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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. 33/2022 concerning Wissam Jadiri (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 15 December 2021 the Working Group transmitted to the Government of Australia a communication concerning Wissam Jadiri. The Government replied to the communication on 16 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. Wissam Jadiri is a Feyli Kurdish man, born in Basrah, Iraq, in 1977. He holds a white card issued by the Iranian Office for Foreigners and Immigrants, which he obtained following his deportation to the Islamic Republic of Iran.

5. According to the source, Mr. Jadiri's father and uncle were jailed multiple times from 1979 to 1981, before and after Saddam Hussein's Decree No. 666 of May 1980, which legalized and ordered the confiscation of property and the forced deportation and detention of Feyli Kurds. In 1981, as a 4-year-old, Mr. Jadiri was reportedly jailed with his family in Basrah Prison for seven months and in Baghdad Prison for 11 months. The source details the constant violence, abuse and torture that Mr. Jadiri suffered while there.

6. The source explains that, in 1982, Mr. Jadiri and his family were deported to the Islamic Republic of Iran and forced to live in a detention camp run by the Red Cross and then the Ministry of the Interior, until an amnesty enabled them to leave. The family's recorded date of departure is 2 January 1994, when Mr. Jadiri was 16 years old.

a. Arrest and detention

7. According to the source, the Royal Australian Navy arrested Mr. Jadiri on 17 August 2013, in Australian territorial waters, north of Darwin, for entering Australia by boat without authorization. The arresting officers did not show a warrant or other decision from a public authority, but they were identifiable by their uniform and the markings on their ship. The source notes that the arrest decision was issued by the Department of Immigration and Citizenship (subsequently subsumed into the Department of Home Affairs).

8. The source reports that Mr. Jadiri arrived in Australian territorial waters on a boat travelling from Indonesia, on or about 15 August 2013. The boat was reportedly intercepted by the Australian Navy and Mr. Jadiri was taken to Christmas Island on 17 August 2013 and held in North-West Point Immigration Detention Centre. Mr. Jadiri has reportedly been held in closed detention since 17 August 2013.

9. According to the source, over the course of his detention, Mr. Jadiri has been frequently transferred between North-West Point and Yongah Hill Immigration Detention Centres for medical treatment and "operational reasons".

10. In March 2015, Mr. Jadiri was reportedly transferred to Casuarina Prison for 10 days, after breaking a window at Yongah Hill Immigration Detention Centre. Mr. Jadiri allegedly witnessed guards forcibly restraining and assaulting an older detainee in the centre's recreation area for more than five minutes. The compound gates being locked, Mr. Jadiri broke a window in frustration and distress. He was advised to plead guilty and was convicted and released without a sentence, on condition of good behaviour for six months and the payment of a reparation fine of 820.60 Australian dollars.

11. The source further explains that in November 2015, Mr. Jadiri was transferred from North-West Point Immigration Detention Centre, on Christmas Island, to Casuarina Prison, and then to Albany Prison, after riots erupted following the death of his close friend. Mr. Jadiri was reportedly charged with spitting at a guard and spent eight months in prison during the investigations of the riots. He was reportedly advised to plead guilty and given a good behaviour bond of 12 months.

12. The source reports that Mr. Jadiri is being detained by the Department of Home Affairs in Yongah Hill Immigration Detention Centre, 100 kilometres north-east of Perth, in Western Australia. The source notes that, in 1997, various aspects of the operation of Australian onshore detention centres were privatized, and that service provision is currently primarily contracted to Serco, for security and garrison services, and International Health and Medical Services, for medical services.

13. According to the source, Mr. Jadiri was arrested on the basis of the Migration Act 1958, which specifically 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)). Section 196 (3) provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa. The source explains that for a person to be able to apply for protection, they must first be invited to do so under section 46A of the Migration Act, a process often referred to as "lifting the bar". Further, for relief from detention to be granted ahead of a protection decision, the Minister must lift the bar under section 195A of the Migration Act. The source adds that Mr. Jadiri remains detained as an unauthorized maritime arrival and an unlawful non-citizen under the Migration Act.

14. Over the course of Mr. Jadiri's detention, his case managers have filed numerous bridging visa applications for ministerial consideration under section 195A of the Migration Act 1958. All applications have reportedly been rejected.

15. On 17 August 2013, upon his arrival in Australia, Mr. Jadiri was reportedly barred from applying for a visa under section 46A of the Migration Act 1958, until 29 September 2015, when the Minister lifted the bar. On 14 March 2017, the Department of Home Affairs rejected Mr. Jadiri's application for a safe haven enterprise visa and advised him that the decision had been referred to the Immigration Assessment Authority.

16. On 23 March 2017, the Immigration Assessment Authority advised Mr. Jadiri that the Department of Home Affairs had provided all documents that it considered relevant to his case, though these documents were not identified. The Immigration Assessment Authority stated that a decision would be made on the basis of that material, unless it decided "to consider new information", but that this could only happen "in limited circumstances". On 12 May 2017, Mr. Jadiri reportedly received a letter from the Immigration Assessment Authority affirming the Department's decision, on the basis of the material referred by the Secretary under section 473CB of the Migration Act 1958. The source notes that the material was not particularized. The Department allegedly identified the material provided to the Immigration Assessment Authority only when Mr. Jadiri sought judicial review of the latter's decision, in 2017. It included 48 pages of material relating to his behaviour in detention, unspecified investigations into security issues, and the fact that he had been considered for release from detention on a bridging visa E "on several occasions". The source reports that Mr. Jadiri has never seen or had a chance to respond to these documents.

17. Further, the source explains that on 8 November 2017, the Federal Circuit Court dismissed Mr. Jadiri's application for judicial review of the decision by the Immigration Assessment Authority. On 21 September 2018, the Federal Court dismissed Mr. Jadiri's appeal. However, on 13 December 2019, the High Court of Australia upheld his appeal on the grounds of apprehended bias and quashed the 2017 decision by the Immigration Assessment Authority. Reportedly, the judgment directed that irrelevant and prejudicial material be removed from Mr. Jadiri's file, which should then be returned to a differently constituted review panel of the Immigration Assessment Authority. On 19 December 2019, Mr. Jadiri received a letter from the Immigration Assessment Authority, noting that his case had been remitted to it for reconsideration and that Mr. Jadiri's submissions had been received.

18. On 15 January 2020, the Immigration Assessment Authority contacted Mr. Jadiri's counsels, informed them of the High Court's judgment and invited them to comment on it. The judgment reportedly contained extensive references to the existence of irrelevant and prejudicial material in Mr. Jadiri's file. The source notes that between 20 January and early February 2020, the Immigration Assessment Authority and Mr. Jadiri's counsels corresponded to address the issue of the breach by the Department of Home Affairs of the High Court's orders and what it meant for the progress of the review. On 26 November 2021, the Federal Court held that the second instance of sharing irrelevant and prejudicial information with the Immigration Assessment Authority constituted a choice by the Secretary. The Federal Court's decision was reserved and is expected within weeks.

19. The source further reports that, on 4 February 2020, the Immigration Assessment Authority affirmed the decision of the Department of Home Affairs to deny Mr. Jadiri a protection visa. Another application for a bridging visa was filed but, given the Immigration Assessment Authority's refusal in 2020 to recognize Mr. Jadiri's refugee status, the source notes that it is unclear on what basis such a visa would be granted.

20. The source explains that, under section 195A of the Migration Act 1958, a detainee waiting for the outcome of an immigration application and appeal is eligible for relief from detention at the Minister's discretion. While Mr. Jadiri has filed several such applications during his detention, all have been refused without justification. Reportedly, despite the success of his High Court action on 13 December 2019, Mr. Jadiri has still received no response to his bridging visa application that was referred to the Minister on or after 23 December 2019.

21. The source notes that, on the morning of 23 December 2020, Mr. Jadiri met with his case manager who confirmed that a further bridging visa application had been referred to the Minister. In February 2021, Mr. Jadiri's partner received confirmation that the referral had met ministerial guidelines and would be reviewed by the Minister. However, on 15 December 2021, the Minister declined to intervene.

22. According to the source, Mr. Jadiri's medical records with International Health and Medical Services detail his mental health upon his arrival in Australia in 2013. It reportedly includes diagnoses of complex post-traumatic stress disorder, detention fatigue, anxiety and chronic grief within weeks and months of his arrival. The source notes that the behavioural issues detailed in Mr. Jadiri's detention records are consistent with symptoms of complex post-traumatic stress disorder, including difficulties with emotional regulation, destructive or risky behaviour, loss of trust in others, dissociation and difficulty concentrating. The source observes that the Department of Home Affairs did not make a connection with his diagnosis with complex post-traumatic stress disorder until his High Court submission in 2019, in which it was noted, under the heading "Behaviour", that Mr. Jadiri had a history of aggressive and/or challenging behaviour when engaging with the Department, possibly attributable to frustration from being held in detention or to his mental health conditions.

23. The source reports that the debilitating impact of detention on Mr. Jadiri, especially when confronted with handcuffs and aggressive behaviour by guards, was outlined in regular correspondence and representations over a three-year period (2017–2020) by specialized legal and medical professionals to all levels of the immigration bureaucracy – from detention administration through to the Minister – and to regulatory bodies including the Commonwealth Ombudsman, the Red Cross and the Australian Human Rights Commission. Reportedly, in 2019 the correspondence included a request for ministerial intervention, a complaint to the Australian Human Rights Commission under the Disability Discrimination Act 1992, and an investigation into a personal injury claim (excessive use of force) by the Public Interest Advocacy Centre.

24. Additionally, the source reports that, in December 2020, Mr. Jadiri's torture and trauma counsellor informed him that she could no longer assist him due to the severity of his symptoms, which include visual and auditory hallucinations. The counsellor reportedly referred him to a psychiatrist but, after one appointment, Mr. Jadiri refused a prescription by International Health and Medical Services staff of high-dose antipsychotics and antidepressants by depot injection, asserting that his detention was the main issue and that medication would be "worse than the voices".

25. The source observes that Mr. Jadiri remains in detention despite having raised extensive concerns about the damage of closed detention on his mental and physical health.

26. The source submits that Mr. Jadiri is stateless and unable to return voluntarily or involuntarily to Iraq, which refuses to recognize him as a citizen. Further, owing to the deteriorating security situation in Iraq, Mr. Jadiri's family reportedly moved to a more secure location and resides in a small apartment with no room for an additional person. The source adds that, as it is Feyli Kurdish, Mr. Jadiri's family remains vulnerable to persecution and discrimination.

27. Further, the source alleges that Australian law and policy do not have targeted and effective measures to deal humanely with stateless people. Reportedly, an increasing number of stateless people are detained in Australia, with no legal mechanisms to secure their release.

b. Legal analysis

i. Category I

28. According to the source, because the ministerial powers under section 195A of the Migration Act 1958 are non-compellable and non-reviewable, there is no correspondence or other feedback that outlines the reasons for keeping Mr. Jadiri in closed detention against the advice and recommendations of medical and legal professionals.

29. The source reports that Mr. Jadiri has been held in Western Australia, including Christmas Island, since July 2016. Mr. Jadiri has reportedly made multiple requests to be relocated to Melbourne, where his partner, an Australian citizen, lives with her children. However, these requests and independent expert recommendations have all been denied, despite several reports by mental health professionals who have treated and/or assessed Mr. Jadiri and a report by a trauma psychologist who had treated his partner for 18 months.

30. The source argues that, given these recommendations and the length of Mr. Jadiri's detention, there is no reasonable explanation as to why he cannot reside in the community with his partner.

31. In its judgment of 13 December 2019, the High Court reportedly established "reasonable apprehension of bias" when it found that the review of Mr. Jadiri's protection visa decision in 2017 had been "infected" with irrelevant and prejudicial information that had been shared with the Immigration Assessment Authority by the Secretary of the Department of Home Affairs, contrary to section 473CB (1) (c) of the Migration Act 1958. Allegedly, despite the High Court's specific instructions, the Department of Home Affairs once again shared irrelevant and prejudicial information with the Immigration Assessment Authority. On 4 February 2020, the Immigration Assessment Authority upheld the rejection by the Department of Home Affairs of Mr. Jadiri's application for a safe haven enterprise visa.

32. The source therefore submits that Mr. Jadiri's detention is arbitrary under category I.

ii. Category II

33. The source argues that Mr. Jadiri was deprived of his liberty because of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights. The source contends that Mr. Jadiri came to Australia in 2013 to seek asylum after a lifetime of persecution, initially as an "enemy of the State", under Saddam Hussein's Decree No. 666, and then in the Islamic Republic of Iran, where he lived from the ages of 6 to 36 years, through the deprivation of basic rights, such as access to a driver's licence, insurance, tertiary education and public-sector employment.

34. The source further submits that Mr. Jadiri has been deprived of his rights to equal protection under the law, without discrimination, as enshrined under article 26 of the Covenant.

35. The source notes that according to the Department of Home Affairs, immigration detention facilities "are used as a last resort and for a very small proportion of people whose status requires resolution, sometimes through protracted legal proceedings".[2] The source submits that this principle does not accord with section 189 of the Migration Act 1958, which requires the detention of unlawful non-citizens.

36. The source stresses that, in a case review in March 2016, despite Mr. Jadiri's history of trauma and mental health conditions having been recorded within weeks of his arrival in Australia, the Department of Home Affairs considered that Mr. Jadiri's involvement in various incidents while in detention was a barrier to the resolution of the case. However, in 2019, the Minister had reportedly argued in a submission to the High Court that the character-related information shared with the Immigration Assessment Authority was not in fact prejudicial.

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

37. In this regard, the source notes that a reference in the case file to Mr. Jadiri being "no longer of interest to Det Intel" was characterized as being "positive in character",[3] and that a reference to Mr. Jadiri having been interviewed by the National Security Monitoring Section included nothing about why that interview had been held, and so could not lead to any inference on the part of a reasonable observer. The source also stresses that references to investigations into a riot on Christmas Island did not specify that Mr. Jadiri himself was under investigation, and a reference to his history of aggressive or challenging behaviour was explained with reference to Mr. Jadiri's mental health.

38. The source therefore submits that Mr. Jadiri's detention is arbitrary under category II.

iii. Category III

39. According to the Human Rights Committee, in its general comment No. 35 (2014), on liberty and security of person, immigration detention must be justified as reasonable, necessary and proportionate in the light of the circumstances, and reassessed as it extends in time.

40. The Minister has personal discretion to provide relief from detention at any point, but has reportedly not chosen to do so, even following the success of Mr. Jadiri's High Court appeal. Given that Mr. Jadiri's counsel made particular mention of his clean detention record at a meeting on 23 December 2019, the source argues that his detention is not warranted or proportionate.

41. Further, the source submits that there is no evidence that an independent assessment of the appropriateness of Mr. Jadiri's detention, as it extends in time, has been undertaken.

42. The source therefore submits that Mr. Jadiri's detention is arbitrary under category III.

iv. Category IV

43. The source submits that, while the Minister may provide relief from detention to asylum seekers under section 195A of the Migration Act 1958, Mr. Jadiri has been consistently denied such relief. His most recent bridging visa application was reportedly referred to the Minister in December 2019, but no response has been received.

44. Additionally, the source underlines that the High Court has held that the mandatory detention of non-citizens is not contrary to the Constitution,[4] despite the Human Rights Committee having held that people subject to mandatory detention in Australia have no effective remedy.[5]

45. The source therefore submits that Mr. Jadiri's detention is arbitrary under category IV.

v. Category V

46. The source contends that citizens and non-citizens are not equal before Australian courts and tribunals. The source recalls the 2004 decision of the High Court in *Al-Kateb v. Godwin* to the effect that detention of non-citizens pursuant to section 189 of the Migration Act 1958, inter alia, does not contravene the Constitution. As a result of that decision, Australian citizens are able to challenge administrative detention, while non-citizens are not.

47. The source therefore concludes that Mr. Jadiri's detention is arbitrary under category V.

[3] The High Court noted in its judgment that there was "no identification of what, exactly, 'Det Intel' referred to". High Court of Australia, *CNY17 v. Minister for Immigration and Border Protection*, [2019] HCA 50, Order, 13 December 2019, para. 81.

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

[5] See Human Rights Committee, *C. v. Australia* (CCPR/C/76/D/900/1999).

Response from the Government

48. On 15 December 2021 the Working Group transmitted the source's allegations to the Government under its regular communications procedure. The Working Group requested that the Government provide, by 14 February 2022, detailed information about the current situation of Mr. Jadiri and 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. Jadiri's physical and mental integrity.

49. On 22 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 16 March 2022.

50. On 16 March 2022, the Government submitted its reply. It explains that Mr. Jadiri is an Iraqi national who entered Australia by sea on 17 August 2013, without a visa. As a result, he became an unauthorized maritime arrival, as defined in section 5AA of the Migration Act 1958, and was detained under section 189 of the Migration Act. Mr. Jadiri is currently being held at Yongah Hill Immigration Detention Centre.

51. Throughout his detention, Mr. Jadiri has allegedly been involved in 37 incidents of abusive and aggressive behaviour and 15 incidents of minor damage to Commonwealth property, and has been recorded as the alleged offender of 12 minor assaults against staff and/or other detainees. Mr. Jadiri was also involved in seven incidents of illicit substance abuse and possession of drug-related contraband.

52. On 20 March 2015, Mr. Jadiri reportedly caused damage to property during a major disturbance in Yongah Hill Immigration Detention Centre. Upon referral to the Australian Federal Police, Mr. Jadiri pleaded guilty to "destroying or damaging Commonwealth property" and was transferred to Casuarina Prison from 20 March until 28 March 2015. He was convicted and sentenced under section 20 (1) (a) of the Crimes Act 1914 to a six-month good behaviour bond with a personal recognizance of 500 Australian dollars and a reparation order of $820.60 dollars.

53. On 23 May 2017, the Department of Home Affairs commenced a ministerial intervention process for Mr. Jadiri's case to be assessed against guidelines on section 195A of the Migration Act 1958 for referral to the Minister. On 21 July 2017, Mr. Jadiri's case was deemed to meet the guidelines.

54. On 29 September 2015, the bar on section 46A of the Migration Act 1958 was lifted, allowing Mr. Jadiri to make a valid application for a temporary protection visa or a safe haven enterprise visa.

55. On 9 November 2015, Mr. Jadiri allegedly spat on a staff member at North-West Point Immigration Detention Centre, on Christmas Island, and was charged with "engaging in conduct without consent, causing harm to a Commonwealth Public Official because of status or duties as Official". He was transferred to Casuarina Prison from 13 November 2015 until 5 July 2016. On 18 November 2016, he was found guilty and given a three-month suspended prison sentence, with a 12-month good behaviour bond. He was released under paragraph 20 (1) (b) of the Crimes Act 1914.

56. On 14 March 2017, his application for a safe haven enterprise visa was rejected on the basis that his case did not engage the protection obligations of Australia, under section 65 of the Migration Act 1958. The Immigration Assessment Authority and the Federal Court upheld the decision on 12 May and 8 November 2017 respectively. On 21 September 2018, Mr. Jadiri's appeal to a full bench of the Federal Court was dismissed. However, on 17 May 2019, the High Court granted him special leave to appeal.

57. On 26 October 2017 and 29 August 2019 respectively, the then Minister for Immigration and Border Protection and the Minister for Home Affairs declined to intervene to grant Mr. Jadiri a bridging visa E.

58. On 13 December 2019, the High Court ordered the Immigration Assessment Authority to reconsider its decision. Upon reconsideration, on 4 February 2020, the

Immigration Assessment Authority affirmed its refusal to grant Mr. Jadiri a safe haven enterprise visa.

59. On 22 June 2020 and 22 April 2021, the Department of Home Affairs assessed Mr. Jadiri's case and found that it did not meet the guidelines for referral for ministerial intervention under sections 195A or 197AB of the Migration Act 1958.

60. On 19 May 2021, the Federal Circuit Court dismissed Mr. Jadiri's request for a review of the Immigration Assessment Authority's decision. The Federal Court dismissed Mr. Jadiri's appeal on 16 December 2021. The Government notes that the deadline for Mr. Jadiri to file an application for special leave to the High Court has passed, and Australia will therefore progress his removal. It is noted that his removal to Iraq will likely be protracted owing to delays in obtaining travel documents and to international travel restrictions.

61. The Government reports that Mr. Jadiri has no ongoing matters before the Department of Home Affairs.

62. Turning to Mr. Jadiri's health, the Government notes that the Department of Home Affairs continues to prioritize the health and safety of all persons in immigration detention. Health examinations are routinely conducted by the International Health and Medical Services to monitor detainees' health and welfare. Psychological consultations are also undertaken as necessary to assess and monitor the mental health of detainees. Detainees have access to external scrutiny bodies that oversee the operations of immigration detention facilities.

63. The Department of Home Affairs is reportedly aware of Mr. Jadiri's mental health conditions, including his complex post-traumatic stress disorder, past history of torture and trauma, prolonged detention syndrome, anxiety, depression and grief. International Health and Medical Services provided Mr. Jadiri with a psychiatrist and a torture and trauma counsellor while in detention, and Mr. Jadiri has reported that his torture and trauma counselling sessions twice a week have been helpful. Mr. Jadiri also engaged with the specialized counselling services from the Association for Services to Torture and Trauma Survivors. Reportedly, and contrary to the source's claims, International Health and Medical Services received no documentation from his torture and trauma counsellor stating that "she could no longer assist him due to the severity of his symptoms" and never prescribed Mr. Jadiri any depot injection. The Government submits that Mr. Jadiri has a history of non-compliance with medication and declined antidepressant therapy in January 2017.

64. On 2 August 2017, a mental health nurse, of International Health and Medical Services, noted that Mr. Jadiri was showing signs of detention fatigue as he had had intrusive thoughts and poor sleep, and discussed coping techniques with him.

65. In late August 2017, Mr. Jadiri reported to a psychologist various symptoms, which, in a follow-up review, the general practitioner identified as a likely result of post-traumatic stress disorder. Medications were commenced to alleviate some of these symptoms.

66. The Government explains that Mr. Jadiri was further examined on 7 May 2018, following possible seizure activity and his noted anxiety, and the psychiatrist noted that he had dependent personality traits. The general practitioner referred him for a psychiatric assessment in September 2018.

67. According to the Government, Mr. Jadiri declined to attend several of his appointments with the International Health and Medical Services psychiatrist and with the Association for Services to Torture and Trauma Survivors, and refused antidepressant medication treatment and psychotropic medication that he had been prescribed. His medication was reportedly ceased in November 2020 as Mr. Jadiri refused to take it, despite having been informed of its potential beneficial effects and the need for consistency.

68. The Government reports that International Health and Medical Services schedules a routine mental health screening every three months, and that Mr. Jadiri did not attend his appointments in December 2021 or February 2022. Mr. Jadiri's mental health continues to be monitored by the mental health and primary health teams of International Health and Medical Services. He will continue to be offered routine mental health assessment

appointments in accordance with his life care plan. Mr. Jadiri is aware of the self-referral process should he require additional support.

69. The Government submits that the universal visa system of Australia requires that all non-citizens hold a valid visa to enter and/or remain in Australia. Under section 189 of the Migration Act 1958, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Under section 196, unlawful non-citizens must be kept in immigration detention until they are removed from Australia or granted a visa. Section 195A enables the Minister to grant a visa to a person in immigration detention if the Minister considers that it is in the public interest to do so, and section 197AB authorizes the Minister to make a residence determination to allow a person in immigration detention to reside in the community at a specified place and under specified conditions, again if the Minister considers that it is in the public interest. What is in the public interest is a matter for the Minister to decide. Ministerial intervention is not an extension of the visa process and occurs only where cases meet established ministerial guidelines. The Minister's powers under sections 195A and 197AB of the Migration Act are non-delegable and non-compellable.

70. The Government assesses valid applications for a protection visa. The domestic legislation of Australia – namely the Migration Act 1958 – and its policies and practices reflect its non-refoulement obligations under the Convention relating to the Status of Refugees and the 1967 Protocol thereto, the Covenant and the Second Optional Protocol there, aiming at the abolition of the death penalty, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

71. Where a valid visa application is refused for not meeting the criteria, the petitioner may have that decision reviewed through the domestic judicial processes in Australia. The Government recalls that the High Court remitted Mr. Jadiri's matter to the Immigration Assessment Authority for reconsideration, and that the Immigration Assessment Authority affirmed the refusal to grant a safe haven enterprise visa. The refusal decision was further upheld by the Federal Circuit Court and the Federal Court. Accordingly, the Government notes that the Immigration Assessment Authority's decision was comprehensively reviewed through the domestic judicial processes.

72. The Government argues that the immigration detention of an individual because they are an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary and proportionate in the light of the individual's particular circumstances, the determining factor being whether the grounds for the detention, rather than the length of the detention, are lawful and justifiable. Under the Migration Act 1958, detention is not limited by a set time frame, but is dependent on a number of factors based on individualized circumstances, including identity determination, developments in country information, and health, character or security matters. The Government notes that immigration detention is a last resort for the management of unlawful non-citizens.

73. According to the Government, Mr. Jadiri is being lawfully detained in an immigration centre as he is an unlawful non-citizen without a visa. Based on his individual circumstances, immigration detention is considered the most appropriate form of detention. This position has been reviewed twice through referral for consideration for a ministerial intervention under the Migration Act 1958.

74. As an unauthorized maritime arrival, Mr. Jadiri is prohibited under section 46A of the Migration Act 1958 from making a valid visa application and will not be settled in Australia, in accordance with government policy.

75. The Government notes that immigration detention is administrative in nature and not punitive. The Government is committed to ensuring that all individuals in immigration detention are treated in accordance with the legal obligations of Australia. The Government argues that Mr. Jadiri's detention while the Department of Home Affairs handles his removal is justifiable and not arbitrary, and is consistent with the Covenant.

76. Furthermore, the Government explains that under section 486N of the Migration Act 1958, the Secretary of the Department of Home Affairs is required to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who

have been in immigration detention for a cumulative period of two years and every six months thereafter. The Ombudsman prepares independent assessments of such individuals' circumstances and provides the Minister with a report under section 486O of the Migration Act. The Ombudsman may make recommendations to the Minister or the Department regarding the individual's detention. The Department has reported on Mr. Jadiri on 13 occasions, with the most recent report sent to the Ombudsman on 3 September 2021.

77. The Government notes that a person in immigration detention may seek judicial review of the lawfulness of his or her detention before the Federal Court or the Hight Court of Australia, in accordance with paragraph 75 (v) of the Constitution and section 39B (1) of the Judiciary Act 1903.

78. The Government argues that in *Al-Kateb v. Godwin*, the High Court held that provisions of the Migration Act 1958 requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The Government submits that the decision in *Al-Kateb v. Godwin* does not alter a non-citizen's ability to challenge the lawfulness of his or her detention under Australian law. The Government adds that non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus.

79. The Government denies that Mr. Jadiri was detained as a result of the exercise of his rights under article 14 of the Universal Declaration of Human Rights. The Government submits that the Universal Declaration of Human Rights does not create legally binding obligations. Nevertheless, Mr. Jadiri is being detained because he is an unlawful non-citizen, as required by section 189 of the Migration Act 1958, and not as a consequence of having sought protection.

80. Article 26 of the Covenant provides that all people are entitled to equal protection under the law without any discrimination. The Government notes that the object of the Migration Act 1958 is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. The purpose of the Migration Act is therefore to differentiate, on the basis of nationality, between non-citizens and citizens. As the Human Rights Committee has noted:

> The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatments and respect for family life arise. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment.[6]

81. The Government submits that it is a matter for it to determine, consistent with its obligations under international law, who may enter its territory and under what conditions, including by requiring that a non-citizen hold a visa in order to lawfully enter and remain in Australia. In circumstances where a visa is not held, a non-citizen is subject to immigration detention.

82. The Government submits that, to the extent that there is differential treatment of citizens and non-citizens in that citizens are not subject to immigration detention, this differential treatment is not discriminatory or inconsistent with article 26 of the Covenant because it is aimed at achieving a purpose that is legitimate, based on reasonable and objective criteria, and that is proportionate to the aim sought.

83. The Government submits that the differential treatment of citizens and non-citizens under the Migration Act 1958 legitimately aims at ensuring the integrity of the migration programme in Australia, assessing the security, identity and health of unlawful non-citizens and protecting the Australian community, consistent with articles 12 and 13 of the Covenant. The Government argues that such differentiation is reasonable because it is consistent with those aims and no more restrictive than required.

[6] Human Rights Committee, general comment No. 15 (1986), para. 5.

84. According to the Government, Australia, as a party to the core international human rights treaties, takes steps to respect, protect, promote and fulfil the right to non-discrimination. However, the Government argues that equality and non-discrimination do not require identical treatment of all persons in all circumstances, and that not all differences in treatment constitute discrimination under international human rights law. The Government submits that the treatment of Mr. Jadiri amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant.

85. The Government therefore submits that Mr. Jadiri's immigration detention is lawful and is reasonable, necessary and proportionate in the light of the circumstances. Mr. Jadiri is therefore lawfully detained under section 189 of the Migration Act 1958, consistent with the international obligations of Australia.

Further comments from the source

86. On 16 March 2022 the reply of the Government was sent to the source for further comments, which the source submitted on 24 March 2022. The source rejects the Government's reply as incompatible with the obligations of Australia under international human rights law and reiterates its original submission that Mr. Jadiri's detention is arbitrary under international law.

Discussion

87. The Working Group thanks the source and the Government for their submissions.

88. In determining whether Mr. Jadiri's deprivation of liberty of 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 the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[7]

Category I

89. 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 and those that preceded it, is the twentieth case since 2017 concerning the same issue, namely mandatory immigration detention in Australia under the Migration Act 1958.[8] The Working Group once again reiterates its views on the Migration Act.[9]

90. 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.

91. 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.

92. 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

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

[8] 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, No. 69/2021, No. 28/2022 and No. 32/2022.

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

repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[10] the Committee on Economic, Social and Cultural Rights,[11] the Committee on Elimination of Discrimination against Women,[12] the Committee on the Elimination of Racial Discrimination,[13] the Special Rapporteur on the human rights of migrants[14] and the Working Group.[15] 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.

93. 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. Jadiri 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

94. The Working Group observes that the present case involves an individual who has spent nearly 10 years in various detention settings in Australia since 17 August 2013. Mr. Jadiri arrived in Australian waters on 17 August 2013. He was intercepted by the Navy and taken to Christmas Island, where he was detained as an illegal maritime arrival. While he has been mostly detained in immigration detention facilities, he has also spent some time in various prisons owing to a number of incidents that occurred while he was being detained in immigration detention facilities. The Working Group notes the source's description of these events, which have not been not contested by the Government.

95. Notwithstanding the Working Group's views and findings regarding 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. Jadiri remains currently detained based on the provisions of the Migration Act. The source argues that Mr. Jadiri 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 does not contest that the detention of Mr. Jadiri is due to his migratory status, it nevertheless argues that such detention is strictly in accordance with the Migration Act.

96. 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.[16]

97. Indeed, Mr. Jadiri arrived in Australia on 17 August 2013, was immediately detained, and remains detained to this day, nearly 10 years later. His detention in Australia is characterized by various visa applications, their rejections and appeals against the rejections. Mr. Jadiri's prolonged detention, of nearly 10 years, has reportedly left him very unwell.

[10] CCPR/C/AUS/CO/6, paras. 33–38.
[11] E/C.12/AUS/CO/5, paras. 17–18.
[12] CEDAW/C/AUS/CO/8, para. 53.
[13] CERD/C/AUS/CO/18-20, paras. 29–33.
[14] See A/HRC/35/25/Add.3.
[15] 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.
[16] See, for example. opinions No. 28/2017, No. 42/2017 and No. 35/2020.

98. The Working Group notes in particular that the Government has made no indication as to when Mr. Jadiri's detention would cease, but has made clear that it would be "protracted" owing to challenges associated with securing travel documents. In this regard, the Working Group notes with concern the source's submission that Mr. Jadiri is in fact a stateless person, which the Government has chosen not to address. This leads the Working Group to conclude that "protracted" may be equated with "indefinite" in the present case, as it would clearly be impossible to obtain travel documents for Mr. Jadiri from Iraq, which does not recognize him as its citizen.

99. 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.[17]

100. This echoes the views of the Human Rights Committee, which, in its general comment No. 35 (2014), 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.

101. In the present case, Mr. Jadiri 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. Jadiri 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, the Australian authorities have never attempted 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 has not presented any particular reason specific to Mr. Jadiri, 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.

102. These failures by the Government lead the Working Group to conclude that there was no other reason for detaining Mr. Jadiri 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. Jadiri was detained as a result of the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

103. Furthermore, while the Working Group agrees with the Government's argument in relation to article 26 of the Covenant, it must nevertheless highlight that the Human Rights Committee, in the same general comment as cited by the Government, 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.[18]

104. Mr. Jadiri is therefore entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and Australia must ensure that he is guaranteed this right without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Jadiri 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.

105. Consequently, noting that Mr. Jadiri has been detained as a result of the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and

[17] A/HRC/39/45, annex, para. 12.
[18] Human Rights Committee, general comment No. 15 (1986), paras. 2 and 7.

articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary under category II. In making this finding, the Working Group notes the Government's submission that Mr. Jadiri 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

106. The source argues that Mr. Jadiri has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government 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 and that the case of Mr. Jadiri has been reviewed by the Commonwealth Ombudsman 13 times.

107. 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.[19] This right, which is a peremptory norm of international law, applies to all forms and situations of deprivation of liberty,[20] including not only to detention for purposes of criminal proceedings but also to migration detention.[21]

108. The facts of Mr. Jadiri's case, as presented to the Working Group, are characterized by various visa applications, their rejections and challenges to these rejections since his detention on 17 August 2013. However, as the Working Group already observed, none of them has concerned the necessity to detain Mr. Jadiri or indeed the proportionality of such detention to his individual circumstances. Rather, they assessed Mr. Jadiri's claims 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.

109. The Government has argued that the case of Mr. Jadiri is being periodically reviewed by the Commonwealth Ombudsman. However, the Government has not explained how such a review satisfies the requirement of article 9 (4) of the Covenant for a review of the legality of detention by a judicial body. The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention, as clearly stipulated by the Government itself.

110. The Government has also argued that the relevant minister has reviewed the detention of Mr. Jadiri. Once again, noting that this is a review by an executive body, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

111. 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. Jadiri'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.[22]

112. 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 arbitrary,[23] 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

[19] A/HRC/30/37, annex, paras. 2–3.
[20] Ibid., para. 11.
[21] Ibid., para. 47 (a).
[22] A/HRC/39/45, annex, paras. 12–13.
[23] 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.

the period for detention set by law, the detained person be automatically released.[24] 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.[25] 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,[26] 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.[27]

113. The Working Group also recalls the Human Rights Committee's numerous findings that the application of mandatory immigration detention in Australia and the impossibility of challenging such detention violate article 9 (1) of the Covenant.[28] 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.[29] In the case of Mr. Jadiri, the Working Group has already established that, since his detention on 17 August 2013, no alternatives to his detention have been considered.

114. Moreover, despite the Government's claims to the contrary, the Working Group opines that the detention of Mr. Jadiri is in fact punitive in nature which, as it highlighted its revised deliberation No. 5, should never be the case.[30] Mr. Jadiri 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.

115. Mr. Jadiri has now been detained for nearly 10 years and the Government was unable to identify how long his detention would last. Consequently, the Working Group finds that Mr. Jadiri 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 guaranteed under article 9 (4) of the Covenant. His detention is therefore arbitrary under category IV.

Category V

116. The source argues that the High Court's decision in *Al-Kateb v. Godwin* effectively places non-citizens such as Mr. Jadiri in a different situation from Australian citizens. According to that decision, while Australian citizens can challenge the legality of their administrative detention before domestic courts and tribunals, non-citizens cannot. In its reply, the Government denies those allegations, arguing that in the cited case the High Court upheld 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.

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

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

[26] Convention Against Torture, Article 3; Refugee Convention, Article 33.

[27] 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.

[28] 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).

[29] 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.

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

117. 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. 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]

118. 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. Jadiri is arbitrary under category V.

Concluding remarks

119. The Working Group wishes to place on record its very serious concern over the state of Mr. Jadiri's mental and physical health, which has severely deteriorated following the more than 10 years of his detention, which the Working Group has established to be indefinite arbitrary detention. Although the Working Group acknowledges the Government's extensive submissions concerning the health-care provision for Mr. Jadiri, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty, including those held in the context of immigration detention, be treated with respect for their human dignity. 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. 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.

120. Although the present opinion does not address Mr. Jadiri's detention in the criminal justice context and is adopted without prejudice to his guilt or otherwise in any criminal acts, the Working Group cannot help but be disturbed at the source's allegations over the various incidents in which Mr. Jadiri has been involved and for which he has been prosecuted. The source's submissions appear to indicate that at least some of these incidents were the result of provocation and altercations with officers in charge of the detention facility, which is run by a private company, allegations which the Government chose not to address. The Working Group recalls that even when the Government contracts out the running of its detention facilities to private companies, the Government is not absolved of its obligations in relation to all those detained.[34] The Working Group refers the case to the Working Group on the issue of human rights and transnational corporations and other business enterprises, for appropriate action.

121. The Working Group also wishes to emphasize that in the light of the coronavirus disease (COVID-19) outbreak, 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

[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, paras. 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.*; *D et al. v.*; *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, 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, No. 69/2021 and No. 28/2022.

[34] Revised Deliberation No 5 at para 46.

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. Jadiri 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.

122. 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 and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

> The deprivation of liberty of Wissam Jadiri, 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.

124. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Jadiri 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.

125. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Jadiri 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. Jadiri.

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

127. 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.

128. 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 Working Group on the issue of human rights and transnational corporations and other business enterprises, for appropriate action.

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

Follow-up procedure

130. 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. Jadiri has been released and, if so, on what date;

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

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

(c) Whether an investigation has been conducted into the violation of Mr. Jadiri'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.

131. 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.

132. 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.

133. 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 6 April 2022*]

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