Advance Edited Version

Distr.: General
29 September 2022

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fourth session, 29 August–2 September 2022

Opinion No. 42/2022 concerning Amani Bol Santino Visona (Australia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,[1] on 28 February 2022 the Working Group transmitted to the Government of Australia a communication concerning Amani Bol Santino Visona. The Government replied to the communication on 26 May 2022. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Amani Bol Santino Visona, of Dinka ethnicity, was born in 1985 in the Sudan. On 8 September 1999, Ms. Visona arrived in Australia on a refugee visa (Refugee class BA subclass 200 visa).

5. On 16 March 2016, Ms. Visona's refugee visa was mandatorily cancelled under section 501 (3A) of the Migration Act 1958, which stipulates that a visa must be cancelled when the visa holder has been sentenced to 12 months or more imprisonment. The visa holder must also be serving a full-time custodial sentence. Ms. Visona was therefore an unlawful non-citizen pursuant to section 14 of the Act and liable to be detained.

6. Following her release from Brisbane Women's Correctional Centre on 16 March 2016, Ms. Visona was detained under section 189 (1) of the Migration Act 1958, which provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person. Ms. Visona was initially placed in immigration detention at the Brisbane Alternative Place of Detention and, on 20 March 2016, transferred to Villawood Immigration Detention Centre.

7. Ms. Visona sought revocation of the mandatory visa cancellation and, on 6 May 2016, a delegate of the Minister for Immigration and Border Protection decided to revoke the mandatory visa cancellation. Ms. Visona was released back into the community on the same day.

8. On 29 November 2016, Ms. Visona's refugee visa was cancelled for the second time while she was serving a sentence of imprisonment. As such, pursuant to section 14 of the Migration Act 1958, she was rendered an unlawful non-citizen and liable to be detained. Ms. Visona was released from prison on 4 January 2017 and detained under section 189 (1) of the Act. She was placed in Brisbane Immigration Transit Accommodation.

9. Ms. Visona sought revocation of the mandatory visa cancellation and, on 27 February 2017, a delegate of the Minister for Immigration and Border Protection decided to revoke the mandatory visa cancellation. Ms. Visona was released back into the community on the same day.

10. On 19 April 2018, Ms. Visona's refugee visa was cancelled for the third time under section 501 (3A) of the Migration Act 1958. By reason of the cancellation, Ms. Visona ceased to hold a visa, making her an unlawful non-citizen pursuant to section 14 of the same Act.

11. On 20 April 2018, Ms. Visona was released from criminal custody at Brisbane Women's Correctional Centre and detained under section 189 (1) of the Migration Act 1958. She was taken to Villawood Immigration Detention Centre.

12. On 14 August 2018, a delegate of the Minister for Immigration and Border Protection decided, under section 501CA (4) of the Migration Act 1958, not to revoke Ms. Visona's third refugee visa cancellation. It is unknown whether that decision was made known to Ms. Visona before or during her arrest. On 9 October 2018, Ms. Visona lodged an application for a protection visa.

13. On 15 September 2020, a delegate of the Minister concluded that it was considered on reasonable grounds that Ms. Visona, having been convicted by final judgment of a particularly serious crime, was a danger to the Australian community. Accordingly, the delegate found that Ms. Visona did not satisfy the criterion in section 36 (1C) of the Migration Act 1958 and refused to grant her a protection visa under section 65 of the same Act.

14. Ms. Visona has been convicted of a number of offences, including breach of probation order, breach of bail, breach of community service order, breach of domestic violence order, commission of public nuisance, wilful damage, obstruction of a police officer, possession of dangerous drugs, unlawful assault, occasioning bodily harm, robbery, stealing and unlawful possession of suspected stolen property.

15. On 6 October 2020, Ms. Visona sought a merits review of the decision of the delegate to refuse the granting of a protection visa. On the basis of Ms. Visona's extensive criminal

record and lack of evidence of rehabilitation, the Tribunal concluded that she was a danger to the community. The source adds that, under Australian law, this conclusion is not liable to further qualification through the application of the proportionality test, where the prospective danger that the applicant poses to the community is balanced against the prospective harm that the applicant would face if returned to the country of origin.

16. On 28 June 2021, because of her criminal convictions, the Tribunal found that Ms. Visona had been convicted by final judgment of a particularly serious crime and that she posed a danger to the community pursuant to section 36 (1C) of the Migration Act 1958, meaning that she was excluded from the granting of a protection visa. That exhausted Ms. Visona's merits review remedies. As Ms. Visona does not hold a valid visa, she falls under the definition of an unlawful non-citizen and is liable to be detained under section 189 (1) of the Act.

17. Under section 36 (1C) of the Migration Act 1958, Australia is not bound in this case by the non-refoulement obligations under article 33 of the Convention relating to the Status of Refugees, which is the specific non-refoulement obligation that is contemplated and implemented by the administration of the protection visa process under the Act. This is despite a protection finding having been made when Ms. Visona was first issued her refugee visa, in 1999. There is no suggestion that the factual circumstances of her homeland have materially changed since the granting of the visa, which would substantiate a finding of fact that it is presently safe for Ms. Visona to return to her homeland.

18. Although Ms. Visona is not subject to non-refoulement obligations under the Convention relating to the Status of Refugees, they apply to her under other international instruments that Australia has ratified, specifically the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3) and the Covenant (art. 2 read with arts. 6 and 7). The implication is that Australia has non-refoulement obligations towards Ms. Visona for the purposes of the Migration Act 1958, which specifically defines non-refoulement obligations under its section 5 (a) to include the Convention relating to the Status of Refugees, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Covenant.

19. Under Australian law, Ms. Visona is liable to be removed to the country towards which she continues to hold a fear of harm, due to the operation of section 197C of the Migration Act 1958, which imposed a duty upon an officer of the Commonwealth to remove an unlawful citizen, irrespective of whether Australia is found to have non-refoulment obligations. This is because there has not been a protection finding made in respect of Ms. Visona's most recent application for a protection visa.

20. Although the removal is theoretically possible under a strict application of the provisions of the Migration Act 1958, there is no evidence that the Government of Australia will take steps to remove an individual where international non-refoulement obligations are present. As a result, Ms. Visona has endured protracted detention within an immigration detention facility that is to continue for an indefinite amount of time as there has been no indication from the Government that it is actively pursuing the removal of Ms. Visona.

21. While the Government may claim that Ms. Visona could bring her detention to an end by making a written request pursuant to section 197C (3) (c) (iii) of the Migration Act 1958, it is contended that such a request would be made to bring an end to the unbearable conditions of immigration detention in Australia and does not constitute a waiver of Ms. Visona's protection claims.

22. The source recalls the doctrine of constructive refoulement, in which the State manufactures circumstances that leave individuals no other choice than to return to their country of origin. The specific conditions manufactured by Australia that would compel Ms. Visona to leave are the implementation of the mandatory detention regime on asylum-seekers and refugees and the harsh environment of immigration detention facilities.

23. Ms. Visona suffers from a range of severe mental health issues. She is also a survivor of repeated sexual abuse, allegedly perpetrated in both Australia and the Sudan. The authorities are aware of Ms. Visona's vulnerabilities.

24. In January 2017, Ms. Visona ingested an unidentified tablet and was subsequently placed under constant observation by the authorities. Ms. Visona later, on several occasions, made known to the authorities her continued drug use, hallucinations, panic attacks, suicidal thoughts and her struggles as a result of her separation from her children. The source adds that Ms. Visona has requested treatment given her history of untreated hepatitis C. It is unclear whether Ms. Visona received treatment following that request.

25. On 18 December 2020, Ms. Visona was assessed in the Emergency Department of Liverpool Hospital. She was diagnosed with drug-induced psychosis and admitted to the Mental Health High-Dependency Unit for further management. On 24 December 2020, Ms. Visona was admitted to the Acute Psychiatric Unit of Liverpool Hospital for an acute relapse of schizophrenia in the context of continued drug use. She remained there as an inpatient until her discharge on 8 January 2021.

26. On about 15 January 2021, Ms. Visona suffered a relapse of the recurrent drug-induced psychosis and was admitted to the Mental Health High-Dependency Unit of Liverpool Hospital, where she remained as an inpatient until 18 January 2021. In the discharge summary it was noted that, owing to her ongoing substance use, Ms. Visona represented a chronically elevated risk of harm to herself and others, including serious injury and death, which was not modifiable by prolonged hospital admission.

27. Ms. Visona's mental health is severely compromised while in indefinite immigration detention. A range of drugs are readily available to Ms. Visona within the immigration detention facilities and that it has been documented that she has received narcotic substances.

28. In relation to category I, the source recalls that the basis for Ms. Visona's deprivation of liberty is sourced from section 189 (1) of the Migration Act 1958. Ms. Visona's detention is nevertheless arbitrary because it is mandatory under Australian law, as her classification as an unlawful non-citizen is the only component necessary for detention. Consideration of the unique circumstances of the individual are not factored in prior to detention. The reasonability, necessity and proportionality of Ms. Visona's detention cannot be assessed if it is imposed without contemplation of her factual circumstances.

29. In relation to category II, the source notes that Ms. Visona has been deprived of liberty because she has exercised her right under article 14 (1) of the Universal Declaration of Human Rights, which provides that everyone has the right to seek in other countries asylum from persecution. As a result of seeking asylum through lodging an application for a protection visa, Ms. Visona has been excluded from refugee status as, having been convicted by a final judgment of a particularly serious crime, she is considered a danger to the Australian community.

30. With regard to category III, article 9 (4) of the Covenant provides that anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful.

31. It is submitted that, in Australia, there is currently no effective mechanism to challenge the legality of the detention of someone who is in similar circumstances to Ms. Visona. In *A. v. Australia*, the Human Rights Committee observed that judicial review by Australian courts of detention decisions was limited to whether detention was lawful in accordance with domestic law and not whether it was in accordance with article 9 (1) of the Covenant.[2]

32. Insofar as category IV is concerned, the source notes that the High Court of Australia has upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. It notes that the Human Rights Committee, in *Mr. C v. Australia*,[3] held that there was no effective remedy for people subject to mandatory detention in Australia.

---

[2] CCPR/C/59/D/560/1993.

[3] CCPR/C/76/D/900/1999.

33. Finally, in relation to category V, the source submits that Australian citizens and non-citizens are not equal before the courts and tribunals in Australia. In this context, it recalls that the decision of the High Court of Australia in *Al-Kateb v. Godwin* (2004) stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act 1958 does not contravene the Constitution. It is submitted that the effective result is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

Response from the Government

34. On 28 February 2022 the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 29 April 2022, detailed information about the current situation of Ms. Visona and to clarify the legal provisions justifying her continued detention, as well as its compatibility with the obligations of Australia under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure her physical and mental integrity.

35. On 31 March 2022, the Government requested an extension in accordance with paragraph 16 of Working Group’s methods of work, which was granted, with the new deadline of 30 May 2022.

36. On 26 May 2022, the Government submitted its reply explaining that, on 8 September 1999, Ms. Visona had arrived in Australia on a refugee visa (subclass 200). On 16 March 2016, Ms. Visona’s refugee visa was mandatorily cancelled under section 501 (3A) of the Migration Act 1958, which requires that the visa be cancelled if it is determined that the person does not pass the character test because they have a “substantial criminal record” and is serving a full-time sentence of imprisonment.

37. As Ms. Visona became an unlawful non-citizen pursuant to section 14 of the Migration Act 1958, she was detained under section 189 (1) of the Act and initially placed in immigration detention at the Brisbane Alternative Place of Detention on 18 March 2016. On 20 March 2016, she was transferred to Villawood Immigration Detention Centre.

38. After Ms. Visona had sought revocation of the first cancellation decision, a delegate of the Minister for Immigration and Border Protection decided to revoke the mandatory visa cancellation on 6 May 2016. Ms. Visona was released back into the community on the same day.

39. On 22 September 2016, Ms. Visona was convicted by the Brisbane Magistrate’s Court of stealing, drug offences, breaches of bail and other offences under the Bail Act and received a term of imprisonment. On 29 November 2016, Ms. Visona’s refugee visa was cancelled for the second time while she was serving a sentence of imprisonment. Pursuant to section 14 of the Migration Act 1958, she was rendered an unlawful non-citizen.

40. On 4 January 2017, Ms. Visona was released from prison and detained under section 189 (1) of the Migration Act 1958. She was placed in Brisbane Immigration Transit Accommodation. On 9 January 2017, she was transferred to Villawood Immigration Detention Centre.

41. After Ms. Visona had sought revocation of that cancellation decision, a delegate of the Minister for Immigration and Border Protection decided to revoke the second mandatory visa cancellation on 27 February 2017. Ms. Visona was released back into the community on the same day.

42. On 9 March 2018, Ms. Visona was convicted of common assault and a number of other offences and sentenced to 18 months of imprisonment. On 19 April 2018, her refugee visa was cancelled for a third time under section 501 (3A) of the Migration Act 1958. Pursuant to section 14 of the Act, she was rendered an unlawful non-citizen and detained under section 189 (1) of the Act while in criminal detention. On 20 April 2018, Ms. Visona was released from criminal custody and detained under section 189 (1) of the Act. She was taken to Villawood Immigration Detention Centre.

43. On 14 August 2018, a delegate of the Minister for Home Affairs decided, under section 501CA-(4) of the Migration Act 1958, not to revoke Ms. Visona's third visa cancellation. On 15 August 2018, Ms. Visona was notified of that decision and provided with information on how to apply for a merits review of that decision before the Administrative Appeals Tribunal; however, no application for a merits review of the visa revocation was ever lodged.

44. On 9 October 2018, while at Villawood Immigration Detention Centre, Ms. Visona lodged an application for a protection visa (class XA, subclass 866).

45. On 15 September 2020, a delegate of the Minister found that Ms. Visona was a person in respect of whom Australia had protection obligations, in respect of South Sudan. However, the delegate found that Ms. Visona did not satisfy the criterion in section 36 (1C) of the Migration Act 1958 as she was a person whom the delegate considered on reasonable grounds, having been convicted by a final judgment of a "particularly serious crime", as "a danger to the Australian community". Accordingly, the delegate refused to grant Ms. Visona a protection visa under section 65 of the Act.

46. The information provided by the source about the previous offences of Ms. Visona is accurate.

47. On 6 October 2020, Ms. Visona sought a merits review at the Administrative Appeals Tribunal in relation to the decision to refuse her protection visa application. On 28 June 2021, the Tribunal affirmed the delegate's refusal decision, finding that she had been convicted by a final judgment of a particularly serious crime and that she posed a danger to the community pursuant to section 36 (1C) (b) of the Migration Act 1958, meaning that she did not satisfy the criteria for the granting of a protection visa. Ms. Visona did not seek to have the decision of the Tribunal reviewed by the courts.

48. This conclusion is not liable to further qualification through the application of the proportionality test, where the prospective danger that Ms. Visona poses to the community is balanced against the prospective harm that she would face if she were returned to her country of origin.

49. Ms. Visona has no outstanding applications with the Department of Home Affairs or reviews with the Administrative Appeals Tribunal or courts.

50. The Government continues to prioritize the health and safety of all persons in immigration detention. It is aware of Ms. Visona's mental and physical health issues. It notes, however, that while Ms. Visona claims to be affected by schizophrenia, she has never actually been diagnosed with that condition.

51. While in immigration detention, Ms. Visona has access to all of the primary health-care services that are available in the community, with an enhanced level of mental health and drug and alcohol services. Specialty mental health services are available for survivors of sexual abuse upon referral.

52. Detainees are provided with programmes aimed at decreasing dependency on substances and minimizing associated harms. The opiate-substitution treatment programme has been made available to Ms. Visona and she has taken advantage of this service.

53. All persons entering an immigration detention facility are subject to various levels of screening, in accordance with the Migration Act 1958.

54. All personnel working in an immigration detention facility must abide by a code of conduct. Allegations of staff misconduct are investigated and any cases that may involve criminal, corrupt and serious misconduct are referred to the police or to the Commission for Law Enforcement Integrity.

55. Ms. Visona's health continues to be monitored and she is aware of the services available to her while in detention. The International Health and Medical Services health summary report for the Commonwealth Ombudsman outlines the status of her ongoing physical health issues. The report also outlines the physical health issues that have been resolved while she has been in detention.

56. The report outlines the ongoing status of Ms. Visona's mental health issues. With regard to the management of those issues, on 21 July 2021, she presented to the International Health and Medical Services mental health nurse, reporting anxiety about the possibility of being repatriated. The nurse encouraged her to follow up with the International Health and Medical Services psychiatrist and to continue taking her medication. On 5 August 2021, Ms. Visona had a scheduled appointment with the psychiatrist, but did not attend. On 19 October 2021, Ms. Visona presented to the mental health nurse, declining further services. She will continue to be offered routine mental health support while in detention.

57. The report also outlines the status of her illicit substance abuse and drug dependency. With regard to the management of those issues, Ms. Visona attended six appointments to have her depot injection for opioid-substitution therapy. On 24 October 2021, Ms. Visona attended a drug and alcohol review, during which she was observed to be agitated. Ms. Visona stated that she was aware that she could not use drugs while on opioid-substitution therapy and that she was trying to stop. The primary health nurse offered mental health support to Ms. Visona; however, she declined. Ms. Visona will continue to be monitored and managed by the International Health and Medical Services mental health team.

58. It is noted in the report that Ms. Visona attended appointments with a rehabilitation specialist on 9 June, 11 June and 16 September 2021. It is confirmed that Ms. Visona has ongoing mental health support.

59. Turning to the legal framework, the Government explains that the universal visa system of Australia requires all non-citizens to hold a valid visa to enter and/or remain in Australia. The country's immigration detention legislative framework provides that, under section 189 of the Migration Act 1958, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Under section 196 of the Act, an unlawful non-citizen must be kept in immigration detention until they are removed or they are granted a visa.

60. Section 195A of the Migration Act 1958 enables the Minister for Immigration and Border Protection to grant a visa to a person in immigration detention if the Minister considers it to be in the public interest. Section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing the person to reside in the community at a specified place and under specified conditions, if the Minister considers it to be in the public interest. What is in the public interest is a matter for the Minister to decide.

61. The Minister has established guidelines on the types of cases that should or should not be referred for consideration under these intervention powers. Cases are only referred for ministerial consideration if they are assessed as meeting these guidelines. Ministerial intervention is not an extension of the visa process. The Minister's powers under sections 195A and 197AB of the Migration Act 1958 are non-delegable and non-compellable. The Minister is under no obligation to exercise or to consider exercising these powers in a case.

62. Persons who make a valid application for a protection visa will have their claims assessed by the Government. Domestic legislation implements the non-refoulement obligations of Australia under the Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

63. If a person who makes a valid application for a visa is found not to meet the criteria for the visa, leading to visa refusal, they can seek to have the legality of that decision reviewed through domestic judicial processes. On 15 September 2020, a delegate found that Ms. Visona was a person in respect of whom Australia had protection obligations with respect to South Sudan. However, the delegate found that Ms. Visona did not satisfy the criterion in section 36 (1C) of the Migration Act 1958 as she was a person whom the delegate considered on reasonable grounds, having been convicted by a final judgment of a particularly serious crime, to be a danger to the Australian community. Accordingly, the delegate refused to grant Ms. Visona a protection visa under section 65 of the Act. The Administrative Appeals Tribunal subsequently affirmed that decision on 29 June 2021. Ms. Visona has not sought

judicial review of the decision. As a "protection finding" has been made for Ms. Visona with respect to South Sudan, pursuant to section 197C (3) of the Act, she cannot be involuntarily removed to South Sudan.

64. Further, the Government is obliged in all proceedings before courts to act as a model litigant. The model litigant obligation requires that the Commonwealth act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency. The obligation includes a duty not to take advantage of a claimant who lacks the resources to litigate a legitimate claim and a duty to adhere to the highest professional standards, including by assisting the court to arrive at the proper and just result.

65. The Government's position is that the detention of an individual on the basis that they are an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary and proportionate in the light of the particular circumstances of the individual. However, continuing detention may become arbitrary if it is no longer reasonable, necessary and proportionate in the circumstances. In instances of continuing detention, the determining factor is not the length of the detention, but whether the grounds for the detention are lawful and justifiable. Under the Migration Act 1958, detention is not limited by a set time frame but is dependent on a number of factors that are based on an individual's circumstances, including identity determination, developments in country information, health, character and security matters.

66. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Ms. Visona remains in immigration detention, in accordance with Australian law, because she is an unlawful non-citizen and, on the basis of her individual circumstances, immigration detention is considered to be the most appropriate form of detention. The Department of Home Affairs notes that the finding of the protection obligations decision maker and the Administrative Appeals Tribunal is that Ms. Visona is a danger to the community due to the serious and consistent nature of her criminal offences.

67. In the most recent Ombudsman's report, it was noted that Ms. Visona is precluded from lodging a valid Bridging visa E application in accordance with section 501E of the Migration Act 1958. She requires ministerial intervention to be granted a Bridging visa E or to be placed in the community. As the information before the Department of Home Affairs indicates that Ms. Visona can be more appropriately managed in a held detention environment (due to her health needs and serious criminal record), her case has not been referred for assessment under the ministerial intervention guidelines.

68. In the same report, it was noted that Ms. Visona has no ongoing matters before the Department of Home Affairs, tribunals or the courts and that the Department has engaged with her to obtain a travel document to facilitate her removal to a country other than South Sudan. As Ms. Visona has considered being removed to the United States of America due to family ties, the Department has advised her to pursue that option.

69. Immigration detention is administrative in nature and not for punitive purposes. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the legal obligations of Australia. The ongoing detention of Ms. Visona is justifiable, not arbitrary, and consistent with the Covenant given that the finding of the protection obligations decision maker and the Administrative Appeals Tribunal is that Ms. Visona is a danger to the community.

70. The Department of Home Affairs is required under section 486N of the Migration Act 1958 to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been in immigration detention for a cumulative period of two years and every six months thereafter. Following receipt of the Department's section 486N reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Commonwealth Ombudsman may make recommendations to the Minister or the Department regarding the circumstances of the individual's detention, including their detention placement. The Department has produced reports on Ms. Visona on five occasions during her time in immigration detention, with the most recent report sent to the Commonwealth Ombudsman on 21 January 2022.

71. 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. Paragraph 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. Subsection 39B (1) of the Judiciary Act 1901 grants the Federal Court of Australia the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. These constitute the mechanism enabling non-citizens to challenge the lawfulness of their detention.

72. In *Al-Kateb v. Godwin (2004)*, the High Court of Australia held that provisions of the Migration Act 1958 requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. That decision does not alter non-citizens' ability to challenge the lawfulness of their detention under Australian law. Further, non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus.

73. The Government notes that the Universal Declaration of Human Rights does not create legally binding obligations. Notwithstanding this, the Government submits that Ms. Visona is detained as required by section 189 of the Migration Act 1958 as she is an unlawful non-citizen, not because she is seeking protection. It notes that Ms. Visona was able to apply for a protection visa and that her application was assessed by a delegate of the Minister and subject to a merits review by the Administrative Appeals Tribunal.

74. Article 26 of the Covenant provides that all people are entitled to equal protection under the law without any discrimination. The Government notes that the object of the Migration Act 1958 is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In that sense, the purpose of the Act is to differentiate, on the basis of nationality, between non-citizens and citizens. The Human Rights Committee has recognized that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party.[4]

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

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

77. The Government submits that the differential treatment in the Migration Act 1958 between citizens and non-citizens is for the legitimate aim of ensuring the integrity of the country's migration programme, assessing the security, identity and health of unlawful non-citizens and protecting the community. This is consistent with articles 12 and 13 of the Covenant. The differentiation is reasonable because it is consistent with those aims, and no more restrictive than required. Therefore, any differential treatment between citizens and non-citizens is based on reasonable and objective criteria for a legitimate purpose and does not amount to prohibited discrimination under the Covenant. Considering Ms. Visona's serious criminal history, her detention is for the legitimate aim of protecting the community from harm.

78. Australia, as a party to the core international human rights treaties, takes steps to respect, protect, promote and fulfil the right to non-discrimination. However, equality and non-discrimination should not be understood simplistically as requiring identical treatment for all persons in all circumstances. Further, under international human rights law, not all differences in treatment will constitute discrimination. The Government submits that the

[4] See the Committee's general comment No. 15 (1986).

treatment of Ms. Visona amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant.

79. The Government submits that Ms. Visona is lawfully detained under section 189 of the Migration Act 1958, and that this is consistent with the international obligations of Australia. It is the position of the Government that her immigration detention is lawful and is reasonable, necessary and proportionate in the light of her particular circumstances. It is a matter for the Government to determine who may enter its territory and under what conditions, including by requiring that non-citizens hold a visa in order to lawfully enter and remain in Australia, and that in circumstances where a visa is not held, a non-citizen is subject to immigration detention.

Further comments from the source

80. On 26 May 2022, the reply of the Government was sent to the source for further comments, which the source provided on 9 June 2022. The source highlights that there is no evidence that Ms. Visona has been granted South Sudanese citizenship, or that a passport or other travel document has been issued by the Government of South Sudan. Given her status as a refugee, and that she is currently detained in Australia with a criminal record, removal to a country other than South Sudan appears highly speculative.

81. Further, it is noted that the environment she is held in is non-conducive to the rehabilitation of drug dependency disorders. The source is concerned that the Government continues to justify the mandatory and indefinite detention of "unlawful non-citizens" as lawful on the basis that it is consistent with Australian law, despite previous findings of the Working Group.

82. The source disagrees that Ms. Visona's continued and indefinite detention is reasonable, necessary or proportionate in relation to her individual circumstances.

Discussion

83. The Working Group thanks the source and the Government for their engagement in this case.

84. In determining whether Ms. Visona's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[5]

Category I

85. The Working Group observes that the present case is the twenty-first case in a long line of recent jurisprudence in relation to Australia since 2017.[6] This case follows the same pattern and concern the same issue, namely mandatory immigration detention in Australia under the Migration Act 1958. The Working Group reiterates its views on the Act.[7]

86. In all those previous instances, the Working Group stated its alarm at the ongoing number of cases from Australia concerning the implementation of the Migration Act 1958 that are being brought to its attention. The Working Group is equally alarmed that, in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Act.

87. The Working Group wishes to reiterate that such an argument can never be accepted as legitimate under international human rights law. The mere fact that a State is following its own domestic legislation does not in itself mean that the legislation conforms with the

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

[6] Opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 69/2021, No. 28/2022, No. 32/2022 and No. 33/2022.

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

obligations that the State has undertaken under international human rights law. No State can legitimately avoid its obligations arising from international human rights law by hiding behind its domestic laws and regulations. To accept otherwise would be to make a mockery of international human rights law.

88. The Working Group wishes to emphasize that it is the duty of the Government to bring its national legislation, including the Migration Act 1958, into line with its obligations under international human rights law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights mechanisms, including the Human Rights Committee,[8] the Committee on Economic, Social and Cultural Rights,[9] the Committee on the Elimination of Discrimination against Women,[10] the Committee on the Elimination of Racial Discrimination[11] and the Special Rapporteur on the human rights of migrants,[12] as well by the Working Group.[13] The Working Group is concerned that the united voice of so many independent, international human rights mechanisms is continuously disregarded. It calls upon the Government to urgently review the legislation and bring it into conformity with its obligations under international human rights law without delay.

89. Noting this and the numerous occasions on which the Working Group, as well as other United Nations human rights bodies and mechanisms, has alerted Australia to the affront to its obligations under international human rights law that the Migration Act 1958 poses, and also noting the failure by the Government to take any action, the Working Group concludes that the detention of Ms. Visona under the said legislation is arbitrary under category I as it violates article 9 (1) of the Covenant. Domestic law that violates international human rights law that has been brought to the attention of the Government on so many occasions by international human rights mechanisms cannot be accepted as a valid legal basis for detention, especially noting the findings of the Working Group under categories II and V below.

Category II

90. The Working Group observes that Ms. Visona arrived in Australia on 8 September 1999 as a dependant on a refugee visa and was free to live in the community. She served terms of imprisonment in the criminal justice context in 2016, 2017 and 2018 and, after each of those occasions, upon release from prison, she was moved to immigration detention due to the mandatory cancellation of her visa as a result of the imprisonment. In 2016 and 2017, the visa cancellation was revoked, but that was not the case in 2018. As such, since 20 April 2018, Ms. Visona has been in immigration detention because she has been assessed as posing danger to Australian society due to her criminal convictions. In its reply, the Government admits that she cannot be removed to the Sudan owing to the protection obligation, but has provided no indication as to when her detention might come to an end.

91. The Working Group wishes to clarify at the outset that the present opinion concerns solely the immigration detention of Ms. Visona and is without prejudice to her detention in the criminal justice context.

92. Notwithstanding the views and findings of the Working Group about the Migration Act 1958 and its compatibility with the obligations of Australia under international human rights law, the Working Group observes that it is not disputed that Ms. Visona remains detained today on the basis of that same Act. The source argues that Ms. Visona is detained under the Act purely for the exercise of her right under article 14 of the Universal Declaration of Human Rights. The Government does not contest that this detention is due to the migratory

[8] CCPR/C/AUS/CO/6, paras. 33–38.
[9] E/C.12/AUS/CO/5, paras. 17–18.
[10] CEDAW/C/AUS/CO/8, paras. 53–54.
[11] CERD/C/AUS/CO/18-20, paras. 29–33.
[12] See A/HRC/35/25/Add.3.
[13] See, for example, opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 115–117; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.

status of Ms. Visona; nevertheless, it argues that such detention is strictly in accordance with the Act.

93. The Working Group has consistently maintained that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees and the Protocol thereto. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.[14]

94. Ms. Visona lived freely in the Australian community until her sentencing in 2016, 2017 and 2018. Following each of those instances, her visa was mandatorily cancelled due her imprisonment. The Government does not contest this. While the mandatory cancellation of her visa was revoked in 2016 and 2017, it was not revoked in 2018 and Ms. Visona has remained in immigration detention since. As such, her migratory status is the sole reason for her detention.

95. The Working Group notes in particular that the Government has given no indication as to when Ms. Visona's detention could end, but has made it clear that she is subject to a protection obligation and cannot be removed to the Sudan. Noting that she has already been detained for more than four years, the Working Group is bound to conclude that her detention appears indefinite.

96. 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."[15] This echoes the views of the Human Rights Committee, which stated in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person that:

> Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

97. The Working Group cannot accept that detention for over four years could be described as a "brief initial period", to use the language of the Human Rights Committee. The Government has not presented any particular reason specific to Ms. Visona, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would justify her detention. Ms. Visona is being detained due to an assessment that she is a "danger to Australian society". This assessment is based solely on her three criminal convictions for which she has served imprisonment terms and the Government's reply makes it clear that no individual assessment of Ms. Visona's circumstances has taken place to ascertain whether a less restrictive measure might be possible, nor is there an indication when this detention might come to an end.

98. These failures on the part of the Government lead the Working Group to conclude that there was no reason for detaining Ms. Visona other than her migratory status as a refugee. Since her visa was mandatorily cancelled due to her criminal conviction, as required by the Migration Act 1958, she has been subjected to the automatic immigration detention policy. The Working Group concludes that Ms. Visona was detained due to the exercise of her legitimate rights under article 14 of the Universal Declaration of Human Rights.

99. Furthermore, while the Working Group agrees with the argument presented againby the Government in relation to article 26,[16] it must nevertheless emphasize that general comment No. 15 (1986) the Human Rights Committee, quoted by the Government, also makes it clear that "aliens receive the benefit of the general requirement of non-

[14] See also, for example, opinions No. 28/2017, No. 42/2017 and No. 35/2020.
[15] A/HRC/39/45, annex, para. 12.
[16] See, for example, opinions No. 28/2022, No. 32/2022 and No. 33/2022.

discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. […] Aliens have the full right to liberty and security of the person."[17]

100. This means that Ms. Visona is entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and that, when guaranteeing these rights to her, Australia must ensure that it is done without distinction of any kind, as required by article 2 of the Covenant. Ms. Visona is subjected to de facto indefinite detention due to her immigration status, in clear breach of articles 2 and 9 of the Covenant.

101. Noting that Ms. Visona has been detained due to the legitimate exercise of her rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds her detention arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Ms. Visona has always been treated in accordance with the stipulations of the Migration Act 1958. Be that as it may, such treatment is not compatible with the obligations that Australia has undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

Category IV

102. The source has argued that Ms. Visona has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government denies these allegations, arguing that persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court and that the case of Ms. Visona has been reviewed by the Commonwealth Ombudsman.

103. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[18] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[19] and applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also migration detention.[20]

104. The facts of Ms. Visona's case since her immigration detention from 20 April 2018 clearly show that there has never been an assessment of the necessity to detain her or indeed the proportionality of such detention to her individual circumstances. Although the Government has claimed that an individualized assessment has taken place in the case of Ms. Visona, it has never explained when, how or by what judicial body it was carried out. On the contrary, the Government has repeatedly argued that a representative assessed Ms. Visona as posing a danger to Australian society, purely due to her criminal convictions. On the basis of that assessment, her visa was cancelled, leading to her immigration detention. It is thus clear that assessments carried out in relation to Ms. Visona's detention did not conform with the legal framework set out in the Migration Act 1958.

105. As is evident by the Working Group's examination above, the Migration Act 1958 is incompatible with the obligations of Australia under international law and, therefore, assessments carried out in accordance with this Act are equally incompatible with the requirements of international law.

106. The Government has argued that the case of Ms. Visona is periodically reviewed by the Commonwealth Ombudsman. However, the Government has not explained how such a review satisfies the requirement of article 9 (4) of the Covenant for a review of legality of detention by a judicial body, a point that the Working Group has already explained to the Government in earlier jurisprudence.[21] The Working Group is particularly mindful that the

[17] Paras. 2 and 7.
[18] A/HRC/30/37, paras. 2–3.
[19] Ibid., para. 11.
[20] Ibid., para. 47 (a).
[21] See, for example, opinion No. 33/2022.

Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention, as clearly stipulated by the Government itself.

107. The Government has also argued that the Minister has reviewed the detention of Ms. Visona. Once again, noting that this is a review by an executive body, the Working Group observes, as it has on previous occasions,[22] that it does not satisfy the criteria of article 9 (4) of the Covenant.

108. The Working Group therefore concludes that, during her over four years of detention, no judicial body has ever been involved in the assessment of the legality of Ms. Visona's detention and notes that international human rights law requires that such consideration by a judicial body necessarily involves an assessment of the legitimacy, necessity and proportionality of detention.[23]

109. The Working Group must therefore reiterate that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[24] which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings must be set by legislation and, upon the expiry of the period for detention set by law, the detained person must be automatically released.[25] There cannot be a situation whereby individuals are caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.[26] As stated in the Working Group's revised deliberation No. 5:

> There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.[27]

110. The Working Group recalls the numerous findings by the Human Rights Committee that the application of mandatory immigration detention in Australia and the impossibility of challenging such detention is in breach of article 9 (1) of the Covenant.[28] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in migration settings must be exceptional and, in order to ensure this, alternatives to detention must be sought.[29] In the case of Ms. Visona, the Working Group has already established that, since her detention on 20 April 2018, no alternatives to detention have been considered.

111. Moreover, despite the claims of the Government to the contrary, the Working Group opines that the detention of Ms. Visona is in fact punitive in nature which, as it highlighted in revised deliberation No. 5, should never be the case[30] and is in breach of article 9 of the Covenant. Presently, Ms. Visona has been detained for over four years and the Government

---

22 See, for example, opinion No. 32/2022.

23 Revised deliberation No. 5, paras. 12–13.

24 Revised deliberation No. 5, para. 26; opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020; and A/HRC/13/30, para. 63.

25 Revised deliberation No. 5, para. 25; A/HRC/13/30, para. 61; and opinion No. 7/2019.

26 See opinions No. 1/2019 and No. 7/2019.

27 Para. 27.

28 *C. v. Australia* (CCPR/C/76/D/900/1999); *Baban et al. 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).

29 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; A/HRC/30/36/Add.1, para. 81; and opinions No. 72/2017 and No. 21/2018.

30 Paras. 9 and 14. See also opinion No. 49/2020, para. 87.

has not been able to identify how long her detention would last, which means that it is de facto indefinite.

112. Consequently, the Working Group finds that Ms. Visona is subjected to de facto indefinite detention due to her migratory status without the possibility of challenging the legality of such detention before a judicial body, which is the right encapsulated in article 9 (4) of the Covenant. This is therefore arbitrary, falling under category IV. In making this finding, the Working Group also 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 has been found to be in breach of article 9 of the Covenant.[31]

Category V

113. The Working Group notes the source's argument that Ms. Visona, as a non-citizen, appears to be in a different situation from Australian citizens in relation to her ability to effectively challenge the legality of her detention before the domestic courts and tribunals owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. In its reply, the Government denies those allegations, arguing that, in this case the High Court held that provisions of the Migration Act 1958 requiring the detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

114. The Working Group remains perplexed by the repeated explanation submitted by the Government,[32] since this confirms only 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.

115. However, as the Working Group has repeatedly noted, the Government is failing to explain how such non-citizens can effectively challenge their continued detention after this decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[33]

116. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[34] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Ms. Visona is arbitrary, falling under category V.

Concluding remarks

117. The Working Group wishes to place on record its very serious concern over the state of Ms. Visona's mental and physical health. It is clear that she is seriously unwell and it is not contested that she has been sectioned. The source has argued that her condition has

---

[31] *C. v. Australia*; *Baban et al. v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia*; *Bakhtiyari v. Australia*; *D and E and their two children v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*.

[32] See opinions No. 21/2018, para. 79; No. 50/2018, para. 81; No. 74/2018, para. 117; No. 1/2019, para. 88; No. 2/2019, para. 98; No. 74/2019, para. 72; No. 35/2020, paras. 95–96; No. 70/2020, paras. 71–73; No. 17/2021, paras. 120–123; and No. 32/2022, paras. 72–73.

[33] *C. v. Australia*; *Baban et al. v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia*; *Bakhtiyari v. Australia*; *D and E and their two children v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*, para. 9.3.

[34] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 28/2022, No. 32/2022 and No. 33/2022.

severely deteriorated following the over four years of detention, which the Working Group has established to be indefinite arbitrary detention.

118. Although the Working Group acknowledges submissions by the Government concerning the health-care provision for Ms. Visona, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty are to be treated with respect for their human dignity, and that this applies also to those held in the context of migration.[35] As the Working Group has explained in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.[36] The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

119. The Working Group also wishes to emphasize that, in the light of the outbreak of the coronavirus disease (COVID-19) pandemic, it has called upon States to note the underlying conditions of detention as especially conducive to the spread of the infection. As highlighted by the Working Group in its deliberation No. 11, States should resort to detention only in exceptional cases.[37] The Working Group calls upon the Government to release Ms. Visona in the prevailing circumstances and especially noting the trauma she has suffered as a result of the years of detention to which she has already been subjected.

120. The Working Group welcomes the invitation dated 27 March 2019 from the Government for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed due to the worldwide pandemic, the Working Group looks forward to carrying out the visit as soon as practically possible. It views the visit as an opportunity to engage with the Government constructively, including with regard to its offshore detention facilities, and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

> The deprivation of liberty of Amani Bol Santino Visona, being in contravention of articles 2, 3, 7–9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

122. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Ms. Visona 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.

123. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Visona immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Ms. Visona.

124. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Visona and to take appropriate measures against those responsible for the violation of her rights.

125. The Working Group requests the Government to bring its laws, particularly the Migration Act 1958, into conformity with the recommendations made in the present opinion and with the commitments made by Australia under international human rights law.

[35] See also deliberation No. 12 (A/HRC/48/55, annex).

[36] Para. 38.

[37] A/HRC/45/16, annex II.

126. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

128. 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 Ms. Visona has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Visona;

(c) Whether an investigation has been conducted into the violation of Ms. Visona'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.

129. 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.

130. 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.

131. 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.[38]

[*Adopted on 29 August 2022*]

---

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