
**ADVANCE UNEDITED
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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. 8/2015 (Australia)****Communication addressed to the Government on 23 February 2015.****Concerning Mr. Sayed Abdellatif, Ms. A, and their six children: B, C, D, E, F and G
(whose names are known to the Working Group on Arbitrary Detention)****The Government has replied to the communication on 23 April 2015 requesting
extension of the deadline to provide comments. The Working Group has decided not
to grant the extension.****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 D);

(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. Sayed Abdellatif is an Egyptian national, born on 9 January 1971. He is in possession of Australian Immigration Documents issued by the Australian authorities on 11 May 2012. Mr. Abdellatif is married to Ms. A, an Albanian national, born on 9 April 1976. Together they have six children: B (female, born on 9 May 1995), C (female, born on 18 August 1997), D (female, born on 22 September 1998), E (female, born on 11 May 2000), F (male, born on 18 January 2003) and G (male, born on 19 October 2010). Names and dates of birth of the children will not be mentioned in this opinion when it is made public.
5. On 11 May 2012, Mr. Abdellatif, along with his wife and six children, were arrested by the Australian Department of Immigration and Border Protection (DIBP) upon their arrival at Christmas Island, Australia, by boat. The arrest was made pursuant to section 189 of the Migration Act, 1958, regarding irregular maritime arrivals. Mr. Abdellatif and his family were notified by a warrant presented by the authorities that they had been arrested on the basis that they are considered unlawful non-citizens, having entered Australia without valid travel documents. They were notified that they do not have any family or support in the community, and were not entitled to apply for a visa at that stage.
6. Mr. Abdellatif and his family were initially detained at the Christmas Island Detention Centre for 15 days. On 26 May 2012, they were transferred to Inverbrackie Alternative Place of Detention in South Australia, where they remained detained for 11 months. On 17 April 2013, they were transferred to Villa Wood Detention Centre in Sydney, where they remain in detention to date. Following the transfer to Villa Wood Detention Centre, Mr. Abdellatif has been housed separately from his family.
7. On 6 June 2012, Mr. Abdellatif and his family were determined to have *prima facie* claims to engage Australia's protection obligations and were 'screened in' to the refugee status determination process. However, the family's Protection visa application was halted due to an Interpol Red Notice issued by the Egyptian authorities against Mr. Abdellatif.
8. The source informs that the Interpol Red Notice was issued based on the mass trial of 107 persons in Egypt in 1999, at which time Mr. Abdellatif was sentenced *in absentia* to 15 years imprisonment with hard labour on charges of involvement in terrorist activities. It is alleged that the trial did not comply with the international standards of fair trial guarantees, including having relied on coerced confessions through torture to secure convictions.
9. As a result of the Interpol Red Notice, Mr. Abdellatif and his family have not been able to continue their application for protection as refugees. In order for them to do so, this would require the Minister for Immigration to lift the "bar" that prevents offshore entry

persons from applying for refugee status, pursuant to section 46A of the Migration Act, 1958. Mr. Abdellatif and his family continue to be detained for nearly three years since the date of their arrest on the basis that their refugee status has not been resolved to date.

10. On 1 May 2013, the Australian Federal Police ceased its investigations in to the Interpol Red Notice. On 13 June 2013, the Egyptian authorities dropped all charges against Mr. Abdellatif relating to his involvement in terrorist activities. The source informs the Working Group that documents issued by the Egyptian Supreme Military Court providing confirmation of this were provided to the DIBP. On 13 March 2014, the Australian Inspector General of Intelligence and Security issued a security report in the case of Mr. Abdellatif, clearing him of any terrorism-related charges, and concluding that he does not present a security risk to Australia. In September 2014, Mr. Abdellatif received his security clearance. Nonetheless, the source notes that he continues to be detained apart from his family.

11. On 20 September 2013, Mr. Abdellatif and his family were notified that a section 46A submission had been prepared in their case, taking into account the revised Interpol Red Notice from the Egyptian authorities, and was [then] currently undergoing final clearances. They have not received any further update on the progress of this submission.

12. On 18 December 2013, the Australian Human Rights Commission (AHRC) provided a notice to the DIBP under section 29 (2) of the AHRC Act setting out its findings in regards to a complaint made by Mr. Abdellatif in August 2012 alleging breaches of his family's human rights by the DIBP (*Abdellatif v Commonwealth (DIBP)* [2014] AusHRC 70).

13. The AHRC determined that that the delay by the BIDP in making a referral to the Minister for Immigration to consider whether to allow the family to make an application for a visa, after they were *prima facie* found to be owed protection obligations, resulted in their arbitrary detention contrary to article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) and, in the case of the children, articles 3 and 37 (b) of the Convention on the Rights of the Child (CRC).

14. The AHRC further determined that the administrative detention of Mr. Abdellatif for more than 18 months after being found to be owed protection obligations *prima facie*, for more than 10 months without a referral being made to the last three Ministers for Immigration to consider lifting the ban under section 46A, is not proportionate to the legitimate aim of ensuring Australia's migration system. (These periods of time relate to the time up to the AHRC's notice to the DIBP of its findings in December 2013). The AHRC found that the delay in referral was not justified in his case by the nature of the investigations described by the DIBP in its submissions; the security and character checks would form part of the substantive assessment of Australia's protection obligations if the Minister for Immigration lifted the bar under section 46A.

15. Furthermore, the AHRC determined that it remained open to the DIBP to process the applications by other family members for protection pending the receipt of character and security checks in relation to Mr. Abdellatif as there is no suggestion that his wife or children were involved in any illegal activities abroad. The AHRC concluded by recommending that the DIBP promptly finalize the submission to the Minister for Immigration to consider lifting the bar under section 46A in relation to the application for protection by Mr. Abdellatif and his family.

16. The source submits that the deprivation of liberty of Mr. Abdellatif and his family may be considered arbitrary according to category IV of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. That is, when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

17. The source argues that the detention of Mr. Abdellatif and his family is arbitrary, as it goes beyond a reasonable amount of time necessary to conduct identity and security checks as well as refugee status interviews. The family remains in detention on the basis that the authorities have not yet referred the section 46A submission to the Minister for Immigration to consider lifting the bar for over 24 months.

18. Furthermore, the source reports that since 20 September 2013, the family has received no information as to whether their refugee claim is being processed or any indication as to how long their detention would last. The source points out that there is no time limit on the length of detention and that the detention could be potentially indefinite. The source argues this is in violation of article 9 of the Universal Declaration of Human Rights (UDHR) and article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR).

19. The source further recalls that since the date of their arrests, Mr. Abdellatif and his family have been denied the right to bring proceedings before a court to challenge the lawfulness of their detention and to be released if the court finds the detention unlawful pursuant to article 9(4) of the ICCPR. Furthermore, requests to the authorities to receive legal representation have gone unheeded.

Response from the Government

20. The Working Group addressed a communication to the Government of Australia on 23 February 2015, requesting that detailed information about the current situation of Mr. Sayed Abdellatif, Ms. A, and their six children: B, C, D, E, F and G, and clarification of the legal base and justification for their continued detention be transmitted within 60 days, in accordance with paragraph 15 of the Working Group's Methods of work.

21. The Government, by letter dated 23 of April 2015, requested an extension of the timeline within which to submit a response due to ongoing consultations within Government. The Working Group considered this request and decided not to grant the extension on the basis that it considers given reasons being not sufficient.

22. The Working Group considers that it is in the position to render its Opinion on the detention of Mr. Sayed Abdellatif and his family, in conformity with paragraph 16 of its Methods of Work. The Working Group has been much assisted by Australian Human Rights Commission (AHRC) findings in its "Abdellatif v Commonwealth (Department of Immigration and Border Protection). Report into arbitrary detention and the best interests of children".¹

Discussion

23. The cases of Mr. Sayed Abdellatif, Ms. A, and their six children, B, C, D, E, F and G will be discussed under category IV of the categories applicable to the cases before the Working Group.

24. Category IV applies when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. Australia is bound by international law on human rights regarding its detention of Mr. Abdellatif. The International Court of Justice in its 2010 *Diallo* judgment

¹ Abdellatif v Commonwealth (DIBP) [2014] AusHRC 70.

stated that article 9, paragraphs 1 and 2, of the ICCPR applies in principle to any form of detention, “whatever its legal basis and the objective being pursued”.²

25. The Working Group has set out its own conclusions on the detention regime for migrants in Australia in its Opinion No.52/2014 (Australia and Papua New Guinea), concerning Reza Raeesi, against the background of its own jurisprudence and statements on detention of migrants in general. The Working Group also set out the jurisprudence of the UN Human Rights Committee and other UN bodies.³ Special mention was made of the conclusions of the Working Group’s 2002 visit to Australia at the invitation of the Government and as a part of the international system of human rights supervision. In its report the Working Group raised several concerns about the mandatory detention of unauthorized arrivals in Australia because of its automatic and indiscriminate character, its potentially indefinite duration and the absence of juridical control of the legality of detention, the psychological impact of detention on asylum-seekers, who suffer “collective depression syndrome”; the denial of family unity in several cases; children in detention; and the amendments to the Migration Act 1958 that had restricted judicial review. The Working Group was particularly concerned with regard to the detention of vulnerable persons, particularly children; about the whole legal process governing the detention of asylum-seekers, and about the lack of adequate information given to the detainees. Other matters of concern mentioned in the report are the lack of proper complaints mechanisms and the implications of the management of the detention centres by a private company.⁴ The Working Group in the present Opinion repeats from Opinion No.52/2014 that under art 9(4) and peremptory norms of customary international law (*jus cogens*), Australia has a duty to guarantee judicial review of detention and it holds that the judicial review available to immigration detainees generally in Australia does not meet this requirement.

26. The United Nations Human Rights Committee in its General Comment No. 35 on Article 9: Liberty and security of person (2014) requires in [18.] that detention “must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time”. Relevant factors must be assessed on a case-by-case basis and children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention. “The UN Committee on the Rights of the Child has clarified the requirements under international law in General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, see also Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices (2014). The Working Group adopts the statement in General Comment No. 14 that Article 3, paragraph 1, creates “an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court”. In detention cases, this is a very strict obligation, falling on anyone involved.

27. The Working Group now turns to the application of international law to Mr. Abdellatif, his wife and their six children. They were detained as they arrived in Australia at Christmas Island by boat on 11 May 2012 and sought asylum. The Australian Human

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, para. 77.

³ Including the 2014 concluding observations on Australia by the UN Committee against Torture.

⁴ Report of the Working Group on Arbitrary Detention, Addendum, Visit to Australia, E/CN.4/2003/8/Add.2 24 October 2002, page 2.

Rights Commission (AHRC) in December 2013 reported to the Government its preliminary assessment that the detention was arbitrary.

28. The AHRC concluded its inquiry in March 2014 in “*Abdellatif v Commonwealth (Department of Immigration and Border Protection)*.”⁵ Report into arbitrary detention and the best interests of children” that the detention was arbitrary contrary to article 9(1) of the International Covenant on Civil and Political Rights and in the case of the children article 37(b) of the Convention on the Rights of the Child (CRC). It explained the circumstances surrounding the Egyptian court proceedings and serious allegations against Mr. Abdellatif. It stated that “the administrative detention of Mr. Abdellatif and his family for more than 18 months after being found to be prima facie owed protection obligations, and for more than 10 months without a referral being made to the last three Ministers for Immigration to consider lifting the bar under s 46A, is not proportionate to the legitimate aim of ensuring the effective operation of Australia’s migration system.”

29. Mr. Abdellatif, his wife and their six children are still in detention three years after they arrived and made the asylum application.

30. This detention is clearly disproportionate and in breach of article 9 of the ICCPR and, in relation to the children, in breach of articles 3 and 37(b) of the CRC.

31. The case falls into category IV of the categories applicable to the cases before the Working Group. The conclusions reached by the Working Group in the present Opinion apply to other migrants finding themselves in detention, including the conclusions on the remedies below.⁶

32. Under international law Australia has a duty to release Mr. Abdellatif, his wife and their six children and accord them an enforceable right to compensation for which they are jointly and severally liable. The duty to comply with international law rests on everyone, including domestic authorities and private individuals, and international and domestic law must provide remedies to make international law effective, see Opinion No.52/2014.

Disposition

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

The deprivation of liberty of Mr. Mr Abdellatif, his wife and their six children is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights. It falls into category IV of the categories applicable to the consideration of the cases submitted to the Working Group.

34. Consequent upon the opinion rendered, the Working Group requests the Government of Australia to take the necessary steps to remedy the situation of Mr. Mr Abdellatif, his wife and their six children 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.

35. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Abdellatif, his wife and their six children and accord them an enforceable right to compensation in accordance with article 9(5) of the International Covenant on Civil and Political Rights.

[Adopted on 24 April 2015]

⁵ *Abdellatif v Commonwealth (DIBP)* [2014] AusHRC 70.

⁶ See Opinion No.52/2014.