Advance Edited Version

Distr.: General
16 June 2017

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 28/2017 concerning Abdalrahman Hussein (Australia)[1]

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 15 February 2017 the Working Group transmitted to the Government of Australia a communication concerning Abdalrahman Hussein. The Government has not replied to the communication in a timely manner. 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).

[1] In accordance with rule 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

Submissions

Communication from the source

4. Abdalrahman Hussein, born in 1987, is an asylum seeker of Syrian origin who usually resides at Villawood Immigration Detention Centre in Australia.

5. The source reports that on or about 15 November 2012, Mr. Hussein arrived in Australia by boat. On or about 16 January 2013, he was released into the community. The source advises that Mr. Hussein has been diagnosed with bipolar disorder and emotional distress and has psychotic episodes.

6. According to the source, on 12 January 2014 Mr. Hussein visited a massage spa. During the massage, he answered a phone call from his brother in the Syrian Arab Republic who informed him that their mother had been killed in a suicide attack there. Mr. Hussein became very agitated and stopped the massage. He asked for his money to be refunded. When this did not occur, he called the police.

7. When the police arrived, Mr. Hussein reportedly tried to explain to them why he was so upset. He did not speak English very well at that point, and the police did not understand Arabic. According to the source, the police therefore did not understand that Mr. Hussein was trying to explain that his mother had died in a suicide blast in the Syrian Arab Republic and instead thought that he was indicating that he was going to kill himself using a suicide vest. Mr. Hussein was therefore arrested by the police.

8. The source reports that Mr. Hussein was subsequently admitted for mental health reasons to St. Vincent's Hospital, 390 Victoria Street, Darlinghurst, New South Wales 2010. He was released later that night. On or about 13 January 2014, he was admitted to Bankstown Hospital, 68 Eldridge Rd, Bankstown, New South Wales 2200, for mental health reasons. On or about 15 January 2014, he was released from Bankstown Hospital.

9. According to the source, on or about 3 February 2014, Mr. Hussein was arrested by officials from the Department of Immigration and Border Protection on the basis of a detention order. He was subsequently transferred from an office of the Department of Immigration and Border Protection to Villawood Immigration Detention Centre.

10. According to the source, it is Mr. Hussein's understanding that he was detained due to the expiry of his visa. Prior to the expiry date of his visa, Mr. Hussein had reportedly notified the Department of Immigration and Border Protection that his visa was soon to expire, but he was told by the Department to wait for the Department to renew the visa. Mr. Hussein was informed that this was the usual procedure and that he could remain in the community. He was, however, detained, on or about 3 February 2014.

11. It is reportedly also Mr. Hussein's understanding that he remains in detention due to security concerns that the Department of Immigration and Border Protection has surrounding the events on 12 January 2014. However, Mr. Hussein has not been charged with any offence relating to those events.

12. According to the source, Mr. Hussein is being detained on the basis of the Migration Act 1958. The Act specifically provides, in sections 189 (1), 196 (1) and 196 (3), that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, it is specifically provided in section 196 (3) that even a court cannot release an unlawful non-citizen from detention (unless the person has been granted a visa).

13. The source considers that Mr. Hussein has been deprived of liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights, whereby "everyone has the right to seek and to enjoy in other countries asylum from persecution". The source thus submits that the detention of Mr. Hussein constitutes an arbitrary deprivation of his liberty, falling under category II of the categories applicable to the cases submitted for consideration by the Working Group.

14. The source also submits that the international norms relating to the right to a fair trial have not been observed in relation to the detention of Mr. Hussein, specifically those rights protected under articles 9 and 10 of the Universal Declaration of Human Rights and

under article 9 of the International Covenant on Civil and Political Rights. The source notes that the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, requires that detention "must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time".

15. In this respect, the source reports that Mr. Hussein was interviewed by the Australian Security Intelligence Organisation in December 2015, almost two years after he was detained. The Department of Immigration and Border Protection has reportedly informed Mr. Hussein that it has not received a decision from the Australian Security Intelligence Organisation regarding his security assessment. Given that the Australian Security Intelligence Organisation interviewed Mr. Hussein almost two years after his detention and still has not issued an assessment approximately six months after his interview, the source submits that this is an unacceptable period of time.

16. In addition, the Inspector-General of Intelligence and Security has reportedly reviewed the treatment of Mr. Hussein by Australia's security agencies (the Inspector-General of Intelligence and Security is unable to disclose which security agency) and has found irregularities (the Inspector-General of Intelligence and Security is unable to disclose what those irregularities are). The source believes that the irregularities relate to the period of time that it took the Australian Security Intelligence Organisation to interview Mr. Hussein, as well as the subsequent delay in producing a security assessment.

17. The source submits that given the time that has elapsed and the failure to reassess Mr. Hussein's case as it has extended in time, it cannot be said that his detention is reasonable, necessary and proportionate. Accordingly, the detention of Mr. Hussein constitutes an arbitrary deprivation of his liberty, falling under category III of the categories applicable to the cases submitted for consideration by the Working Group.

18. Furthermore, the source submits that Mr. Hussein, as an asylum seeker, who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

19. In this respect, the source notes that the High Court of Australia, in its decision in *Al-Kateb v. Godwin*, has upheld mandatory detention of non-citizens as a practice which is not contrary to the Constitution of Australia. The source also notes that the Human Rights Committee, in its decision on *C. v. Australia*, held that there was no effective remedy for people subject to mandatory detention in Australia. As such, Mr. Hussein lacks any chance of his detention being the subject of a real administrative or judicial review or remedy. Therefore, his detention constitutes an arbitrary deprivation of liberty, falling under category IV of the categories applicable to the cases submitted for consideration by the Working Group.

20. The source advises that Mr. Hussein was invited to apply for a temporary protection visa on 1 October 2015. This visa reportedly does not carry any rights to then apply for permanent residency. According to the source, Mr. Hussein was not provided with any legal assistance to complete the visa application at that time. More than eight months later, Mr. Hussein was provided with limited government-funded legal assistance to amend his application or lodge a new application. A visa application was subsequently lodged, on 27 June 2016. Reportedly, the Department of Immigration and Border Protection does not provide time frames within which visa applications are processed. Some asylum seekers wait for more than a year. Although Mr. Hussein is able to challenge the decision of the Department of Immigration and Border Protection relating to this visa application (when it is made), he is reportedly not able to challenge his detention.

21. The source reports that Mr. Hussein signed various documents relating to social security and so on sometime in August 2016. According to the source, this was a strong indication to Mr. Hussein that he would be released while his visa application was being processed. However, Mr. Hussein not only remains in detention but he has also been moved to Christmas Island, away from his support networks. The source underscores that the hope caused by the Department of Immigration and Border Protection asking him to sign documents indicating that he would be released is gradually turning into despair.

22. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin*, referred to above, is that while Australian citizens can challenge administrative detention, non-citizens cannot. The detention of Mr. Hussein thus constitutes an arbitrary deprivation of his liberty, falling under category V of the categories applicable to the cases submitted for consideration by the Working Group.

Response from the Government

23. On 15 February 2017, 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 17 April 2017, detailed information about the current situation of Abdalrahman Hussein and any comments on the source's allegations. The Working Group also requested the Government to clarify the legal provisions justifying his deprivation of liberty, as well as its compatibility with the Government's obligations under international human rights law, particularly treaties which Australia has ratified.

24. On 13 April 2017, the Government sought an extension of the deadline to submit its response. The Working Group did not grant such extension, as the request did not meet the requirement of paragraph 16 of its methods of work.

25. The Working Group notes that it received a response from the Government on 9 May 2017. However, the Working Group cannot accept the reply as if it had been presented within the time limit.

Discussion

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

27. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

28. The source has made a number of submissions arguing that the detention of Mr. Hussein is arbitrary and falls under categories II, III, IV and V of the categories applicable to the consideration of cases by the Working Group. The Working Group will consider these in turn.

29. The source argues and the Government of Australia has not contested that the detention of Mr. Hussein is arbitrary and falls under category II, since he has been deprived of liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights, whereby "everyone has the right to seek and to enjoy in other countries asylum from persecution", as well as by the Convention relating to the Status of Refugees, of 1951, and its 1967 Protocol.

30. The Working Group notes that Mr. Hussein is an asylum seeker of Syrian origin who has been living in Australia since 2012 and that since January 2013 he had been living in the community on the basis of a visa. He was, however, arrested on 3 February 2014 and remains in custody to date. The source argues that this detention was due to the expiry of his visa, but it is also of the view that it may have been due to an incident with the police on 12 January 2014.

31. The Working Group notes that the arrest of Mr. Hussein on 3 February 2014 was carried out on the basis of the detention order issued in relation to his immigration status. The Working Group accepts the submissions made by the source that Mr. Hussein had warned the authorities about the expiry of his visa but was reassured by the authorities that no action on his part was required. The Working Group also accepts that this raised legitimate expectations on the part of Mr. Hussein that, as a minimum, no action on his part was required in order to renew the visa, and indeed he had legitimate expectations that his

visa would be renewed as the authorities had not communicated anything to him to the contrary.

32. The Working Group reiterates 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 its 1967 Protocol. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.

33. The Working Group notes that detention in the course of proceedings for the control of immigration is not arbitrary per se. However, such detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[2] It must not be punitive in nature[3] and should be based on the individual assessment of each individual. In the present case, the Working Group concludes that Mr. Hussein was detained due to his exercise of the right to seek asylum, as no other explanation has been provided by the Government of Australia. Moreover, the Working Group concludes that this detention was due to the expiry of his visa, as no other explanation has been presented by the Government.

34. The Working Group is concerned at the significant lapse in time since the arrest of Mr. Hussein. More than three years have passed since his initial arrest and the Government still has not provided an explanation as to why his visa has not been renewed. On this basis, the Working Group concludes that the detention of Mr. Hussein is arbitrary and falls under category II.

35. The source has also argued that the detention of Mr. Hussein is arbitrary and falls under category III, as he remains in custody since his arrest on 3 February 2014 without any possibility of challenging the legality of his continued detention. The Government of Australia has not challenged these submissions.

36. The Working Group wishes to recall 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.[4] This right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,[5] and it applies to "all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention …".[6] Moreover, it applies "irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary."[7]

37. Mr. Hussein has been in detention since 3 February 2014 on the basis of the detention order that was issued on the same date. This is a case of an administrative detention of an asylum seeker and is not a case related to criminal proceedings. Since the date of his arrest, Mr. Hussein has not been able to challenge the continued legality of his detention which is his legitimate right in accordance with article 9 (4) of the Covenant. He has had no indication from the authorities about the progress of his case during this period of time, which now exceeds three years. This is a clear breach of article 9 (4) of the Covenant and the Working Group thus concludes that the detention of Mr. Hussein is arbitrary and falls under category IV and not category III as submitted by the source.

[2] See the Committee's general comment No. 35, para. 18.
[3] Ibid.
[4] See A/HRC/30/37, paras. 2 and 3.
[5] Ibid., para. 11.
[6] Ibid., para. 47 (a).
[7] Ibid., para. 47 (b).

38. The source has also argued that the detention of Mr. Hussein is arbitrary and falls under category V since, according to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The Working Group is aware of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin*, which effectively means that while Australian citizens can challenge administrative detention, non-citizens cannot.

39. The Working Group notes the numerous findings by the Human Rights Committee where 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.[8] The Working Group also notes that the effect of the decision of the High Court of Australia in the case of *Al-Kateb v. Godwin* is such that non-citizens have no effective remedy against their continued administrative detention. The Working Group further specifically notes the decision of the Human Rights Committee in *F.J. et al. v. Australia*. In that case, the Human Rights Committee examined the implications of the High Court's judgment in the case of *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 the continued administrative detention:

> "The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the *Plaintiff M47* case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted and that the communication is admissible with reference to article 5 (2) (b) of the Optional Protocol."[9]

40. The Working Group concurs with the views of the Human Rights Committee that the decision in *Al-Kateb v. Godwin* effectively means that non-citizens are unable to challenge the continued legality of their administrative detention. The Working Group therefore considers that the detention of Mr. Hussein is arbitrary, falling under category V, since there is no effective remedy for non-citizens to challenge the legality of their detention in Australia. The Working Group also underlines that this is discriminatory and contrary to articles 16 and 26 of the Covenant.

Disposition

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

> The deprivation of liberty of Abdalrahman Hussein, being in contravention of articles 2, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and of articles 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

42. Consequent upon the opinion rendered, the Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Hussein 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.

[8] See communications No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002; No. 1014/2001, *Baban et al. v. Australia*, Views adopted on 6 August 2003; No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006; Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004, *Shams et al. v. Australia*, Views adopted on 20 July 2007; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003; No. 1050/2002, *D and E and their two children v. Australia*, Views adopted on 11 July 2006; No. 2229/2012, *Nasir v. Australia*, Views adopted on 29 March 2016; and No. 2233/2013, *F.J. et al. v. Australia*, Views adopted on 22 March 2016.

[9] See *F.J. et al. v. Australia*, para. 9.3.

43. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hussein immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

Follow-up procedure

44. 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. Hussein has been released and, if so, on what date;

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

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

45. 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.

46. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

47. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.[10]

[*Adopted on 25 April 2017*]

[10] See Human Rights Council resolution 33/30, paras. 3 and 7.