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**Human Rights Council**  
Working Group on Arbitrary Detention**ADVANCE UNEDITED VERSION****Opinions adopted by the Working Group on Arbitrary  
Detention at its seventy-second session, 19 – 28 April 2015****No. 21/2015 (New Zealand)****Communication addressed to the Government on 22 January 2015.****Concerning Mr. A (whose name is known to the Working Group on Arbitrary  
Detention)****The Government of New Zealand has not replied to the communication of 22 January  
2015.****The State is a party to the International Covenant on Civil and Political Rights.**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

## Submissions

### *Communication from the source*

3. The case was reported to the Working Group on Arbitrary Detention as follows:
4. Mr. A, born on 21 September 1956, is a national of New Zealand. In 1973, Mr. A was diagnosed with “mild mental retardation”, according to the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, also referred to as an “intellectual disability”.
5. To date, Mr. A has been detained for 45 years in psychiatric institutions or in prisons. From 1969 to 1993, Mr. A was held in psychiatric detention at the following hospitals: Kingseat Hospital; Oakley Hospital; Lake Alice Hospital; and Mt Eden Prison; Carrington Hospital. From 1994 to the present, Mr. A has been held in the following prisons where he is detained on a sentence of preventive detention: [Auckland Prison; Kaitoke Prison, Wanganui; Pohutukawa Unit, Mason Clinic; Tongariro Prison]. Since 1994, brief periods have been spent in psychiatric facilities.
6. In 1968, Mr. A was admitted to Kingseat Hospital at the age of 12 for allegedly sexually abusing a young girl. From 1969 to 1989, he was transferred among various psychiatric hospitals for allegedly committing sexual offences whilst on leave.
7. In 1973, at the age of 17, Mr. A was charged with sodomy. He was found to be under a legal disability, and unfit to plead. He was therefore committed to Lake Alice hospital under the Criminal Justice Act, 1954. In 1984, he was again charged with sodomy, and found to be under a disability under the Criminal Justice Act.
8. In 1989, Mr. A’s legal disability was questioned, and he became an informal patient at Kingseat Hospital until 1992, at which time he had weekend leaves with his mother. In 1993, he became an informal patient and later that year was released and went to live with his sister in Mangere, South Auckland.
9. In 1992, the Mental Health (Compulsory Assessment and Treatment) Act which came in to force that year changed the legal landscape removing the previous protection from prosecution and imprisonment accorded to individuals with intellectual disabilities, including those with a mild mental retardation such as Mr. A. The source submits that this resulted in limited options available to the courts for dealing with persons with an intellectual disability who were charged or convicted with an imprisonable offence, often resulting in an inappropriate placement in prison or other.
10. In 1994, Mr. A was prosecuted and convicted of unlawful sexual connection with a minor. On 20 April 1994, the High Court sentenced him to preventive detention with a minimum non-parole period of 10 years pursuant to Section 75 of the Criminal Justice Act, 1985 (now repealed). This section provided that preventive detention may be imposed where a person is convicted of an offence of sexual violation under s. 128(1) of the Crimes

Act and where the Court is satisfied that it is necessary that the person be detained in custody for a substantial period. Relying on a 1994 psychiatric report, the Court determined Mr. A's conviction fell under this section. On 7 October 1994, the High Court sentenced him to a second preventive detention. On 22 May 1995, both sentences of preventive detention were affirmed by the Court of Appeal. Mr. A remains detained to date.

11. The source submits that the detention of Mr. A is arbitrary and falls under categories I and V of the Working Group's defined categories of arbitrary detention on the basis that he has been deprived of his liberty since 1994 for reasons of discrimination based on disability and, since 2004, has been deprived of his liberty without any legal basis.

12. The source submits that when Mr. A was sentenced in 1994, there was no legislative scheme to ensure that he was placed in a proper facility to account for his intellectual deficiencies, and to protect his rights, or provide rehabilitation, in contrast to individuals with mental health concerns who could be detained in psychiatric hospitals. In view of the Mental Health (Compulsory Assessment and Treatment) Act, 1992, removing the previous exemption of individuals with intellectual disabilities from standing trial before criminal courts, the Courts sentenced Mr. A to preventive detention in prison, having no other legitimate domestic law choice. The source argues this violates Article 7 of the Universal Declaration of Human rights (UDHR), Article 26 of the International Covenant on Civil and Political Rights (ICCPR), and Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD) for the failure to recognize the rights of the intellectually disabled as a discrete and vulnerable group to be treated equally before the law.

13. The source draws attention to the Human Rights Committee's General Comment no. 35, para. 19, requiring that "any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question from harm or preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law." In its view, such factors as acceptance of responsibility, steps taken to avoid reoffending, and predilection and proclivity for offending should have been assessed in a different light given Mr. A's intellectual disabilities, yet they were not.

14. The source refers to the Working Group's statement at the conclusion of its visit to New Zealand, 24 March – 7 April 2014, which stated: "The Working Group also heard consistent testimonies that people with intellectual or learning disabilities are at a particular disadvantage in the criminal justice system [...] the Working Group would like to stress that, pursuant to article 13 of the Convention on the Rights of Persons with Disabilities, persons with disabilities must be afforded access to justice on an equal basis with others."

15. The source further submits that the threshold to a sentence of preventive detention has become more onerous since the time of Mr. A's sentencing in 1994. At that time only a single psychiatric opinion was required. This requirement has since been amended by the Sentencing Act, 2002, requiring two health assessors' reports as a prerequisite to a sentence of preventive detention. It argues that were the sentencing judge to apply this new standard to Mr. A's case, the threshold to indeterminately detain him would not be reached.

16. With preventive detention sentences there is an entitlement to be considered for parole annually after the expiry of a minimum non-parole period. Hence, in 2004, after the expiry of his ten-year tariff period, Mr. A was eligible for his first consideration of parole. That same year the Intellectual Disability (Compulsory Care and Rehabilitation) Act, 2003, ("IDCCRA") was implemented, providing for the compulsory care of individuals with intellectual disabilities who have offended. The goal of the Act, it is submitted, is to ensure that the rights of intellectually disabled offenders were accounted for and protected, effectively to remedy past legislative discrimination.

17. The source informs that multiple psychological reports stated that Mr. A met the criteria specified in Section 7 of the Act for the diagnosis of intellectual disability, and was therefore eligible for a Compulsory Care order. However, the New Zealand Parole Board has continuously denied Mr. A's applications for compulsory care under the Statute. In its determination that he is not eligible for parole, the Board has relied exclusively on the finding of one psychologist, who stated that it was inappropriate for Mr. A to be transferred from the criminal justice system to a placement provided under the IDCCRA as he posed too high a risk. Despite previous counsel's application for judicial review regarding the decision not to apply for compulsory care and subsequent decision to deny parole, Mr. A remains in prison.

18. For support, the source draws attention to the Human Rights Committee's General Comment no. 35, para. 21, which states that, "when a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should only use such detention as a last resort, and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society."

19. The source submits that the continuation of Mr. A's incarceration after 2004, following the expiry of his ten-year tariff period in prison, is considered an arbitrary deprivation of liberty in contravention of the rights guaranteed to him under Article 9 of the ICCPR and Article 14 of the CRPD. It argues that, given Mr. A's disabilities, there is no legal basis for keeping him detained in prison with no plan for integration or rehabilitation, when he should be receiving the psychological and rehabilitative care the law provides. The decision to keep Mr. A in prison is for protection of the public, given that there are less restrictive and more humane alternatives to prison, and that the decision was based on a suspicion that he might re-offend, is, in its view, punitive.

*No response from the Government*

20. The Working Group addressed a communication to the Government on 22 January 2015, requesting detailed information about the current situation of Mr. A, and clarification of the legal base and justification for his continued detention.

21. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

22. Despite the absence of any further information from the Government, the Working Group has decided to render its Opinion in conformity with paragraph 16 of its Methods of Work. The Government has not rebutted the *prima facie* reliable allegations submitted by the source.<sup>1</sup>

**Discussion**

23. The case of Mr. A concerns certain aspects of of New Zealand criminal law and its compliance with international law which have been the subject of the Working Group's

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<sup>1</sup> See Opinion No.52/2014 (Australia and Papua New Guinea).

report from its 2014 visit to New Zealand<sup>2</sup> and also of a view of the United Nations Human Rights Committee.<sup>3</sup>

24. Mr. A remains in prison long after he completed his ten-year tariff period in prison, which expired in 2004. The source has in its submission about Mr. A's case drawn the Working Group's attention to many aspects of the compliance with international law of the New Zealand legislation and practice. In its conclusion, the source submits that Mr. A, who suffers from serious disabilities, should not be detained in prison with no plan for integration or rehabilitation. He should receive psychological and rehabilitative care. Mr. A is kept in prison based on a suspicion that he might re-offend and for the protection of the public, and this decision is punitive while there are less restrictive and more humane alternatives to prison available. The Working Group agrees with these submissions by the source. International law requires that conditions in such detention as for the Mr. A must be distinct from the conditions for convicted prisoners serving a punitive sentence.

25. The Working Group has addressed the issues in its Report on its 2011 Mission to Germany.<sup>4</sup> The conditions of preventive detention regimes must satisfy demanding proportionality requirements and establish a difference between preventive detention and an ordinary prison sentence regime. The Working Group discusses the jurisprudence of German courts and the European Court on Human Rights, and the Working Group in the current opinion again confirms that the requirements laid down in the European Court's jurisprudence constitute international law.

26. The Human Rights Committee followed up these issues in its Concluding observations on Germany from 2012,<sup>5</sup> and restated the international law requirements in its General Comment no. 35 on Article 9 Liberty and security of person) of the ICCPR (2014) in para. 21 on detention when a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals. The Human Rights Committee set out the requirements which must be satisfied to comply with international law and to avoid arbitrariness under Article 9 ICCPR. The additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should only use such detention as a last resort, and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The following requirement restated by the Human Rights Committee determines Mr. A's case now before the Working Group: "The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence". The Human Rights Committee refers to its view in *Dean v. New Zealand*. Also the next requirement restated in by the Human Rights Committee contributes to the outcome in Mr. A's case now before the Working Group: the detention "must be aimed at the detainees' rehabilitation and reintegration into society".

27. The Human Rights Committees restatements above are made under the heading "II. Arbitrary detention and unlawful detention". The restatement sets out in [10] that the right to liberty of person is not absolute: "Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. Paragraph 1 requires

<sup>2</sup> A/HRC/30/36/Add.2

<sup>3</sup> 1512/2006, *Dean v. New Zealand*, para. 7.5.

<sup>4</sup> A/HRC/19/57/Add.3, in particular at [28] and [29], also setting out that 'post-sentence preventive detention is subject to the ban on retroactivity in a strict sense'.

<sup>5</sup> CCPR/C/DEU/CO/6, 2012, [14] and the United Nations Human Rights Committee added that State parties must exercise caution and provide appropriate guarantees in evaluating future dangers.

that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.” In [12] the Human Rights Committee explains that “an arrest or detention may be authorized by domestic law and nonetheless be arbitrary”. Law or practice in breach of the requirements set out in [26] above are in breach of Article 9 ICCPR.

28. The Working Group concludes that the continuation of Mr. A’s incarceration after 2004 for the protection of the public, is an arbitrary deprivation of liberty falling into category I of the categories applicable to the consideration of the cases submitted to the Working Group. The detention also constitutes a violation of international law for reasons of discrimination and falls into category V.

#### **Disposition**

29. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. A is arbitrary and in contravention of articles 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It falls into categories I and V of the categories applicable to the consideration of the cases submitted to the Working Group.

30. Consequent upon the opinion rendered, the Working Group requests the Government of New Zealand to take the necessary steps to remedy the situation of Mr. A and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

31. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. A from prison and accord him an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights.

[Adopted on 29 April 2015]