Advance Edited Version

Distr.: General
10 January 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

Opinion No. 74/2018 concerning Ahmad Shalikhan (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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 30 July 2018 the Working Group transmitted to the Government of Australia a communication concerning Ahmad Shalikhan. The Government replied to the communication on 28 September 2018. 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 para. 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. Ahmad Shalikhan was born in 1997. He is a stateless person, as a Kurdish man born in Tehran to an Iraqi family who are undocumented in the Islamic Republic of Iran. Mr. Shalikhan's father is dead and his older brother arrived in Australia prior to Mr. Shalikhan and has been granted a visa.

5. Mr. Shalikhan usually resides at the Villawood Immigration Detention Centre, 15 Birmingham Ave, Villawood, NSW 2163, Australia.

Arrest and detention

6. According to the source, on 25 August 2013, Mr. Shalikhan arrived in Australia with his mother, Ms. Janabi, as passengers on board suspected illegal entry vessel 839 Wattsville as "illegal maritime arrivals" on Christmas Island in order to seek asylum. At the time, Mr. Shalikhan was approximately 16 years old and together with his mother was detained upon arrival by the Department of Home Affairs (then Department of Immigration and Border Protection). According to the source, it is likely that a document showing that Mr. Shalikhan must be detained was shown to his mother. However, no copy of this document is currently available.

7. Upon arrival, Mr. Shalikhan and his mother were immediately detained at Phosphate Hill alternative place of detention. On 28 February 2014, Mr. Shalikhan and his mother were transferred to the Perth immigration detention centre and on 28 March 2014, to Perth immigration residential housing.

8. On 15 May 2014, Mr. Shalikhan and his mother were referred to the Minister for Immigration and Border Protection for consideration under section 197AB of the Migration Act for a possible community detention placement. The referral reportedly indicated that the offshore processing centres did not currently have the services available to manage Mr. Shalikhan's significant mental health needs and there was no information suggesting that he or his family would pose a threat if placed in community detention.

9. The source reports that on 27 May 2014, Mr. Shalikhan was arrested and charged with two counts of assault on a public officer and one count each of common assault in circumstances of aggravation or racial aggravation and damaging property. On 7 January 2015, Mr. Shalikhan received a caution in court, where the court noted that "all criminal matters were finalized". Mr. Shalikhan was approximately 17 years old at the time of the incident.

10. On 19 June 2014, the Minister intervened under section 197AB of the Migration Act to allow Mr. Shalikhan and his mother to reside in community detention. The Minister further commented that they "should remain subject to transfer to Nauru, pending a further assessment within the next three months".

11. According to the source, on 1 August 2014, Mr. Shalikhan was transferred to the Banksia Hill detention centre and on 28 August 2014, the Minister revoked the community detention placement of Mr. Shalikhan and his mother under section 197AD of the Migration Act. Mr. Shalikhan was subsequently transferred back to the Perth immigration detention centre on 3 September 2014, then transferred, together with his mother, to Wickham Point alternative place of detention in Darwin for a short period, before being transferred back to the Perth immigration detention centre on 6 January 2015 for finalization of the criminal charges against him. Mr. Shalikhan and his mother were subsequently transferred back to Wickham Point alternative place of detention on 9 January 2015.

12. On 26 May 2015, the Department noted an "Advice from AFP (Australian Federal Police) – investigating incidents at PIRH (Perth Immigration Residential Housing) from 02–10 September 2014". On 1 June 2015, Mr. Shalikhan's case was reportedly "escalated to Centre Manager and Director, case management for weekly detention network placement meeting for transfer to an alternative facility in a larger city which offers the recommended support services for his known cognitive and behavioural vulnerabilities until outcome of ministerial submission is known."

13. On 24 July 2015, Mr. Shalikhan's case review noted that he had been "involved in 6 incidents since last review, 2 of those he was the perpetrator. He has presented [as] aggressive and argumentative on one occasion this month, when case manager ended their interaction early due to his unwillingness to cooperate. His last meeting with case manager was calm, quiet and [he] listened after his mother advised him to stop and listen."

14. On 17 August 2015, the incidents referred to in paragraph 9 above were reportedly detailed as "threatened self-harm, behaved aggressively, damaged Commonwealth property and assaulted a number of officers at PIRH". The source notes that no further action appears to have been taken with regard to those incidents.

15. The source reports that on 29 September 2015, the Minister intervened, lifting the bar under section 46A of the Migration Act to allow Mr. Shalikhan to lodge an application for a valid temporary protection visa or safe haven enterprise visa (subclass 790). On 12 November 2015, the Department invited Mr. Shalikhan to lodge such an application.

16. According to the source, Mr. Shalikhan's case review, dated 16 November 2015, stated that his "ongoing behavioural issues are a barrier to a community release".

17. On 8 December 2015, the Department notified Mr. Shalikhan that he was eligible to receive assistance from the Primary Application and Information Service in lodging an application for a temporary protection or safe haven enterprise visa. Mr. Shalikhan accepted the offer on 18 December 2015 and the Department assigned him a case worker from the Service.

18. On 25 December 2015, Mr. Shalikhan's case review stated that he "was placed on a behaviour management program (BMP) 4/12/2015 after another incident in the compound. His behaviour can change from one meeting to the next."

19. The source emphasizes that in numerous reviews of Mr. Shalikhan's case the authorities stated that he needed close monitoring. For example: "The case has complex barriers and vulnerabilities which present a clear risk to the detainee and prevention of status resolution. This detainee requires frequent contact from case management to ensure effective communication of options and key messages. A high level of stakeholder engagement is afforded" and "This case has been assigned the acuity of 4 – significant. This case requires scheduled detainee contact multiple times a month. This detainee demonstrates little self-agency and requires active support to engage necessary processes and services. The case manager is involved in meetings/case conferences to confirm strategies for managing identified barriers/vulnerabilities."

20. By 2016, Mr. Shalikhan's behaviour had reportedly improved. According to his case review of 11 February 2016, "Mr. Shalikhan was well behaved and engaged well" during his and his mother's meeting with the case manager, although he "appeared somewhat agitated particularly when addressing schooling. He asked about schooling and stated that he wanted to go back to school so that he could complete his studies."

21. The source reports that on 26 February 2016, Mr. Shalikhan's protection claims were considered against new and updated information available to the Department and it was considered that reassessment of his protection claims were warranted. He was thus issued with a qualified security assessment.

22. On 29 February 2016, Mr. Shalikhan's 30-month detention review noted that he had "been referred to the External Agency for investigation in relation to national security concerns". That was after he allegedly made national security threats to a consultant on 18 March 2015. However, the nature of those threats has not been specified. In his case review of 26 May 2015, Mr. Shalikhan remained a "person of interest to the National Security and Serious Crimes Reporting Team (NSSCRT) and Detention Intelligence". On 20 July 2015, the National Security and Serious Crimes Reporting Team confirmed that they were no longer actively monitoring Mr. Shalikhan.

23. On 31 March 2016, Mr. Shalikhan applied for a safe haven enterprise visa as a dependant on his mother's application and on 26 April 2016, he attended an interview with the Department in relation to his visa application. On 26 May 2016, the Department advised

Mr. Shalikhan that his Bridging E (subclass 050) visa application, associated with his visa application, was invalid.

24. According to the source, on 20 June 2016, Mr. Shalikhan was subsequently notified by the Department of the refusal of his safe haven enterprise visa application. On 23 June 2016, Mr. Shalikhan's case was referred to the Immigration Assessment Authority for review of the Department's decision.

25. On 7 July 2016, Mr. Shalikhan was reportedly transferred with his mother to Villawood immigration detention centre in Sydney. He was placed in a single room and had a Serco[1] officer with him at all times. His mother was placed in a different compound, but they were able to see each other daily on the community area.

26. The source reports that following his transfer to Villawood, Mr. Shalikhan appeared "to have improved his behavioural issues and is engaging with the International Health and Medical Services (IHMS) for his mental health as well as taking medications. He has recently had excursions refused and in response to this has made a threat of running away if he was ever allowed on excursions. He remains frustrated at what he feels is a lack of progression in his case and believes the current case manager is responsible for this".[2]

27. On 11 July 2016, the Immigration Assessment Authority reportedly remitted Mr. Shalikhan's safe haven enterprise visa application back to the Department with a direction that he was a refugee within the meaning of section 5 H (1) of the Migration Act. According to the source, this implies that Mr. Shalikhan was found to be owed protection by Australia as a refugee and under the complementary protection criteria.

28. On 28 July 2016, Mr. Shalikhan's case review noted that he was undergoing health and character checks for his safe haven enterprise visa application. His case had been escalated with the processing area owing to his mental health issues. The option of his placement in an alternative place of detention, at which Serco was in charge of the care and security arrangements, was considered, however, not acceptable in the light of his risk rating, incident history and severe behavioural issues.

29. According to the source, on 5 August 2016, Mr. Shalikhan was issued a letter requesting further information regarding his character. The temporary protection visa processing area advised that his case might be referred to the Visa Applicant Character Consideration Unit for assessment of a possible visa refusal under section 501 of the Migration Act owing to Mr. Shalikhan's "convictions at Juvenile Court whilst in detention". In that respect, the source states that Mr. Shalikhan has never been convicted of a crime and he was only ever issued with a caution in court as a 16-year-old minor, with no formal punishment or custodial sentence (see para. 9 above). His case was subsequently referred to the Visa Applicant Character Consideration Unit for refusal consideration under section 501 of the Migration Act on 7 September 2016.

30. The source reports that on 11 August 2016, Mr. Shalikhan's mother was granted community detention and she was placed in community detention on 22 August 2016.

31. On 4 November 2016, a community protection assessment tool was reportedly conducted and Mr. Shalikhan was recommended for community detention subject to the outcome of his character assessment under section 501 of the Migration Act.

32. In that respect, the source notes that under section 501 of the Migration Act, the Minister may refuse to issue a visa if he or she believes that the person applying does not meet the character requirements as set out in that section. Owing to Mr. Shalikhan's behavioural issues, he was issued a qualified security assessment by the Australian security forces.

33. On 2 December 2016, Mr. Shalikhan's case was referred to the Complex Cancellations team by the Visa Applicant Character Consideration Unit in an effort to speed

[1] Serco is a global company that supports Governments around the world in the delivery of essential public services, including in the area of immigration.

[2] The source adds that this statement was repeated in his case reviews of 6 December 2016 and 6 January, 3 February, 14 March, 20 April and 16 May 2017.

up the processing, as the Complex Cancellations team reportedly has the clearance and ability to review Mr. Shalikhan's qualified security assessment. According to the source, there are no time frames associated with the referral.

34. On 5 December 2016, Mr. Shalikhan's mother was granted a five-year safe haven enterprise visa. The source submits that in finding that Mr. Shalikhan was initially owed protection and in granting such a visa to his mother, Australia has recognized the family's refugee status and that any return to their country of birth would constitute refoulement. However, unlike his mother, Mr. Shalikhan has not been granted a safe haven enterprise visa owing to concerns about his character.

35. According to his case review of 6 December 2016, Mr. Shalikhan's community detention referral under section 197AB of the Migration Act was finalized on 30 September 2015 as not referred. No mention was made of the referral on 4 November 2016 (see para. 31 above). It was also noted that "Mr. Shalikhan has a Serco officer placed with him from 8 a.m.–8 p.m. daily; this was recently reduced from 24 hours per day to encourage more self-management and Mr. Shalikhan appears to be adjusting well to this change." The situation remained the same in his case review of 6 January 2017.[3]

36. On 30 January 2017, the Complex Cancellations team advised that Mr. Shalikhan's case was being considered under section 501 of the Migration Act.

37. On 2 February 2017, the Department referred Mr. Shalikhan to the Australian Federal Police following an incident on 1 February 2017, during which he allegedly threatened a departmental officer. According to the source, no further details of the incident are available.

38. On 20 April 2017, Mr. Shalikhan was issued with a notice of intention to consider refusal of the grant of a safe haven enterprise visa and he was given 28 days to respond. On 18 May 2017, Mr. Shalikhan's legal representatives submitted a response to the notice of intention.

39. As of the date of the submission by the source, Mr. Shalikhan is awaiting a decision on the submission to the notice of intention to consider refusal. The source states that the outcome of this step will determine if Mr. Shalikhan is granted a visa and released into the community or if he is denied a visa and thus remains in detention. Mr. Shalikhan's lawyers have been in regular contact with the Department regarding the time frame within which the decision will be made. However, no time frame has been given.

Health concerns

40. According to the source, Mr. Shalikhan has suffered significant mental health problems since a young age, which have been exacerbated by his lengthy time in detention as a child and a young adult.

41. According to a Department report dated 14 May 2014, "the Department's health service provider, IHMS, advise that Master Shalikhan has been diagnosed with attention deficit hyperactivity disorder and hyperkinetic conduct disorder. He was hospitalized in February 2014 for suicidal ideation and pseudo-psychotic symptoms. He was referred to a clinical and forensic psychologist for further management of his impulsive behavioural problems and to a psychiatrist for ongoing monitoring. He remains on a psychological support programme due to chronic risk of harm to self and others." The report also noted that "the psychiatrist advises that remaining in his current confined environment is exacerbating his mental health" and that "Master Shalikhan has been involved in a series of behavioural incidents while held in detention, including incidents of self-harm and threats of self-harm, alleged physical assaults, and abusive and aggressive behaviour."

42. According to Mr. Shalikhan's case review dated 2 June 2015, "he appears as increasingly agitated. Incident of abusive/aggressive behaviour on 1 June 2015 indicative of his special needs/support required for self-regulation of his behaviours/words are still required". Furthermore, he has "become increasingly anxious, demanding of stakeholder

[3] According to the source, this remained the same in the subsequent case reviews of 3 February, 14 March, 20 April and 16 May 2017.

services and does not retain previous conversations, warranting frequent repetition, modification of language, additional preparatory interview planning time and documentation thereafter". Also, "Mr. Shalikhan was being given supplementary self-directed activities such as maths worksheets as he states to all stakeholders he is too sad to attend any programmes and activities … refused timetable planning help … DPPM agreed actions, such as supervised (by mother) Internet access and access to compound's oval time to play soccer with friends also unresolved".

43. On 22 December 2016, a report by the NSW Service for Treatment and Rehabilitation of Torture and Trauma Survivors. was issued in relation to Mr. Shalikhan that records him as having significant symptoms of post-traumatic stress disorder, depression and anxiety.

Personal situation

44. The source reports that Mr. Shalikhan's schooling has been severely disrupted owing to his administrative detention. According to his case review dated 24 July 2015, he requested that he be allowed to return to school, but his case manager "confirmed that as he was over the age of 18, he was no longer able to attend school". During an interview on 18 September 2015, "concerns were raised regarding him not being able to attend offsite schooling". Those concerns were repeated during his interview of 9 October 2015.

45. Since turning 18, Mr. Shalikhan has not been allowed to pursue education, even though he is recorded as having stated in his case review dated 11 February 2016 that "schooling was more important to him than getting a visa". According to his case review of 23 March 2016, "Mr. Shalikhan stated he was doing okay in the centre but wanted to know when he was getting out. He wanted to go to school, his mother was sick and they needed to be out in the community."

46. Despite frequent promises to enquire about other means of education, as of the date of the submission, Mr. Shalikhan had still not been able to undertake any formal education.

47. The source underlines that Mr. Shalikhan desires to be reunited with his mother in the community. For example, in an interview on 17 June 2016 (reported in Mr. Shalikhan's case review of 18 June 2016), he stated: "I want to know when I will be back with my mother ... Even if I did hit her, which I did not, don't you think I have been punished enough?[4] How long are you going to keep us separated? I want to know when I am getting out into community detention. I have been in here for four years, I am getting older – I don't want to be an old man still in detention. I've done nothing wrong and I need to get out to live my life. I have said things whilst here but this was all due to the frustration of being in detention. I wouldn't do any of the things talked about. In any event, I was a child when I said these things. I want to live in Australia, I will not be a threat to the Australian community. I am a good person, I've done nothing wrong – all the incidents that have been recorded against me have not been my fault, other people have either made up stories or provoked me."

48. In his case review of 29 September 2016, Mr. Shalikhan is recorded as advising that "his mother is currently unable to visit him due to illness and has requested that he be allowed to visit her in the CD [community detention] village. These visits are not supported by the stakeholders."

49. In this respect, the source reports that Mr. Shalikhan's mother suffers from a range of health issues. She cannot visit the detention centre alone without transport support. As such, owing to her illnesses, long periods pass without Mr. Shalikhan having any physical contact with his mother. Furthermore, because Mr. Shalikhan arrived by boat, he is not allowed access to a mobile phone to call his mother. Only detainees who arrived by other means than boat are reportedly allowed mobile phones.

[4] In this respect, the source notes that on 18 June 2014, when Mr. Shalikhan was approximately 17 years old, a domestic violence order was made by his mother against him. The order has since been withdrawn.

Analysis of violations

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

51. The source adds that given that Mr. Shalikhan has previously been recognized as a refugee by the Department, that his mother has been granted a safe haven enterprise visa and that the family is stateless, he cannot be removed from Australia without such removal constituting refoulement. In addition, the Department and the Minister have so far not granted him a visa, owing to concerns about his character that appear closely linked to his mental illness and behavioural issues.

52. The source underlines that Mr. Shalikhan has undertaken a number of domestic remedies to secure his release into the Australian community, as referred to above. Complaints have also been made to the Australian Human Rights Commission regarding the detention of Mr. Shalikhan, but the complaints have not been successful.

53. The source asserts that the detention of Mr. Shalikhan constitutes an arbitrary deprivation of his liberty under categories II, III, IV and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category II

54. The source submits that Mr. Shalikhan 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." Mr. Shalikhan came to Australia as a refugee in the exercise of his right to seek and enjoy asylum. If it had not been for Mr. Shalikhan coming to Australia to seek asylum, he would not currently be detained.

55. According to the source, Mr. Shalikhan has also been deprived of his liberty in contravention of article 26 of the Covenant. Mr. Shalikhan, as a non-Australian citizen, is subject to administrative detention, whereas Australian citizens are not subject to the same treatment.

Category III

56. 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. Shalikhan, specifically those rights protected under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant.

57. 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".

58. Nonetheless, the source notes that Mr. Shalikhan has been held in administrative detention for more than four and a half years, since he arrived in Australia at the age of 16. The Government and the Department, through finding Mr. Shalikhan to be a refugee and through the grant of his mother's visa, have recognized him as a person meriting Australia's protection obligations. Given that Mr. Shalikhan is stateless, any return of Mr. Shalikhan to the Islamic Republic of Iran would constitute refoulement.

59. The source thus submits that unless Mr. Shalikhan is released from administrative detention, he will be in detention indefinitely. Given that he cannot return to the Islamic Republic of Iran, his detention is not reasonable.

Category IV

60. The source further submits that Mr. Shalikhan, as a recognized refugee who has been subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy. The source refers to the relevant provisions of the Migration Act 1958 (see para. 50 above).

61. In that regard, the source notes that the High Court of Australia, in its decision in the case of *Al-Kateb v. Godwin*, has upheld mandatory detention of non-citizens as a practice which is not contrary to the Constitution of Australia.[5] The source further notes that in Mr. *C v. Australia*, the Human Rights Committee held that there was no effective remedy for people subject to mandatory detention in Australia.[6] As such, Mr. Shalikhan lacks any chance of his detention being the subject of a real administrative or judicial review remedy.

Category V

62. 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 the case of *Al-Kateb v. Godwin*, as referred to in paragraph 61 above, is that while Australian citizens can challenge administrative detention, non-citizens cannot.

Response from the Government

63. On 30 July 2018, the Working Group transmitted the allegations from the source to the Government of Australia under its regular communications procedure. The Working Group requested the Government to provide, by 28 September 2018, detailed information about the current situation of Mr. Shalikhan and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Australia under international human rights law, and in particular with regard to the treaties ratified by the State. Furthermore, the Working Group called upon the Government to ensure his physical and mental integrity.

64. In its response of 28 September 2018, the Government indicated that Mr. Shalikhan remained in immigration detention, as he was an unlawful non-citizen. The Government added that it was considering whether to refuse to grant a safe haven enterprise (subclass 790) visa to Mr. Shalikhan under section 501 of the Migration Act 1958.

65. On 20 April 2017, Mr. Shalikhan was issued with a notice of intention to consider refusal of his visa application, under section 501 (1) of the Act. He may not pass the character test by virtue of section 501 (6) (d) (i), in that there is a risk that he would engage in criminal conduct in Australia. The notice of intention to consider refusal invited Mr. Shalikhan to comment or provide information on any factors he believed to be relevant as to whether he would pass the character test, or relevant as to why his visa application should not be refused.

66. On 24 April 2017 and 18 May 2017, Mr. Shalikhan's migration agent reportedly responded to the notice of intention to consider refusal. On 19 May 2017, he was issued with a further natural justice letter and a response was received on 6 June 2017.

67. According to the Government, Mr. Shalikhan's immigration status cannot be progressed while the matter of the notice of intention to consider refusal is ongoing. It has been given preferential processing and the Department of Home Affairs is actively progressing the section 501 assessment. The Government notes that this can be a lengthy process and owing to the complexities of the case, consideration must be given to representations made by or on behalf of Mr. Shalikhan.

68. On 7 February 2018, the Minister for Home Affairs stated in Parliament that Mr. Shalikhan's visa application was undergoing assessment with consideration of visa refusal under section 501 of the Act. The Minister stated that community placement considerations were not appropriate until the assessment was finalized and that Mr. Shalikhan's welfare and

[5] *Al-Kateb v. Godwin* (2004) 219 CLR 562.

[6] See *C. v. Australia* (CCPR/C/76/D/900/1999).

education needs were being met within the existing programmes and activities available to all detainees.

69. The Government adds that the detention of Mr. Shalikhan has been reviewed by the Department on 32 occasions since June 2015, under case management processes. Those reviews have found that his detention continues to be appropriate and his current place of detention suitable.

70. Australian immigration status resolution practices ensure that any person who is detained understands the reason for their detention and the choices and pathways which may be available to them, including choosing to return to their country of origin or deciding whether to pursue legal remedies.

71. The ongoing review of individuals in immigration detention includes a risk-based approach to the consideration of the appropriate placement and management of an individual while their status is being resolved. Placement in an immigration detention facility is based on the assessment of a person's risk to the community and level of engagement in the status resolution process. If the individual does not present unacceptable risks to the community, community-based options may be used. Individuals may be required to comply with various conditions while remaining in the community, until a substantive immigration status outcome has been reached and/or they leave the country. Immigration detention in an immigration detention centre will continue to be available for those who pose a risk to the safety and security of the community.

72. On 14 September 2018, the Department submitted a report (60-month) to the Commonwealth Ombudsman in relation to Mr. Shalikhan's ongoing detention, in accordance with section 486N of the Act.

73. Persons who arrive in Australia without a visa, or whose visa is cancelled at the border, and seek protection from Australia are not eligible for a permanent protection visa. They are only eligible to apply for a temporary protection (subclass 785) visa or a safe haven enterprise visa, valid for three and five years, respectively. Subsequent visas may be granted if the person continues to engage the country's protection obligations, or if they meet pathways to other visas while holding a safe haven enterprise visa.

74. Persons who are in Australia and make an application for protection will have their claims assessed by the Department. The domestic legislation of Australia, namely the Migration Act and policies and practices, implement the country's non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol, the Covenant and its Second Optional Protocol and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. If a person is found to engage the country's protection obligations, they are also required to meet health, character and security requirements, in order to be granted a protection visa. If a person does not meet such requirements, they may be refused a protection visa.

75. In order to be granted a visa, all applicants must meet the character requirements under section 501 of the Migration Act. A person may fail the character test on a number of grounds including, but not limited to, where there is a risk that the non-citizen would engage in conduct that would pose a threat to the safety of the community. When a decision is made as to whether it is appropriate to refuse or cancel a visa, all relevant information and circumstances relating to the case, including the impact on the individual, are taken into account. Nevertheless, the safety of the Australian public is a primary consideration and a decision to refuse or cancel a visa may be made, even where there are other countervailing factors.

76. The Government of Australia considers that mandatory immigration detention of unlawful non-citizens is an essential component of strong border control. The need to protect Australia from people who may pose a risk to the community and national security is a factor in determining how Australia meets its international obligations in particular cases. For example, posing a risk to the community may mean that the detention of an individual is not arbitrary. People who enter Australia without a valid visa do not provide the Government with an opportunity to assess any risks they might pose to the community prior to their arrival. In contrast, people who arrive lawfully are assessed through visa processes prior to their

travel to Australia. Detention of those who have arrived unlawfully provides the opportunity to undertake appropriate health, identity and security checks.

77. Detention under the Migration Act is administrative in nature and not for punitive purposes. The Government is committed to ensuring that all people in immigration detention are treated in a manner consistent with the country's international legal obligations.

78. According to the legislative framework, the length of immigration detention is not limited by a set time frame but is dependent upon a number of factors, including identity determination, developments in country information and the complexity of processing owing to individual circumstances relating to health, character or security matters. Relevant assessments are completed as expeditiously as possible to facilitate the shortest possible time frame for detaining people in immigration detention facilities.

79. Both citizens and non-citizens are able to challenge the lawfulness of their detention in a court, through actions such as habeas corpus. The basis on which a court may order release depends on the type of detention.

80. A person in immigration detention is able to seek a judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia. Section 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

81. The source of the communication claims that, as a result of the decision of the High Court in the case of *Al-Kateb v. Godwin*, non-citizens are not equal before the courts. That is not correct. The High Court held in that matter that the provisions of the Migration Act requiring 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, are valid.

82. Persons can make a request to the Minister to exercise his or her personal, discretionary and non-compellable powers under the Migration Act to intervene in their case in a range of circumstances. The Minister does not have a duty to, and is not legally bound to, exercise or consider exercising any of his or her personal powers. The Minister has approved guidelines on his or her intervention powers. When a person makes a request to the Minister for intervention, an assessment is made by a departmental officer as to whether the request meets the approved guidelines and the request is either referred to the Minister, or the Department declines to refer the matter to the Minister. When the Minister intervenes, he or she may allow an application for a visa to be made, may grant a visa, or may intervene to make a residence determination for a detainee, depending upon the power under which he or she intervenes.

83. On 19 June 2014, the then Minister intervened under section 197AB of the Migration Act to make a residence determination for Mr. Shalikhan and his mother. A residence determination allows a person held in immigration detention to reside at a specified address, instead of being detained in immigration detention. Prior to Mr. Shalikhan being notified of the residence determination, the Department became aware that he was likely to be charged with criminal matters and placed progression of the residence determination on hold.

84. On 25 July 2014, the Department was advised that Mr. Shalikhan had been charged with two counts of assaulting a public officer, one count of common assault in circumstances of aggravation or racial aggravation, and one count of damage to property. On 21 August 2014, a submission was referred to the then Minister detailing those charges and providing an option to revoke the residence determination under section 197AD of the Migration Act. On 28 August 2014, the Minister revoked Mr. Shalikhan's residence determination.

85. Mr. Shalikhan was again assessed against the Minister's guidelines for a residence determination in 2017. His case was found not to meet the guidelines for referral under section 197AB of the Act. That assessment found that a residence determination was not appropriate for him owing to the significant support he required for his mental health issues, his criminal history and alleged domestic violence against his mother.

86. The Government refers to the claims by the source regarding the Universal Declaration of Human Rights. The Government notes that the Universal Declaration of

Human Rights is not legally binding but that its articles reflect international law, such as by being codified in other legally binding instruments.

87. The source also claims that Mr. Shalikhan has been deprived of his liberty in contravention of article 26 of the Covenant in that only non-citizens are subject to administrative detention. To the extent that this claim relates to Mr. Shalikhan's administrative detention in Australia, the Government assumes that the source is claiming that the administrative detention of non-nationals could amount to a distinction on a prohibited ground under the Covenant on the basis of "other status".

88. In response, the Government notes that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". In that sense, the purpose of the Act is to differentiate on the basis of nationality between non-citizens and citizens. In that respect, the Government refers to paragraph 5 of Human Rights Committee general comment No. 15 (1986) on the position of aliens under the Covenant.

89. The Government concludes that it is a matter for it to determine 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 and that in the circumstance that a visa is not held, a non-citizen is subject to immigration detention. In that respect, the Government respectfully submits that Mr. Shalikhan is lawfully detained under the section 189 (3) of the Migration Act.

Further comments from the source

90. On 1 October 2018, the reply from the Government was transmitted to the source for comments and the source has provided further comments.

Discussion

91. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter.

92. The source has submitted that the detention of Mr. Shalikhan is arbitrary and falls within categories II, III, IV and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. While not addressing the categories as employed by the Working Group specifically, the Government of Australia rejects the submissions. The Working Group will examine each in turn.

93. The Working Group notes that Mr. Shalikhan arrived in Australia on 25 August 2013 as a 16-year-old boy with his mother and that they were both detained as illegal arrivals. The source argues that such detention was arbitrary and falls within category II, since Mr. Shalikhan was detained for the exercise of his rights under article 14 of the Universal Declaration of Human Rights. The source also argues that the rights of Mr. Shalikhan under article 26 of the Covenant were violated as only unlawful non-citizens can be detained.

94. In its response to those claims, the Government submits that mandatory immigration detention of unlawful non-citizens is an essential component of the strong border control practised by Australia. The Government underlines the need to protect Australia from people who may pose a risk to the community and that national security is a factor in determining how the country meets its international obligations in particular cases. The Government also submits that unlawful non-citizens cannot be assessed prior to their arrival, as is the case with lawful non-citizens, and their detention is therefore necessary and justified. The Government also briefly explains the process of such individual assessments, noting that since June 2015 Mr. Shalikhan's case has been reviewed 32 times and that those reviews have found his detention to be appropriate.

95. The Government further submits that the national legal framework does not set a time frame for the permissible length of immigration detention but that this depends on a number of factors, including identity determination, developments in country information and the complexity of processing owing to individual circumstances relating to health, character or security matters. The Working Group understands that the latter three elements, namely health, character and security matters, are particularly relevant in the case of Mr. Shalikhan.

96. The Government rejects the claim of breach of article 26 of the Covenant, since the objective of the Migration Act 1958 is to regulate the arrival of non-citizens to Australia and therefore, by definition, does not apply to its citizens. The Government points to general comment No. 15 of the Human Rights Committee in which the Committee makes it clear that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that the State, in principle, is free to decide who it will admit to its territory. The Government also rejects the claim of breach of article 14 of the Universal Declaration of Human Rights, arguing that it is not a legally binding instrument.

97. The Working Group observes that it is not disputed by the Government that Mr. Shalikhan has been in immigration detention since 25 August 2013, which is a lengthy period of more than five years. The Working Group takes note of the numerous reviews that have taken place in the case of Mr. Shalikhan since June 2015 and that, according to the Government, individualized assessments of the need to detain him have been carried out, a point not contested by the source. The outcomes of such reviews have been that detention remains appropriate in his case. However, Mr. Shalikhan arrived in Australia on 25 August 2013 and was immediately detained. In addition, the first review of the need to detain him, as stated by the Government itself, did not take place until some 20 months later. The Working Group wishes to emphasize that the Government has chosen not to provide any explanation for that significant delay, although it had the opportunity to do so.

98. 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."

99. The Working Group regrets that the present case is only the latest in a number of cases from Australia that have come before the Working Group during the past two years, all of which have concerned the same issue, namely mandatory immigration detention in Australia under the Migration Act 1958.[7] The Act stipulates that an unlawful non-citizen must be detained and kept in immigration detention until he or she is removed from Australia or granted a visa. In addition, section 196 (3) of the Act provides that "[T]o avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa) or (b)) unless the non-citizen has been granted a visa." As such, providing there is some sort of process relating to the grant of a visa, or removal (even if removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

100. The Working Group wishes to reiterate 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 1951 Convention relating to the Status of Refugees, and its 1967 Protocol.[8] The Working Group notes that those instruments constitute international legal obligations undertaken by Australia and in particular notes the undoubtedly legally binding nature of the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol in relation to Australia.

101. The Working Group once again wishes to emphasize that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.[9] Moreover, as the Human Rights Committee has argued in its general comment No. 35 (2014) on liberty and security of person: "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 a particular reason 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."

[7] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018 and No. 50/2018.

[8] See opinions No. 28/2017, No. 42/2017 and No. 50/2018. See also revised deliberation No. 5, para. 9.

[9] See A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

102. The provisions of the Migration Act 1958 stand at odds with such requirements of international law, as sections 189 (1) and 189 (3) of the Act provide for de facto mandatory detention of all unlawful non-citizens, unless they are being removed from the country or granted a visa. Furthermore, the Working Group observes that the Act does not reflect the principle of exceptionality of detention in the context of migration as recognized in international law, nor does it provide for alternatives to detention to meet the requirement of proportionality.[10]

103. The Working Group reiterates its serious concern at the increasing number of cases emanating from Australia concerning the implementation of the Migration Act, which are being brought to its attention and again urges the Government to review the legislation in the light of its obligations under international law without delay.[11]

104. In the present case, the Working Group has already noted that the first assessment of the need to detain Mr. Shalikhan did not take place until some 20 months after his arrival to Australia. That is not a period that could be described as a "brief initial period", to use the language of the Human Rights Committee in its general comment No. 35. The Government has not put forward any explanation for such a delay with the assessment. That leads the Working Group to conclude that the only reason for Mr. Shalikhan's detention was that he was an asylum seeker and therefore subject to the automatic immigration detention policy of Australia. In other words, Mr. Shalikhan was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights. That in turn renders the initial detention of Mr. Shalikhan from the time of his arrival until his first assessment in June 2015 arbitrary, falling under category II.

105. Moreover, as clearly stated in revised deliberation No. 5, indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.[12] That is why the Working Group has required that a maximum detention period in the course of migration proceedings be set by legislation and that such detention be permissible only for the shortest period of time.[13] Mr. Shalikhan has now been in detention for more than five years without any clear prospect of when he could be released. The Working Group is mindful that even the Government itself has not been able to make such an indication in its reply to the Working Group.

106. The Working Group agrees with the argument presented by the Government in relation to article 26 of the Covenant. However, the Working Group wishes to point out that the Human Rights Committee in its general comment No. 15 quoted 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." Also: "Aliens have the full right to liberty and security of the person."

107. That means that Mr. Shalikhan is entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and that when guaranteeing those rights to him, Australia must ensure that this is done without distinction of any kind as required under article 2 of the Covenant. In the present case, Mr. Shalikhan's de facto indefinite detention owing to his immigration status runs contrary to article 2 in conjunction with article 9 of the Covenant. The Working Group therefore considers that the detention of Mr. Shalikhan since the reviews started in June 2015 is also arbitrary and falls under category II.

108. The source has further argued that the international norms relating to the right to a fair trial have not been observed in relation to the detention of Mr. Shalikhan, specifically those rights protected under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant. According to the source, Mr. Shalikhan's detention therefore falls under category III. The source also argues that Mr. Shalikhan, as a recognized refugee, who has been subject to prolonged administrative custody, has not been guaranteed the possibility

[10] Ibid.

[11] See opinion No. 50/2018, paras. 86–89.

[12] See also A/HRC/13/30, para. 63, and opinions No. 28/2017 and No. 42/2017.

[13] See also opinions No. 5/2009 and No. 42/2017; E/CN.4/1999/63/Add.3, para. 35; and A/HRC/33/50/Add.1, paras. 49–50.

of administrative or judicial review or remedy. According to the source, that means that his detention is arbitrary and falls under category IV.

109. The Government of Australia denies those allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia through such actions as habeas corpus.

110. 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 preserving legality in a democratic society.[14] That right, which in fact constitutes a peremptory norm of international law, applies to all forms and 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 and migration detention.[15] Furthermore, it applies irrespective of the place of detention or the legal terminology used in the legislation and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[16]

111. The Working Group observes that the facts of Mr. Shalikhan's case since his detention on 25 August 2013, as presented to it by both the source and the Government, are characterized by various applications for different types of visas. However, the Working Group is mindful that there has not been a single appearance of Mr. Shalikhan before a judicial body concerning the exercise of his right to challenge the legality of his detention, as stipulated in article 9 (4) of the Covenant, noting that such consideration by a judicial body would necessarily involve an assessment of the legitimacy, need and proportionality of his detention.[17]

112. In other words, throughout his detention for more than five years, Mr. Shalikhan has been unable to challenge the legality of his detention per se. The only body that appears to have been reviewing the need for Mr. Shalikhan to remain in detention is the review body. The Working Group presumes that this body is the Case Management and Detention Review Committee since the Government has not indicated that this was not the case. However, that body, as observed by the Working Group in other cases, is not a judicial body.[18] Moreover, the Working Group notes the repeated failure of the Government to explain how the reviews carried out by that Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 (4) of the Covenant.[19]

113. The Working Group recalls the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention have been found to be in breach of article 9 (1) of the Covenant.[20] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in the migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[21] In the case of Mr. Shalikhan, it appears to the Working Group that while community placement was considered, it was not deemed appropriate given the

[14] See A/HRC/30/37, paras. 2–3.

[15] See A/HRC/30/37, annex, paras. 11 and 47 (a).

[16] Ibid, para. 47 (b).

[17] See revised deliberation No. 5, paras. 12–13.

[18] See opinions No. 20/2018, para. 61, and No. 50/2018, para. 77.

[19] Ibid.

[20] See *C. v. Australia*; *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 v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children 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).

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

mental health problems experienced by Mr. Shalikhan and the caution he received from the court in January 2015, and he was therefore remanded in custody. The Working Group is, however, of the view that the choice between community placement and detention does not satisfy the requirement to duly consider alternatives to detention. Furthermore, the Government has not responded to the submission made by the source about the assessment reports concerning Mr. Shalikhan, which made it clear that the confined environment of detention is exacerbating his mental health (see para. 40 above).

114. The Working Group also remains surprised by the Government's submission that actions such as habeas corpus are a possible avenue of redress for Mr. Shalikhan.[22] It is clear to the Working Group that current Australian legislation does indeed allow for the detention of Mr. Shalikhan and that the habeas corpus challenge, which is aimed at challenging illegal detention, does not therefore provide a realistic avenue of redress for people in his situation. However, the Working Group recalls that just because a detention is carried out in conformity with national law, it does not mean that the detention is not arbitrary under international law. All States must ensure that their domestic legislation duly and fully reflects the obligations stemming from international law.

115. The Working Group therefore concludes that Mr. Shalikhan has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling within category IV and not category III, as argued by the source.

116. Furthermore, the source submits that the detention of Mr. Shalikhan falls within category V, as Australian citizens and non-citizens are not equal before the courts and tribunals of Australia, owing to the effective result of the decision of the High Court in the case of *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in the case cited by the High Court held that the provisions of the Migration Act requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal was not reasonably practicable in the foreseeable future, were valid.

117. The Working Group remains puzzled by the explanation provided again by the Government in relation to the decision of the High Court in that case,[23] 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. In other words, the Government has actually failed to explain how such non-citizens can challenge their continued detention after that decision.

118. The Working Group notes the numerous findings by the Human Rights Committee, as referred to in paragraph 113 above, and it also notes that the effect of the decision of the High Court of Australia in the above-mentioned case is such that non-citizens have no effective remedy to challenge the legality of their continued administrative detention.[24]

119. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter and this remains the position of the Working Group in the present case.[25] The Working Group emphasizes that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Shalikhan is arbitrary, falling within category V.

120. In all the findings above concerning Mr. Shalikhan, the Working Group is particularly mindful that at the time of his arrival in Australia, Mr. Shalikhan was only 16 years old. The Working Group is of the view that this engaged the country's obligations also under the Convention on the Rights of the Child, and in particular articles 2, 22, 24, 28 and 37 (b) and (d), to which Australia has been a party since 17 December 1990.

121. On 7 August 2017, the Working Group sent a request to the Government of Australia to undertake a country visit. The Working Group notes the encouraging response received on

[22] See opinion No. 20/2018, para. 64.
[23] See opinions No. 21/2018, para. 79, and No. 50/2018, para. 81.
[24] See *F.J. et al. v. Australia*, para. 9.3.
[25] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018 and No. 50/2018.

24 November 2017 in which the Government indicated that it would be in a position to invite the Working Group to conduct a visit in the first quarter of 2019. The Working Group appreciates that the Government confirmed this during the interactive dialogue with the Working Group at the thirty-sixth session of the Human Rights Council on 12 September 2018.

122. The Working Group reiterates that it would welcome the opportunity to conduct a visit to Australia and its offshore detention facilities in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty. The Working Group looks forward to discussing concrete dates for such a visit to be carried out in 2019.

Disposition

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

> The deprivation of liberty of Ahmad Shalikhan, being in contravention of articles 2, 3, 7, 8, 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

124. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Shalikhan 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. Shalikhan immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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. Shalikhan and to take appropriate measures against those responsible for the violation of his rights.

127. The Working Group urges the Government of Australia to review the provisions of the 1958 Migration Act in the light of its obligations under international law without delay.

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

Follow-up procedure

129. 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. Shalikhan has been released and, if so, on what date;

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

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

130. 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.

131. 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.

132. 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.[26]

[*Adopted on 21 November 2018*]

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