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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-fifth session, 14–18 November 2022

Opinion No. 69/2022 concerning Mr. A, whose name is known to the Working Group on Arbitrary Detention (Australia)

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. 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 51/8.

2. In accordance with its methods of work,[1] on 21 June 2022 the Working Group transmitted to the Government of Australia a communication concerning Mr. A. The Government replied to the communication on 16 September 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.

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Submissions

Communication from the source

4. Mr. A is a citizen of the Islamic Republic of Iran of Ahwazi Arab decent, born on 26 June 1980. Mr. A and his family, like other Ahwaz Arabs, have allegedly been persecuted by the authorities.

5. Mr. A came to the attention of the Iranian authorities for accompanying his father, for safety reasons, to certain meetings and gatherings and for not regarding himself as Muslim.

6. In 2005, Mr. A came into contact with members of the National Liberation Movement of Ahwaz and became a member. He was engaged in the distribution of publications, informing the public about alleged incidents of the persecution of Ahwaz Arabs.

7. On 4 September 2009, Mr. A was driving home wearing a traditional Arab dress. He was stopped by authorities at a checkpoint, his car was searched and he was arrested for insulting sacred values and for clashing with the authorities. He was detained, beaten and interrogated for three days, after which he was forced to sign a paper that he was not given a chance to understand and was released.

8. Mr. A was again arrested on 9 September 2010, when the authorities found his Arab dress in the back of his car. After managing to escape from his place of detention in the middle of the night, he went directly to the airport and fled to Indonesia on 10 September 2010.

9. Following his departure, members of his family were arrested on several occasions. Furthermore, a verdict of the Criminal Court, dated 19 February 2013, was issued against Mr. A, announcing that, as punishment for failing to appear before the court, the authorities would confiscate and sell his house and cars, which they did in January 2015. The verdict also states that the case against Mr. A for failing to appear in court is still pending and has been adjourned.

10. In October 2013, Mr. A discovered that two of his school friends who had worked for the National Liberation Movement of Ahwaz had been arrested and killed for trying to flee the country. In addition, the authorities had raided his friends' retail shops to check for materials related to the movement.

11. On 11 October 2010, Mr. An arrived by boat at Christmas Island as an unauthorized maritime arrival. He was detained as an offshore entry person under section 189 (3) of the Migration Act (1958). The Act specifically provides, in sections 189 (1), 196 (1) and 196 (3), that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) specifically provides that an unlawful non-citizen cannot be released from detention "even by a court".

12. While Mr. A remained in detention, on 6 May 2011, under a government refugee status determination, it was found that he was not owed protection obligations. This finding was confirmed on 7 November 2011 by an independent government merits review.

13. From 11 October 2010 to December 2011, Mr. A was detained at the Christmas Island detention centre and in December 2011 he was moved the Wickham Point alternative place of detention. On 12 April 2012, Mr. A was released from detention on a bridging visa. In total, he spent 18 months deprived of his liberty during his first period of detention.

14. On 21 September 2012, the Federal Circuit Court in Darwin dismissed Mr. A's appeal against the finding that he was not owed protection under Australian international law obligations.

15. Mr. A was granted work rights only until the end of 2012. He remained reliant on charity in the community in Melbourne until 2017, when he was granted another bridging visa for the period 2017–2019, after which he travelled to Sydney to look for work.

16. On 4 August 2017, Mr. A's bridging visa was cancelled and he was detained a second time. On that date, Mr. A was test-driving a car owned by a friend, to decide whether to purchase it, when they were stopped by the police. The police found a gun belonging to the car owner, as well as a laser pointer, in the car. Mr. A was charged with four offenses and

attended a local court hearing on 13 April 2018, where he was found not guilty on the first three charges but guilty on the fourth charge of having a laser pointer in his custody in a public place. However, without proceeding to conviction, the matter was dismissed. Nevertheless, Mr. A has remained in immigration detention at the Villawood immigration detention centre in New South Wales ever since.

17. The source states that on 15 September 2014, the Department of Home Affairs reported that it would reassess Mr. A’s claim to protection in the light of complementary protection provisions by undertaking an International Treaties Obligations Assessment to determine whether his circumstances would come under Australia’s non-refoulement obligations. However, the Department suspended the assessment process from 4 August 2017 until 16 April 2018 while Mr. A’s criminal charges remained in process.

18. On 12 September 2019, the Commonwealth Ombudsman recommended that the Department of Home Affairs expedite the finalization of Mr. A’s International Treaties Obligations Assessment and that his case be referred to the Minister for Home Affairs for reconsideration under section 195A of the Migration Act (1958) for the grant of a bridging visa.

19. On 26 March 2020, the Minister for Home Affairs agreed to intervene to lift the statutory bar under section 46 A of the Migration Act (1958) to allow Mr. A to make an application for a temporary protection visa or a safe haven enterprise visa. On 30 April 2020, the Department of Home Affairs received an application for the latter visa.

20. On 18 August 2020, a representative of the Minister for Home Affairs refused to grant Mr. A a safe haven enterprise visa. On 20 August 2020, his legal representatives requested that the Administrative Appeals Tribunal review that decision. On 11 December 2020, the Appeals Tribunal affirmed the decision under review.

21. On 15 March 2021, Mr. A’s legal representatives initiated a request for a ministerial intervention under section 195A of the Migration Act (1958). The request remains pending before the Minister for Home Affairs. On 16 March 2021, Mr. A applied for a bridging visa on the grounds of his request for a ministerial intervention. Promptly, on 18 March 2021, the Department of Home Affairs rejected Mr. A’s application as invalid because it did not meet the requirements under section 46 A of the Migration Act (1958).

22. On 15 August 2021, Mr. A’s legal representatives initiated a request for a ministerial intervention under section 195A of the Migration Act (1958). The request remains pending before the Minister for Home Affairs who, thus far, has chosen not to lift the immigration bar. Mr. A has taken all necessary steps to seek protection in Australia and to use the appeal avenues available to him by law.

23. In his first years in Australia, Mr. A did not understand the Australian legal system and was apprehensive of disclosing his entire story for fear of being forcibly returned to the Islamic Republic of Iran. It was only after June 2011, when he felt reassured that it was safe to provide more information, that he did his best to cooperate with the authorities.

24. In Australia, Mr. A does not have a criminal record and has an exemplary behavioural record in detention.

25. Mr. A suffers from depression due to his prolonged detention and uncertainty about his future. He was devastated by the loss of his partner in February 2020 and of his mother in April 2020.

26. Mr. A has been deprived of his liberty and the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights as he came to Australia to seek asylum. Mr. A has also been deprived of his rights in contravention of article 26 of the International Covenant on Civil and Political Rights, which states that all people are entitled to equal protection under the law, without discrimination.

27. The source argues that asylum-seekers do not have the same rights under Australian law as Australian citizens, who are not subjected to administrative immigration detention. Immigration detention is described by the Department of Home Affairs as being used as a last resort and for a very small proportion of people whose status requires resolution, sometimes through protracted legal proceedings.

28. This is not the case for Mr. A, who was detained immediately upon arrival in Australia from 2010–2012 and again since 2017, despite the dismissal of criminal charges against him. Furthermore, he has lived peaceably and without incident in low-security facilities in immigration detention.

29. The Human Rights Committee, in its general comment No. 35 (2014), requires that detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it is extended in time.

30. The very fact that Mr. A has been held in administrative detention since August 2017, has no behavioural issues and no criminal record, illustrates that his detention is not reasonable, necessary or proportionate and has not been properly or independently assessed over time. Without a course to obtain release, it appears that he may be held in detention indefinitely. Given that he cannot return to the Islamic Republic of Iran, his detention is unreasonable.

31. Mr. A was not invited to apply for protection under section 46 A of the Migration Act (1958) until 26 March 2020, when he had been in closed detention for almost three years. He did not apply for bridging visa under section 195A of the Act until his legal representatives applied on his behalf on 16 March 2021, despite his exemplary behaviour and long-term residence in a low-security facility.

32. The High Court of Australia has upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia (*Al-Kateb v. Godwin (2004)*). Australian citizens and non-citizens are not equal before the courts and tribunals. The Court's decision in *Al-Kateb v. Godwin* stands for the proposition that detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act (1958) does not contravene the Constitution. The effective result is that while citizens can challenge administrative detention, non-citizens cannot.

33. The Human Rights Committee, in *Mr. C v. Australia*,[2] held that there is no effective remedy for people subjected to mandatory detention. The judgment in the case of *The Commonwealth v. AJL20* (2021) further entrenched the legality of indefinite immigration detention, even if it is evident that the Government is not taking active steps to remove an individual as soon as reasonably practicable.

Response from the Government

34. On 21 June 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 detailed information by 19 August 2022 about the current situation of Mr. A and to clarify legal provisions justifying his continued detention, as well as its compatibility with Australia's obligations under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group has called upon the Government to ensure Mr. A's physical and mental integrity.

35. On 1 July 2022, the Government requested an extension of time in accordance with paragraph 16 of the Working Group's methods of work and was granted a new deadline of 19 September 2022.

36. In its reply, dated 16 September 2022, the Government noted that Mr. A is an Iranian citizen of Ahwazi Arab descent who entered Australia by sea on 11 October 2010 and became an unauthorized maritime arrival as defined in section 5AA of the Migration Act (1958).

37. Mr. A was detained at the Christmas Island immigration detention centre under section 189 (3) of the Migration Act (1958) on the basis that he was an unlawful non-citizen pursuant to section 14 of the Act.

38. Mr. A is currently at the Villawood immigration detention centre because he is an unlawful non-citizen, meaning he is a non-citizen who does not hold an effective visa (sections 13 and 14 of the Migration Act (1958)).

[2] See CCPR/C/76/D/900/1999.

39. Mr. A’s claims for protection have been considered, but he has been found not to engage Australia’s protection obligations. Mr. A’s case has been repeatedly referred for intervention to the Minister for Home Affairs, requesting that his case be considered under sections 195A and 197 AB of the Migration Act (1958).

40. Mr. A underwent multiple external review processes relating to his immigration status. He currently has no substantive matters before the Department of Home Affairs, tribunals or the courts. While Mr. A has an ongoing request for ministerial intervention under section 48B of the Migration Act (1958), this is not a legal barrier to his involuntary removal from Australia and the Department is currently considering claims raised in regard to such a request. If Mr. A is found to meet the guidelines for referral to the Minister for Home Affairs, it will only allow him to make a further application for a protection visa; that is, it will not effect his release from immigration detention. Mr. A may request voluntary removal from Australia at any time. He is currently on an involuntary removal pathway with the Department.

41. Upon detention, on 16 October 2010, Mr. A participated in an entry interview and indicated he was seeking protection under Australia’s obligations as a State party to the Convention relating to the Status of Refugees of 1951.

42. On 10 December 2010, Mr. A lodged a request for a refugee status assessment. On 6 May 2011, a representative of the Minister for Home Affairs found that Mr. A did not qualify for engagement under Australia’s protection obligations under the 1951 Convention.

43. On 20 May 2011, Mr. A requested an independent merits review of his request for refugee status. On 7 November 2011, the reviewer recommended that Mr. A did not meet the definition of a refugee under the 1951 Convention and therefore did not satisfy the criterion for a protection visa set out in section 36 (2) of the Migration Act (1958).

44. On 6 December 2011, Mr. A sought a judicial review of the decision on the independent merits review before the Federal Circuit Court and Family Court of Australia.

45. On 27 March 2012, the Department of Home Affairs initiated an investigation into Mr. A’s case under section 195A of the Migration Act (1958). On 5 April 2012, the Minister for Home Affairs agreed to consider Mr. A’s case under section 195A.

46. As a result, on 12 April 2012, the Minister for Home Affairs intervened in Mr. A’s case to grant him a temporary protection visa and a bridging visa. Mr. A was released from immigration detention on the same day. The temporary visa was valid for seven days and the bridging visa for six months, until 12 October 2012.

47. On 30 May 2012, as Mr. A’s refugee status assessment and independent merits review processes had been completed prior to 24 March 2012 when complementary protection provisions of the Migration Act (1958) commenced, his case was assessed against the guidelines for the consideration of post-review protection claims to determine whether his case should be referred to the Minister for Home Affairs for consideration. On the same day, the Department of Home Affairs found that Mr. A did not meet the criteria set out in the guidelines for referral to the Minister under section 195A.

48. On 6 July 2012, the Department of Home Affairs commenced a ministerial intervention process for Mr. A’s case to be assessed against the guidelines for ministerial intervention under section 195A of the Migration Act (1958). On 6 July 2012, his case was assessed as not meeting the section 195A guidelines.

49. On 21 September 2012, Mr. A’s appeal of the independent merits review decision was dismissed by the Federal Circuit Court and Family Court.

50. On 11 October 2012, the Department of Home Affairs commenced a ministerial intervention process for Mr. A’s case under section 195A of the Migration Act (1958). On 17 October 2012, the Minister for Home Affairs intervened in Mr. A’s case under section 195A.

51. On 14 January 2013, the Department of Home Affairs commenced an additional ministerial intervention process in relation to Mr. A under section 195A. On 21 January 2013,

the Minister intervened in Mr. A’s case under section 195A. This process resulted in the granting of a bridging visa.

52. On 19 April 2013, the Department of Home Affairs once again commenced a ministerial intervention process for Mr. A’s case under section 195A. On 24 April 2013, the then Minister for Home Affairs intervened in Mr. A’s case under section 195A. This process resulted in the granting of another bridging visa.

53. On 6 August 2013, Mr. A’s case was identified for potential inclusion in a group submission for referral to the Minister for Home Affairs under section 195A. It was subsequently determined that Mr. A’s case was not to be included and the ministerial intervention process was terminated.

54. On 15 September 2014, owing to legal developments and changes to departmental policy, the Department of Home Affairs determined that it would no longer rely on its earlier assessment under the guidelines for consideration of post-review protection claims of May 2012. The Department commenced a reassessment of Mr. A’s protection claims by undertaking an International Treaties Obligations Assessment.

55. On 9 October 2014, the Department of Home Affairs commenced a ministerial intervention process in relation to Mr. A under section 195A. The Minister for Home Affairs decided to intervene, in accordance with section 195A, granting Mr. A a further bridging visa with a number of conditions.

56. On 9 January 2015, Mr. A’s bridging visa expired, and he became an unlawful non-citizen. Until 4 August 2017, Mr. A resided unlawfully in the community.

57. On 4 August 2017, Mr. A was arrested and charged by New South Wales police with a number of criminal offences. On 5 August 2017, Mr. A was released from police custody, but detained again on the same day under section 189 (1) of the Migration Act (1958) (as he did not hold a visa) and transferred to the Villawood immigration detention centre.

58. On 16 April 2018, the Federal Court found that Mr. A has a laser pointer in his custody in a public place, but the matter was dismissed. Mr. A was charged with three other offences but was found not guilty on all charges.

59. On 16 April 2018, the Department of Home Affairs commenced a ministerial intervention process in relation to Mr. A under section 195A. On 23 October 2018, the Minister for Home Affairs declined to consider Mr. A’s case under section 195A.

60. On 28 March 2019, the Department of Home Affairs commenced a ministerial intervention process for Mr. A’s case to be assessed against the guidelines under section 195A for referral to Minister for Home Affairs. On 27 February 2020. Mr. A’s case was assessed as meeting the guidelines.

61. Noting changes in Mr. A’s circumstances since February 2020, a review of the previous assessment on ministerial intervention was undertaken. On 16 July 2021, the review found that Mr. A had had no ongoing immigration processes since December 2020 (and was therefore available for removal) and that the International Health and Medical Services had stated that his health conditions could be managed in his current environment. The review also noted that Mr. A refused to depart Australia voluntarily. Therefore, his case was assessed as not meeting the guidelines under section 195A and the assessment process was finalized by the Department of Home Affairs as “not met” and “not referred to the Minister”.

62. On 10 May 2019, the Commonwealth Ombudsman had recommended that the Department of Home Affairs expedite the finalization of the International Treaties Obligations Assessment for Mr. A. The Ombudsman had also recommended that Mr. A’s case be referred to the Minister for Home Affairs for consideration under section 195A for the grant of a bridging visa.

63. On 5 August 2019, Mr. A lodged two applications for a bridging visa. On the same day, the first application was determined to be invalid as it was not made in a place or manner specified by the Minister for Home Affairs. On 7 August 2019, the second application was determined to be invalid, as Mr. A was barred from making a valid application for a visa under section 46A of the Migration Act (1958).

64. On 7 August 2019. Mr. A’s case was referred to the Minister for Home Affairs for consideration to intervene to lift the legislative bar imposed by section 46A of the Migration Act (1958), which would allow Mr. A to submit a valid application for a temporary protection visa or a safe haven enterprise visa. On 24 December 2019, the Department of Home Affairs referred the case to the Assistant Minister for Home Affairs.

65. Prior to 29 January 2020, Mr. A lodged six applications for bridging visas. All of the applications were determined to be invalid either because they were not made as specified by the Minister for Home Affairs or because he was barred under section 46A of the Migration Act (1958).

66. On 26 March 2020, the Minister for Home Affairs lifted the bar under section 46A to allow Mr. A to submit an application for a temporary protection visa or a safe haven enterprise visa so that his protection claims could be assessed through a statutory process.

67. On 29 March 2020, Mr. A lodged an application for a temporary protection visa and on 30 March 2020, for a safe haven enterprise visa. On 15 May 2020, Mr. A withdrew his application for a temporary protection visa.

68. On 18 August 2020, Mr. A’s application for a safe haven enterprise visa was refused by a representative of the Minister for Home Affairs in accordance with section 65 of the Migration Act (1958). The application was on the basis that he was found not to engage Australia’s protection obligations as a refugee or under the complementary protection provisions as codified in paragraphs 36 (2) (a) and 36 (2) (aa) of the Migration Act (1958). On 20 August 2020, Mr. A sought a merits review of the refusal of his application for a safe haven visa with the Administrative Appeals Tribunal. On 11 December 2020, the Tribunal affirmed the decision to refuse to grant a safe haven enterprise visa to Mr. A.

69. On 15 March 2021; the Department of Home Affairs commenced a ministerial intervention process for Mr. A’s case to be assessed against the relevant guidelines in sections 195A and 197AB of the Migration Act (1958). On 2 March 2022, Mr. A’s case was assessed as not meeting the guidelines and the process was finalized.

70. On 11 June 2022. the Department of Home Affairs commenced a ministerial intervention process for Mr. A’s case to be assessed against the guidelines. On 4 July 2022, Mr. A’s case was again assessed as not meeting the guidelines.

71. On 7 September 2022, Mr. A’s migration agent, on his behalf, made a request for a ministerial intervention under section 48B of the Migration Act (1958), seeking the intervention of the Minister for Home Affairs to allow Mr. A to lodge another application for a temporary protection visa. That request remains in process before the Department of Home Affairs.

72. The Department of Home Affairs is aware of Mr. A’s mental health issues, for which he actively engages with a torture and trauma counsellor.

73. With regard to Mr. A’s physical health, he has a history of several conditions that are being monitored and managed.

74. Mr. A is aware of the services available to him. Mr. A has no health issues that cannot be managed in a detention facility.

75. Australia’s universal visa system requires all non-citizens to hold a valid visa to enter and/or remain in Australia. Under section 189 of the Migration Act (1958), an individual must be detained when an officer knows or reasonably suspects that an individual is an unlawful non-citizen. Under section 196 of the Act, unlawful non-citizens are subject to immigration detention for administrative purposes until they are removed from Australia or are granted a visa.

76. Section 195A of the Migration Act (1958) enables the Minister for Home Affairs to grant a visa to a person in immigration detention if the Minister considers it is in the public interest to do so. In addition, section 197AB provides the Minister with the power to make a residence determination in respect of persons in immigration detention, allowing them to reside in the community at a specified place and under specified conditions if the Minister

considers it is in the public interest to do so. What is in the public interest is a matter for the Minister to decide.

77. The Minister for Home Affairs has established guidelines that describe the types of cases that should or should not be referred for consideration under the above intervention powers. Cases are only referred for ministerial intervention if they are assessed as meeting the guidelines set out in section 195A of the Migration Act (1958). Ministerial intervention is not an extension of the visa process.

78. Persons in Australia who make valid applications for a protection visa have their claims assessed. Australia's domestic legislation, namely the Migration Act (1958), and Australia's policies and practices, are used to implement the country's non-refoulement obligations under the Convention relating to the Status of Refugees of 1951, the Covenant and the Convention against Torture.

79. If a person who makes a valid application for a visa is found not to satisfy the criteria for a visa and it is refused, that person can seek to have the lawfulness of the decision to refuse the visa reviewed through domestic judicial review processes. Judicial review of administrative decisions is available to both citizens and non-citizens. Mr. A has exercised this right on multiple occasions.

80. The Government is obliged in all court proceedings to act as a model litigant, including acting fairly in the handling of claims, not taking advantage of a claimant who lacks the resources to litigate and assisting the court to arrive at a proper and just result.

81. The detention of individuals on the basis that they are unlawful non-citizens is not arbitrary under international law if it is reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. 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 based on an individual's circumstances, including identity determination, information on developments in the country of origin, health, character and security matters. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. A remains in immigration detention because he is an unlawful non-citizen.

82. Immigration detention is administrative in nature and not for punitive purposes.

83. 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 reports of the Department under section 486N, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister for Home Affairs with a report under section 486O of the Migration Act (1958). The Commonwealth Ombudsman may make recommendations to the Minister/Department regarding the circumstances of the individual's detention, including their detention placement. The Department has reported on Mr. A on nine occasions during his time in immigration detention; the most recent report was sent to the Commonwealth Ombudsman in February 2022.

84. 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. Section 75 (v) of the Australian 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. Section 39B (1) of the Judiciary Act (1903) grants the Federal Court of Australia the same jurisdiction as the High Court under section 75 (v) of the Constitution. It is those provisions that constitute the legal mechanism through which non-citizens may challenge the lawfulness of their detention.

85. In the case of *Al-Kateb v. Australia*, 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. The decision in the *Al-Kateb* case does not alter a non-citizen's ability to challenge

the lawfulness of their detention under Australian law. Furthermore, non-citizens are also able to challenge the lawfulness of their detention through an application for a writ of habeas corpus. Mr. A has not sought to challenge the lawfulness of his detention through these legal domestic avenues.

86. The Universal Declaration of Human Rights is not a legally binding instrument. However, the Government of Australia recognizes that articles of the Declaration reflect international law to the extent that they have been codified in other legally binding instruments. Notwithstanding this, the Government submits that Mr. A is detained as required under section 189 of the Migration Act (1958) as he is an unlawful non-citizen, not as a consequence of seeking protection. His protection claims have been assessed by a number of decision-makers who have found that under domestic law he does not engage Australia's protection obligations.

87. The Human Rights Committee has recognized, in the context of the Covenant, that it does not recognize the right of aliens to enter or reside in the territory of a State party. It is, in principle, a matter for the State to decide who it will admit to its territory. However, in certain circumstances, an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatments and respect for family life arise. Consent for entry may be given, subject to certain conditions relating, for example, to movement, residence and employment. [3]

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

89. The differential treatment is not discriminatory and is not inconsistent with articles 12, 13 and 26 of the Covenant because it is aimed at achieving a purpose that is legitimate, based on reasonable and objective criteria and is proportionate to the aim to be achieved.

90. The differential treatment in the Migration Act (1958) between citizens and non-citizens is for the legitimate aim of ensuring the integrity of Australia's migration programme, assessing the security, identity and health of unlawful non-citizens and protecting the community.

91. Equality and non-discrimination should not be understood simplistically as requiring identical treatment of all persons in all circumstances. The treatment of Mr. A amounts to permissible legitimate differential treatment.

92. Mr. A has been found not to engage Australia's protection obligations under the Migration Act (1958). He has no ongoing substantive matters before the Department of Home Affairs. His request for ministerial intervention under section 48B of the Migration Act (1958) will be assessed and he will be notified of that decision once available.

93. There is no information in the records of the Department of Home Affairs to indicate that Mr. A's current placement is not appropriate.

94. Mr. A remains opposed to his involuntary removal from Australia to the Islamic Republic of Iran. The Iranian Embassy is currently not issuing travel documents to Iranians who would be removed involuntarily. The Department of Home Affairs continues to engage with Mr. A and continues to explore options to effect his removal from Australia.

95. The Government concludes that Mr. A is lawfully detained under section 189 (1) of the Migration Act (1958), consistent with Australia's international obligations.

Additional comments from the source

96. On 30 September 2022, the reply of the Government was sent to the source for further comments, which the source provided on 14 October 2022. The source notes that current events in the Islamic Republic of Iran warrant a reconsideration of Mr. A's protection claims, both as an Ahwaz Arab from Khuzestan, a persecuted minority group in the country, and as

[3] Human Rights Committee, general comment No. 15 (1986).

an active member of the National Liberation Movement of Ahwaz. Mr. A will be at serious risk of persecution, torture or death if he is not granted protection in Australia.

97. Recently, several members of Mr. A's family were shot and killed by Iranian security forces during protests in the city of Ahvaz.

98. The Government refers to changes in Mr. A's circumstances since February 2020 as forming the basis of a review of his previous assessment for a ministerial intervention under section 195A of the Migration Act (1958), although those changes are not specified.

99. The source notes that Government is not entitled to draw an adverse conclusion from the fact that, by refusing to depart Australia voluntarily, Mr. A has been assessed as not meeting the guidelines for ministerial intervention. His refusal to be removed to the Islamic Republic of Iran both reiterates and reinforces his acute fear of persecution if returned.

100. The source recalls that in the last report on Mr. A's condition submitted by the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors, dated 24 June 2022, it was stated that his current visa immigration issues continue to have a significant impact on his psychological well-being. The ongoing detention is also affecting his ability to maintain hope for the future.

101. The source also elaborates on Mr. A's negative emotions associated with his ongoing detention status. His health, namely, his acute mental distress and anxiety, far from being managed in a detention facility as the Government asserts, have been caused, and continue to be exacerbated, by his closed and indefinite administrative detention, which is having a punitive effect on him.

102. In subsequently affirming the decision of the Department of Home Affairs, the Administrative Appeals Tribunal concluded that Mr. A's family continues to remain affluent, and hence unlikely to face discrimination, despite finding that his family properties have been confiscated by the Iranian authorities over the years.

103. The source submits that Mr. A's most recent request for ministerial intervention under section 48B of the Migration Act (1958) was once again finalized without referral to the Department of Home Affairs because it did not meet the guidelines under section 195A. In a separate document, explaining the reasons behind its decision, the Department stated that it will continue to rely on the findings of the Administrative Appeals Tribunal because Mr. A has not provided any new evidence that would support his claims or contradict those findings and that there is little to demonstrate that he is at risk of serious and significant harm if he returns to the Islamic Republic of Iran.

104. Mr. A, however, has provided considerable evidence over the years pertaining to his continued active membership in the National Liberation Movement of Ahwaz, the confiscation of his family's property, its continued harassment and his activism on social media. In addition, it should be remembered that Mr. A's public activism is limited to what he can access from immigration detention where he has been confined since 5 August 2017.

105. Mr. A has been left drained and exhausted, mentally, physically and financially, after years of appeals for recognition as a refugee to whom Australia owes protection obligations. He does not have the means to continue with further lengthy judicial process to seek to establish his protection claims, let alone challenge the lawfulness of his detention through domestic legal avenues.

106. Since 30 September 2019, Mr. A has not received notification of the reports of the Department of Home Affairs or the Commonwealth Ombudsman's assessments and recommendations regarding his immigration detention arrangements, and the source believes that his assessment number with the office of the Commonwealth Ombudsman may have changed. Mr. A has discussed this issue with his case manager and has also made a freedom of information request in this regard pertaining to the time period 2020–2022, to which he is awaiting a response.

Discussion

107. The Working Group thanks the source and the Government for the submissions.

108. In determining whether Mr. A’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 established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source’s allegations.[4]

i. Category I

109. The Working Group observes that the present case is the latest in a long line of cases that it has been asked to consider in recent years in relation to Australia. This case follows the same pattern and concerns the same issue as those that proceed it, namely mandatory immigration detention in Australian under the Migration Act (1958).[5] The Working Group once again reiterates its views on the Migration Act (1958).[6]

110. As in each of those previous instances, the Working Group reiterates its alarm at the rising number of cases emanating 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 such cases, the Government has argued that the detention is lawful purely because it follows the stipulations of the Migration Act (1958).

111. The Working Group once again wishes to emphasize that such arguments can never be accepted as legitimate under international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that the State has undertaken. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations. To accept otherwise would be to undermine international human rights law.

112. The Working Group wished 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. For several years, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[7] the Committee on Economic, Social and Cultural Rights,[8] the Committee on Elimination of Discrimination against Women,[9] the Committee on the Elimination of Racial Discrimination,[10] the Special Rapporteur on the human rights of migrants[11] and the Working Group itself.[12] The Working Group is concerned that the consistent views of these independent international human rights mechanisms might be disregarded and calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law without delay.

113. Noting the present case, and the numerous occasions upon which the Working Group and other United Nations human rights bodies and mechanisms have alerted Australia to the challenge to its obligations under international human rights law posed by the Migration Act (1958), and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. A 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, and which has been brought to the attention of the Government on numerous

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

[5] Opinions No. 28/017; 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; No. 33/2022; and No. 42/2022.

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

[7] CCPR/C/AUS/CO/6, paras. 33–38.

[8] E/C.12/AUS/CO/5, paras. 17–18.

[9] CEDAW/C/AUS/CO/8, para. 53.

[10] CERD/C/AUS/CO/18-20, paras. 29–33.

[11] See A/HRC/35/25/Add.3.

[12] 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. 112–117; No. 74/2019, paras. 75–80; No. 35/2020, paras. 98–103; No. 17/2021, paras. 125–128; No. 68/2021, No. 69/2021, No. 28/2022, No. 32/2022 and No. 33/2022.

occasions by international human rights mechanisms, cannot be accepted as a valid legal basis for detention, in particular noting the findings of the Working Group under categories II and V below.

ii. Category II

114. The Working Group observes that the present case involves an individual who has spent more than six and a half years in various detention settings in Australia since October 2010 and who remains in detention. Mr. A arrived in Australian waters on 11 October 2010 and was detained as an illegal maritime arrival. Thereafter, he remained in detention for 18 months until he was granted a bridging visa. Mr. A was detained a second time in August 2017, after being stopped on a criminal matter, although the charge was ultimately dismissed.

115. Mr. A was arrested on 4 August 2017 and detained at a police facility. The next day, on 5 August 2017, he was released from police custody, only to be detained again on the same day under section 189 (1) of the Migration Act (1958). He is still detained.

116. Notwithstanding the Working Group's views and findings regarding 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 Mr. A remains currently detained under its provisions. The source argues that Mr. A is detained under the Migration Act (1958) purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights, which provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". While the Government does not contest that the detention of Mr. A is due to his migratory status, it nevertheless argues that such detention is strictly in accordance with the Migration Act.

117. 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 of 1951 and the 1967 Protocol relating to the Status of Refugees. The Working Group notes that those instruments constitute international legal obligations that Australia has undertaken.[13] In fact, Mr. A arrived in Australia on 11 October 2010 and was immediately detained. During his detention in Australia he has submitted various visa applications, received rejections and made appeals against those rejections. Mr. A's prolonged detention, of over six years, has reportedly left him in poor health.

118. The Working Group notes in particular that the Government has given no indication as to when Mr. A's detention might cease but that it has indicated that he is not willing to be removed to the Islamic Republic of Iran voluntarily and that the Iranian Embassy is currently not issuing travel documents to Iranians who would be removed involuntarily. Noting that he has already been detained for more than six years, the Working Group is bound to conclude that his detention appears indefinite.

119. 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.[14]

120. This echoes the views of the Human Rights Committee, which, in its general comment No. 35 (2014), argued 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

[13] See, for example, Opinions No. 28/2017; No. 42/2017; and No. 35/2020.

[14] A/HRC/39/45, annex, para. 12.

individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.[15]

121. In the present case, Mr. A was detained immediately upon arrival and has remained in detention for over six years, spending time in various detention facilities in Australia. It is not clear to the Working Group as to why, when Mr. A was initially detained, the Government did not engage in an assessment of the need to detain him and no attempt was made to ascertain if a less restrictive measure would have been better suited to his individual circumstances, as required under international humanitarian law. In fact, throughout his time in Australia, the authorities have never attempted to do so. The Working Group cannot accept that detention for over six years could be described as a "brief initial period", to use the language of the Human Rights Committee. Furthermore, the Government has not presented any particular reason specific to Mr. A, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would have justified his detention.

122. These failures by the Government lead the Working Group to conclude that there was no other reason for detaining Mr. A other than the fact that he was seeking asylum and arrived in Australia without a visa, where he was subjected to the automatic immigration detention policy of Australia under the Migration Act (1958). The Working Group therefore concludes that Mr. A was detained as a result of the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

123. Furthermore, while the Working Group acknowledges the Government's argument that article 26 of the Covenant does not create any right for aliens to reside in a country subject to the Convention,[16] it must nevertheless highlight that the Human Rights Committee also makes it clear that aliens should receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof, and that aliens have the full right to liberty and security of person.[17] The Working Group has declared, in this respect, that "[a]ny 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".[18]

124. Mr. A is therefore entitled to the right to liberty and security of person as guaranteed under article 9 of the Covenant and Australia must ensure that he is guaranteed this right without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. A has been subjected to de facto indefinite detention as a result of his immigration status, in clear breach of article 2, in conjunction with article 9, of the Covenant.

125. Consequently, noting that Mr. A has been detained as a result of the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary under category II. In making this finding, the Working Group notes the Government's submission that Mr. A has always been treated in accordance with the stipulations of the Migration Act (1958). Be that as it may, as noted above, such treatment is not compatible with the obligations that Australia has undertaken under international humanitarian law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

iii. Category IV

126. The source argues that Mr. A has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government

[15] Human Rights Committee, general comment No. 35 (2014) (CCPR/C/GC/35, para. 18).

[16] Human Rights Committee, general comment No. 15 (1986).

[17] See, for example, Opinions No. 28/2022; No. 32/2022; and No. 33/2022; see also Human Rights Committee, general comment No. 35 (2014) on liberty and security of persons, (CCPR/C/GC/35, paras. 21 and 32).

[18] A/HRC/39/45, annex, para. 12.

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 Mr. A has been reviewed by the Commonwealth Ombudsman 13 times.

127. 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.[19] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[20] and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also migration detention.[21]

128. The Government has argued that the case of Mr. A has been repeatedly reviewed by the Commonwealth Ombudsman. However, in doing so, the Government has not explained how such reviews satisfy the requirement under article 9 (4) of the Covenant for a review of legality of detention by a *judicial body* (emphasis added), a point that the Working Group has already explained to the Government in earlier jurisprudence.[22] The Working Group is particularly mindful that the 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.

129. The Government has also argued that the Minister for Home Affairs has reviewed the detention of Mr. A. The Working Group observes, once again, as it has on previous occasions,[23] that this is a review by an executive body that does not satisfy the criterion set out in article 9 (4) of the Covenant. The Government has failed to provide explanations for the necessity of Mr. A's detention other than his immigration status.

130. The facts of Mr. A's case, as presented to the Working Group, are characterized by various visa applications, rejections and challenges to those rejections since his detention on 5 August 2017. However, as the Working Group has already observed, there is no clear explanation of the necessity to detain Mr. A, nor indeed the proportionality of such detention to his individual circumstances. Rather, Mr. A's claims have been assessed against the legal framework set out by the Migration Act (1958). As is evident from 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 it are equally incompatible with the requirements of international law.

131. In this connection, the Working Group must once again 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, detained persons 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 that cannot be remedied even by the most meaningful review of detention on an ongoing basis.[26]

132. Consequently, the Working Group finds that Mr. A is subjected to de facto indefinite detention due to his migratory status without the possibility of being able to challenge the legality of such detention before a judicial body, the right encapsulated in article 9 (4) of the Covenant. This detention is therefore deemed arbitrary under category IV. In making this finding, the Working Group also recalls the numerous findings by the Human Rights

[19] A/HRC/30/37, paras. 2–3.
[20] Ibid., para. 11.
[21] Ibid., para. 47 (a).
[22] See Opinion 33/2022.
[23] Ibid.
[24] Revised deliberation No. 5, para. 18; see also Opinions 42/2017; No. 28/2017; No. 7/2019 and No. 35/2020 and A/HRC/13/30, para. 63.
[25] Revised deliberation No. 5, para. 17, see also A/HRC/13/30, para. 61, and Opinion No. 7/2019.
[26] See Opinions No. 1/2019 and No. 7/2019.

Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.[27]

iv. Category V

133. The Working Group notes the source's argument that Mr. A, as a non-citizen, appears to be in a different situation from Australian citizens in relation to his ability to effectively challenge the legality of his detention before the domestic courts and tribunals owing to the effective result of the decision of the High Court in the case of *Al-Kateb v. Godwin* (2004). 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 detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

134. The Working Group remains perplexed by the repeated explanation submitted by the Government[28] since it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal was not reasonably practicable in the foreseeable future.

135. As the Working Group has repeatedly noted, the Government fails to explain how such non-citizens can effectively challenge their continued detention after such a 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 that 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* (2004) and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[29]

136. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[30] 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 Mr. A is arbitrary, falling under category V.

v. Concluding remarks

137. The Working Group wishes to place on record its very serious concern over the state of Mr. A's mental health, which has severely deteriorated during his months spent in detention. Although the Working Group acknowledges the Government's submissions concerning the provision of health care for Mr. A, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty, including

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[27] See Human Rights Committee, *Mr. 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 and 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).

[28] 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.

[29] See Human Rights Committee *Mr. 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 and 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), para. 9.3.

[30] 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.

those held in the context of immigration detention, be treated with respect for their human dignity. 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, and 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. 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.

138. Additionally, the Working Group would like to point out that Mr. A belongs to a vulnerable minority in the Islamic Republic of Iran. According to his unrefuted submissions, Mr. A and his family have been persecuted by the Iranian Government because of their ethnic identity. The Government should consider this vulnerable position in its conduct towards Mr. A. In relation to the principle of non-refoulement, as the Working Group stated in its revised deliberation No. 5, "the principle of non-refoulement must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum-seekers, refugees and stateless persons, is prohibited by international law".[31] The Working Group recalls that individuals should not be expelled to another country when there are substitutional grounds for believing that their lives or freedom would be at risk, or that they would be in danger of being subjected to torture or ill-treatment.[32]

139. The Working Group welcomes the Government's invitation of 27 March 2019 for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed owing to the worldwide coronavirus disease (COVID-19) 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 and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

> The deprivation of liberty of Mr. A, 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.

141. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. A 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.

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

143. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. A and to take appropriate measures against those responsible for the violation of his rights.

144. 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.

145. 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 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.

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[31] A/HRC/39/45, annex, para. 43.

[32] A/HRC/WGAD/2022/12, para. 84.

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

Follow-up procedure

147. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. A has been released and, if so, on what date;

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

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

148. 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.

149. 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.

150. 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.[33]

[*Adopted on 15 November 2022*]

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[33] See Human Rights Council resolution 51/8, paras. 6 and 9.