution. The source submits that, accordingly, and as the Human Rights Committee has stated, there is no effective remedy for people subject to mandatory detention in Australia.

27. For these reasons, the source argues that Mr. A.'s detention is arbitrary under category I.

ii. Category II

28. According to the source, Mr. A. was deprived of his liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights, and in contravention of article 26 of the Covenant, which protects individuals' right to the equal protection of the law without discrimination.

29. The source reports that according to the Department of Home Affairs, immigration detention facilities "are used as a last resort and for a very small proportion of the people whose status requires resolution, sometimes through protracted legal proceedings".[5] The source submits that this principle was not applied to Mr. A., who was immediately detained upon arrival in Australia.

iii. Category III

30. The source first notes the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, according to which immigration detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.

31. In this regard, the source reports that Mr. A. has been held in administrative detention for more than seven years and remains in detention to this day. The source submits that there is no mechanism under Australian law to challenge such detention because it is authorized under the Migration Act 1958 and by case law.

[5] Australia, Department of Home Affairs, *Annual Report 2018–19* (Canberra, 2019), p. 22.

iv. Category IV

32. The source argues that, as an asylum seeker, Mr. A. was reportedly subjected to administrative custody and was not afforded the possibility of administrative or judicial review or remedy.

33. In relation to the second period of detention, in Nauru, the source affirms that, even if a judicial remedy was available, the Government of Australia denies that Australian courts have jurisdiction over individuals detained in Nauru or on Manus Island, Papua New Guinea.

v. Category V

34. Lastly, the source claims that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. In this regard, the source recalls the decision of the High Court to the effect that section 189 of the Migration Act 1958 is constitutional. The source argues that the effective result of that decision is that while citizens can challenge administrative detention, non-citizens cannot.

Response from the Government

35. On 30 November 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 31 January 2022, detailed information about the current situation of Mr. A. and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Australia under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure Mr. A.'s physical and mental integrity.

36. On 6 December 2021, the Government requested an extension in accordance with paragraph 16 of the Working Group's methods of work, which was granted, with a new deadline of 2 March 2022.

37. On 7 March 2022, the Government submitted its reply. This reply was submitted late, despite the extension period already granted by the Working Group. Consequently, the Working Group cannot accept the reply as if it was presented within the time limit.

Further comments from the source

38. On 7 March 2022, the late reply of the Government was transmitted to the source. On 24 March 2022, the source submitted further comments, in which it reiterated its original submission.

Discussion

39. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

40. In determining whether the deprivation of liberty of Mr. A. is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.[6] In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

Category I

41. The Working Group observes that the present case is the latest in a long line of cases that it has been asked to consider in recent years in relation to Australia. This case, which follows the same pattern as those that preceded it, is the eighteenth case since 2017 concerning the same issue, namely mandatory immigration detention in Australia under the

[6] A/HRC/19/57, para. 68.

Migration Act 1958.[7] The Working Group once again reiterates its views on the Migration Act.[8]

42. As in each of those previous instances, the Working Group reiterates its alarm at the rising number of cases emanating from Australia concerning the implementation of the Migration Act 1958 that are being brought to its attention. The Working Group is equally alarmed that in all these cases the Government has argued that the detention is lawful purely because it follows the stipulations of the Migration Act.

43. The Working Group once again wishes to emphasize that such arguments can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that the State has undertaken. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations. To accept otherwise would be to make a mockery of international human rights law.

44. The Working Group wishes to emphasize that it is the duty of the Government to bring its national legislation, including the Migration Act 1958, into line with its obligations under international human rights law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[9] the Committee on Economic, Social and Cultural Rights,[10] the Committee on Elimination of Discrimination against Women,[11] the Committee on the Elimination of Racial Discrimination,[12] the Special Rapporteur on the human rights of migrants[13] and the Working Group.[14] The Working Group is concerned that the unison voice of so many independent, international human rights mechanisms should be disregarded, and calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law, without delay.

45. Noting this and the numerous occasions on which the Working Group and other United Nations human rights bodies and mechanisms have alerted Australia to the affront to its obligations under international human rights law that the Migration Act 1958 poses, and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. A. under the said legislation is arbitrary under category I as it violates article 9 (1) of the Covenant. Domestic law that violates international human rights law, and which has been brought to the attention of the Government on so many occasions by international human rights mechanisms, cannot be accepted as a valid legal basis for detention, especially noting the findings of the Working Group under categories II and V below.

Category II

46. The Working Group observes that the present case involves an individual who has spent nearly 10 years in various detention settings in Australia and Nauru. Mr. A. arrived in Australia by boat, on 24 December 2012, to seek asylum. He was immediately detained upon arrival by the Department of Home Affairs and has remained in detention ever since.

[7] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021 and No. 69/2021.

[8] Opinion No. 35/2020, paras. 98–103.

[9] CCPR/C/AUS/CO/6, paras. 33–38.

[10] E/C.12/AUS/CO/5, paras. 17–18.

[11] CEDAW/C/AUS/CO/8, para. 53.

[12] CERD/C/AUS/CO/18-20, paras. 29–33.

[13] See A/HRC/35/25/Add.3.

[14] For example, opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 112–117; No. 74/2019, paras. 75–80; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.

47. Notwithstanding the Working Group's views and findings about the Migration Act 1958 and its compatibility with the obligations of Australia under international human rights law (see above), the Working Group observes that it is not disputed that Mr. A. remains detained today based on the provisions of the Migration Act. The source argues that Mr. A. is detained under the Migration Act purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights. While the Government, in its late reply, does not contest that the detention of Mr. A. is due to his migratory status, it nevertheless argues that such detention is strictly in accordance with the Migration Act.

48. The Working Group has consistently maintained that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees of 1951 and the 1967 Protocol thereto. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.[15]

49. Indeed, Mr. A. arrived in Australia on 24 December 2012 and was immediately detained. Since then, he was briefly transferred to Nauru and then sent back to Australia, where he remains detained today. His detention in Australia is characterized by various visa applications, their rejections and appeals against the rejections. Mr. A. has been detained for nearly 10 years and has become very unwell, apparently owing to his prolonged detention. The Working Group notes in particular that, in its late response, the Government has made no indication as to when Mr. A.'s detention would cease.

50. As the Working Group has explained, in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.[16]

51. This echoes the views of the Human Rights Committee, which, in paragraph 18 of its general comment No. 35 (2014), has argued the following:

> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

52. In the present case, Mr. A. was detained immediately upon arrival and has remained in detention for nearly 10 years, spending time in various detention facilities in Australia. It is clear to the Working Group that when Mr. A. was initially detained, the Government did not engage in the assessment of the need to detain him and there was no attempt to ascertain if a less restrictive measure would have been suited to his individual circumstances, as required by international law. In fact, throughout his time in Australia, there has never been any attempt by the Australian authorities to do so. The Working Group cannot accept that detention for nearly 10 years could be described as a "brief initial period", to use the language of the Human Rights Committee. Furthermore, the Government, in its late reply, has not presented any particular reason specific to Mr. A., such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would have justified his detention.

53. These failures by the Government lead the Working Group to conclude that there was no other reason for detaining Mr. A. but the fact that he was seeking asylum and arrived in Australia without a visa, therefore being subjected to the automatic immigration detention policy of Australia under the Migration Act 1958. The Working Group therefore concludes that Mr. A. was detained as a result of the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

[15] See, for example, opinions No. 28/2017, No. 42/2017 and No. 35/2020.
[16] A/HRC/39/45, annex, para. 12.

54. Furthermore, while the Working Group agrees with the argument presented by the Government, in its late reply, in relation to article 26 of the Covenant, it must nevertheless highlight that, in the same general comment cited by the Government, the Human Rights Committee also makes it clear that aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof, and that aliens have the full right to liberty and security of person.[17]

55. Mr. A. is therefore entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and, when guaranteeing this right to him, Australia must ensure that this is done without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. A. is subjected to de facto indefinite detention due to his immigration status, in clear breach of article 2, in conjunction with article 9, of the Covenant.

56. Consequently, noting that Mr. A. has been detained as a result of the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government, in its late reply, that Mr. A. has always been treated in accordance with the stipulations of the Migration Act 1958. Be that as it may, as noted above, such treatment is not compatible with the obligations that Australia has undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

Category IV

57. The source has argued that Mr. A. has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government, in its late reply, denies these allegations, arguing that persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court.

58. The Working Group recalls that, according to the 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, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[18] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[19] and to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to migration detention.[20]

59. The facts of Mr. A.'s case since his detention on 24 December 2012, as presented to the Working Group, are characterized by various visa applications, their rejections and challenges to these rejections. However, as the Working Group has already observed, none of them has concerned the necessity to detain Mr. A. or indeed the proportionality of such detention to his individual circumstances. Rather, they assessed the claims of Mr. A. against the legal framework set out by the Migration Act 1958. As is evident by the Working Group's examination above, the Migration Act is incompatible with the obligations of Australia under international law and therefore assessments carried out in accordance with the Migration Act are equally incompatible with the requirements of international law.

60. The Working Group therefore concludes that during the nearly 10 years of his detention, no judicial body has ever been involved in the assessment of the legality of Mr. A.'s detention, noting that international human rights law requires that such consideration by a judicial body necessarily involve the assessment of the legitimacy, necessity and proportionality to detain.[21]

61. In this connection, the Working Group must once again reiterate that indefinite detention of individuals in the course of migration proceedings cannot be justified and is

[17] Human Rights Committee, general comment No. 15 (1986), paras. 2 and 7.
[18] A/HRC/30/37, annex, paras. 2–3.
[19] Ibid., para. 11.
[20] Ibid., para. 47 (a).
[21] A/HRC/39/45, annex, paras. 12–13.

arbitrary,[22] which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings be set by legislation and, upon the expiry of the period for detention set by law, the detained person be automatically released.[23] There cannot be a situation whereby individuals are caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. Such a situation is akin to indefinite detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.[24] As the Working Group has stated, in its revised deliberation No. 5:

> There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement,[25] or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.[26]

62. The Working Group also recalls the numerous findings of the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[27] Moreover, as the Working Group has noted in its revised deliberation No. 5, detention in migration settings must be exceptional and, in order to ensure this, alternatives to detention must be sought.[28] In the case of Mr. A., the Working Group has already established that, since his detention on 24 December 2012, no alternatives to his detention have been considered.

63. Moreover, despite the claims of the Government to the contrary, the Working Group opines that the detention of Mr. A. is in fact punitive in nature which, as it highlighted in its revised deliberation No. 5, should never be the case.[29] Mr. A. has been detained for nearly 10 years, without a charge or a trial in what was clearly a punitive detention, in breach of article 9 of the Covenant.

64. Mr. A. has now been detained for nearly 10 years and the Government, in its late reply, was unable to identify how long his detention would last, which means that the detention of Mr. A. is de facto indefinite. Consequently, the Working Group finds that Mr. A. is subjected to de facto indefinite detention due to his migratory status without the possibility of challenging the legality of his detention before a judicial body, a right encapsulated in article 9 (4) of the Covenant. His detention is therefore arbitrary, falling under category IV. In making this finding, the Working Group once again emphasizes the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.[30]

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[22] Ibid., para. 18, and see opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020; see also A/HRC/13/30, para. 63.

[23] A/HRC/39/45, annex, para. 25; see also A/HRC/13/30, para. 61; and opinion No. 7/2019.

[24] See opinions No. 1/2019 and No. 7/2019.

[25] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3; and Convention relating to the Status of Refugees, art. 33.

[26] A/HRC/39/45, annex, para. 27. See also A/HRC/7/4, para. 48; A/HRC/10/21, para. 82; A/HRC/13/30, para. 63; and opinion No. 45/2006.

[27] See Human Rights Committee, *C. v. Australia*, *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001), *Shafiq v. Australia* (CCPR/C/88/D/1324/2004), *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004), *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002), *D et al. v. Australia* (CCPR/C/87/D/1050/2002), *Nasir v. Australia* (CCPR/C/116/D/2229/2012) and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[28] A/HRC/13/30, para. 59; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; A/HRC/30/36/Add.1, para. 81; E/CN.4/1999/63/Add.3, para. 33; and opinions No. 72/2017 and No. 21/2018.

[29] A/HRC/39/45, annex, paras. 9 and 14. See also opinion No. 49/2020, para. 87.

[30] See Human Rights Committee, *C. v. Australia*, *Baban and Baban v. Australia*, *Shafiq v. Australia*, *Shams et al. v. Australia*, *Bakhtiyari et al. v. Australia*, *D et al. v. Australia*, *Nasir v. Australia* and *F.J. et al. v. Australia*.

Category V

65. The Working Group notes the source's argument that Mr. A., as a non-citizen, appears to be in a different situation from Australian citizens in relation to his ability to effectively challenge the legality of his detention before the domestic courts and tribunals, owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government, in its late reply, denies those allegations, arguing that in the cited case the High Court held that provisions of the Migration Act 1958 requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

66. The Working Group remains perplexed by the explanation provided repeatedly by the Government in relation to the High Court's decision in that case,[31] as it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

67. However, as the Working Group has repeatedly noted, the Government fails to explain how such non-citizens can effectively challenge their continued detention given the decision of the High Court, which is what the Government must do in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee, which has examined the implications of the High Court's judgment in *Al-Kateb v. Godwin* and concluded that the effect of that judgment is such that there is no effective remedy to challenge the legality of continued administrative detention.[32]

68. In the past, the Working Group has concurred with the views of the Human Rights Committee on the matter,[33] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. A. is arbitrary, falling under category V.

Concluding remarks

69. The Working Group wishes to place on record its very serious concern over the state of Mr. A.'s mental and physical health, which has severely deteriorated following the nearly 10 years of his detention, which the Working Group has established to be indefinite arbitrary detention. The Working Group reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty be treated with respect for their human dignity and that this also applies to those held in the context of immigration detention. As the Working Group has explained in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity, and the conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.[34] The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

70. The Working Group is also disturbed at the source's allegations regarding the interviews to which Mr. A. and others LGBTQI asylum seekers are subjected in Australia, which appear to clearly discourage asylum seekers from disclosing their LGBTQI status. The Working Group is mindful of the failure of the Government to address these allegations in

[31] Opinions No. 21/2018, para. 79; No. 50/2018, para. 81; No. 74/2018, para. 117; No. 1/2019, para. 88; No. 2/2019, para. 98; No. 74/2019, para. 72; No. 35/2020, para. 95; No. 70/2020, para. 113; and No. 17/2021, para. 121.

[32] See Human Rights Committee, *C. v. Australia*; *Baban and Baban v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia*; *Bakhtiyari et al. v. Australia*; *D et al. v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*, para. 9.3.

[33] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021 and No. 69/2021.

[34] A/HRC/39/45, annex, para. 38.

its late reply. The Working Group refers the case to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, for appropriate action.

71. The Working Group also wishes to emphasize that in the light of the outbreak of COVID-19, it has called upon States to note the underlying conditions of detention as especially conducive to the spread of the disease. As the Working Group has highlighted in its deliberation No. 11, detention in the context of migration is only permissible as an exceptional measure of last resort, which is a particularly high threshold to be satisfied in the context of a pandemic or other public health emergency.[35] The Working Group calls upon the Government to release Mr. A. in the prevailing circumstances and especially noting the trauma that he has suffered as a result of the years of detention to which he has already been subjected.

72. The Working Group welcomes the Government's invitation of 27 March 2019 for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed owing to the worldwide pandemic, the Working Group looks forward to carrying out the visit as soon as practically possible. It views the visit as an opportunity to engage with the Government constructively, including with regard to its offshore detention facilities, and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

73. The Working Group wishes to emphasize that the findings in the present opinion concern the immigration detention of Mr. A. in Australia only and is adopted without prejudice to any other proceedings concerning his time spent in Nauru.

Disposition

74. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mr. A., being in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

75. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. A. without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

76. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. A. immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Mr. A.

77. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. A. and to take appropriate measures against those responsible for the violation of his rights.

78. The Working Group requests the Government to bring its laws, particularly the Migration Act 1958, into conformity with the recommendations made in the present opinion and with the commitments made by Australia under international human rights law.

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, for appropriate action.

[35] A/HRC/45/16, annex II, para. 23.

80. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

81. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. A. has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. A.;

(c) Whether an investigation has been conducted into the violation of Mr. A.'s rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

82. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

83. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

84. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[36]

[*Adopted on 5 April 2022*]

[36] Human Rights Council resolution 42/22, paras. 3 and 7.