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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-ninth session, 18–27 March 2024

Opinion No. 23/2024 concerning Wajid Ali (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 51/8.

2. In accordance with its methods of work,[1] on 24 October 2023 the Working Group transmitted to the Government of Australia a communication concerning Wajid Ali. The Government submitted a late response on 25 January 2024. 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).

* Miriam Estrada Castillo did not participate in the discussion of the present case.
[1] A/HRC/36/38.

1. Submissions

(a) Communication from the source

(i) Background

4. Wajid Ali is believed to have been born on 20 March 1987 (also recorded as 1 August 1988 and 14 February 1992). Mr. Ali is an ethnic Pashtun from Pakistan who practises the Shia Muslim faith.

5. The source reports that, on 19 June 2012, Mr. Ali arrived in Australia by boat, fleeing persecution by the Taliban in Pakistan. Upon arrival, he was administratively detained by the authorities under section 189 (1) of the Migration Act of 1958. Mr. Ali was held at the North West Point Immigration Detention Centre on Christmas Island. Mr. Ali promptly sought asylum in Australia on the ground of being subject to persecution by the Taliban.

6. On 25 October 2012, Mr. Ali was granted a six-month Bridging E (Class WE) visa and released into the community. On 1 February 2013, Mr. Ali was granted a further Bridging E (Class WE) visa.

7. On 9 September 2013, Mr. Ali was arrested and charged with indecent treatment of a child under 16 years of age, contrary to section 210 (1) (a) of the Criminal Code Act 1899 of Queensland, and common-law assault but was immediately released on bail. He spent two weeks in the community on bail and did not reoffend during this time.

8. On 10 April 2014, Mr. Ali's bridging visa was cancelled, with effect from 11 April 2014, in accordance with section 116 of the Migration Act and regulation 2.43 of the Migration Regulations 1994. The source explains that this cancellation was prompted by Mr. Ali being charged with a criminal offence.

9. Following the cancellation of the bridging visa, Mr. Ali was rendered an "unlawful non-citizen" pursuant to sections 13 and 14 of the Migration Act. Under section 189 of the same Act, he became liable to mandatory detention. On or around 11 April 2014, Mr. Ali was detained by the authorities. He has since been in indefinite immigration detention, without any prospect of release.

10. The source recalls that Mr. Ali remains in administrative immigration detention, despite having been recognized as being owed a protection obligation on or around 19–24 September 2014. On 27 September 2013, Mr. Ali's protection visa application was refused on character grounds under section 501 (6) (e) (i) of the Migration Act, a decision that is subject to an ongoing review process. This process relates to Mr. Ali's protection visa and not specifically to Mr. Ali's detention.

11. On 25 June 2016, a conviction was recorded against Mr. Ali by the District Court of Queensland, Ipswich, for indecent treatment of child under 16 years of age, contrary to section 210 (1) (a) of the Criminal Code Act of Queensland. Mr. Ali was not given a sentence of imprisonment; rather, he received a one-year good behaviour bond and a fine amounting to $A 200. This sentence, notes the source, was on the lower end of those available for the offence. By the time of Mr. Ali's sentencing, he had already been in administrative detention for 13 months.

12. On 12 December 2016, the Minister for Immigration and Border Protection exercised his personal discretion under section 501 (1) of the Migration Act to refuse Mr. Ali a Temporary Protection (Class XD) visa, giving as the reason, inter alia, the fact that Mr. Ali did not pass the character test due to his criminal conviction.

13. On 16 December 2016, Mr. Ali appealed his criminal conviction of 25 June 2016. His appeal was dismissed.

14. On 16 May 2017, the Federal Court of Australia handed down a judgment for judicial review of the ministerial decision of 12 December 2016 to refuse Mr. Ali a Temporary Protection (Class XD) visa. The decision was quashed and the matter remitted to the Department of Home Affairs for reconsideration.

15. On 7 December 2018, Mr. Ali's application for a protection visa under section 501 (1) of the Migration Act was refused again. On 21 December 2018, Mr. Ali made an application with the Administrative Appeals Tribunal for a merits review of that refusal decision. On 8 March 2019, the Administrative Appeals Tribunal decided to affirm the refusal decision.

16. On 13 August 2019, the Court heard Mr. Ali's application for judicial review of the decision of the Administrative Appeals Tribunal to affirm the decision to refuse a visa to Mr. Ali. On 4 October 2019, Mr. Ali's appeal was dismissed.

17. On 21 May 2021, a hearing was held before the Federal Circuit and Family Court. The Court heard Mr. Ali's appeal against the 4 October 2019 judgment.

18. On 20 September 2021, the Federal Circuit and Family Court made an order to allow Mr. Ali's appeal and have the matter remitted to the Administrative Appeals Tribunal for reconsideration.

19. On 28 November 2022, the Administrative Appeals Tribunal reconsidered the refusal decision and again decided to affirm it. On 31 December 2022, Mr. Ali lodged an originating application with the Federal Court of Australia, seeking judicial review of that decision of the Administrative Appeals Tribunal. Mr. Ali is currently undertaking these proceedings.

20. The source explains that the refusal of Mr. Ali's application for a Temporary Protection (Class XD) visa means that he will be prevented by section 501E of the Migration Act from making an application for another visa and will be prevented by section 48A of the same Act from making a further application for a protection visa. Without a visa, Mr. Ali is an unlawful non-citizen and, pursuant to sections 189 and 196 of the Migration Act, must be detained until his immigration status has been resolved.

21. According to the source, in accordance with the non-refoulement obligations of Australia, Mr. Ali cannot be returned to Pakistan. Consequently, the only foreseeable legal outcome is that of Mr. Ali remaining in immigration detention for an indefinite period.

22. The source notes that, through medical evaluations, Mr. Ali was found to be of low likelihood to reoffend. According to a forensic psychological and neuropsychological assessment dated 10 November 2022, Mr. Ali was rated as having a moderate to low risk – a likelihood of between 5.8 per cent and 7.2 per cent – of reoffending.

23. The source emphasizes that Mr. Ali received the criminal sentence of a one-year good behaviour bond but has already spent a period of almost two thirds of the maximum criminal sentence for the offence of which he was convicted (14 years) in immigration detention.

24. In May 2015, the International Health and Medical Services, the organization that provides health care to detainees, identified Mr. Ali as vulnerable due to his criminal history and as at a high risk of being assaulted by other detainees.

25. In or around June 2016, the Commonwealth Ombudsman provided a report regarding the ongoing immigration detention of Mr. Ali. The Ombudsman recommended that priority be given to exploring options to enable the resolution of Mr. Ali's immigration status. Little positive action has since been taken by the Minister for Immigration and Border Protection to address the recommendations contained in the Ombudsman's report.

26. According to the source, during his time in detention, Mr. Ali suffered a significant physical injury and did not receive sufficient timely medical treatment, despite expert recommendations, and is at risk of permanent hearing loss.

27. The source details that, on 9 January 2021, Mr. Ali was allegedly assaulted by an officer who hit him on the head with a plastic shield, causing him to fall to the ground, during a riot at the North West Point Immigration Detention Centre on Christmas Island.

28. According to the source, there has also been a failure by the authorities to adequately investigate claims of sexual assault, in particular three incidents that allegedly occurred in 2016, 2017 and 2021, in relation to which Mr. Ali lodged formal complaints of having been indecently touched while being restrained by the Emergency Response Team of the Department of Home Affairs.

29. Mr. Ali's mental health has been severely compromised in detention, and he has symptoms such as low mood, sleeping for up to 22 hours at a time and, at times, a loss of faith.

30. Mr. Ali denies any history of head injuries, concussion, epilepsy or other neurological disorders and any history of psychiatric illness prior to his detention, indicating that his mental and physical symptoms developed solely as a result of his treatment and conditions in detention, as well as the arbitrary nature and indefinite length of his detention. It was acknowledged in expert reports and court reports that continued and indefinite immigration detention was detrimental to Mr. Ali's recovery from his mental health issues.

31. In this context, the source recalls revised deliberation No. 5 of the Working Group on Arbitrary Detention, in which the Working Group stated that 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.[2]

32. The source submits that Mr. Ali's poor treatment and lack of care while in detention and its resulting harm should be seen as, at a minimum, ill-treatment and a breach of the Commonwealth's duty of care. It recalls that physical or mental conduct not meeting the threshold of torture may be regarded as cruel, inhuman or degrading treatment or punishment and would be prohibited under article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the Covenant.

(ii) Legal Analysis

33. The source submits that the continued deprivation of liberty of Mr. Ali is arbitrary and falls under categories I, II, III, IV and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

a. Category I

34. In relation to category I, the source recalls that the basis for Mr. Ali's deprivation of liberty is section 189 (1) of the Migration Act and judicial precedent. Under statute, the pressing of criminal charges against a bridging visa holder constitutes a prescribed ground for cancellation under section 116 of the Migration Act and regulation 2.43 (1) (p) (ii) of the Migration Regulations.

35. Following the filing of criminal charges, Mr. Ali's bridging visa was cancelled, on 10 April 2014. The cancellation made Mr. Ali an "unlawful non-citizen" pursuant to section 14 of the Migration Act and liable to be detained under section 189 (1) of the Migration Act.

36. Classification as an unlawful non-citizen under sections 13 and 14 of the Migration Act is the only component necessary for detention. Under common law, the High Court of Australia, in *Al-Kateb v. Godwin*, has held that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution of Australia.

37. The Working Group has previously held that no State can legitimately evade its obligations under international human rights law by citing its domestic laws and regulations and that indefinite detention cannot be considered to be lawful purely because it follows the stipulations of the Migration Act.[3] The Working Group has found indefinite detention under the Migration Act to be arbitrary under category I, as it violates article 9 (1) of the Covenant.

38. The source submits that the test for whether detention is arbitrary is whether it is reasonable, necessary and proportionate in the light of the circumstances of each individual and whether it is reassessed as it extends in time.

39. While the source acknowledges that Mr. Ali ultimately received a criminal conviction for a serious offence, it also notes that the criminal justice process has appropriately dealt with that offence. It is not reasonable, necessary or proportionate for Mr. Ali to be subjected

[2] A/HRC/39/45, annex, para. 38.
[3] Opinions No. 69/2021, paras. 109 and 110; and No. 35/2020, paras. 98–103.

to prolonged mandatory detention for an offence that does not relate to his migration status and that has been dealt with by the criminal courts.

40. The source argues that the mandatory detention of Mr. Ali began immediately after he was charged, before any conviction. It was based on mere charges, regardless of their severity, which breaches a fundamental principle of the Australian common law, namely, the presumption of innocence. Cancelling a visa prior to the determination of criminal guilt presupposes that the visa holder is guilty. The Commonwealth Ombudsman has found that depriving a person of liberty on the basis of an allegation raises the question of whether the authorities are acting prematurely by cancelling a visa. The reasonability, necessity and proportionality of Mr. Ali's detention during the period before his conviction cannot be assessed if it is imposed without consideration of his factual circumstances.

41. Furthermore, Mr. Ali has been held in prolonged detention for nine years, which is significantly longer than the one-year duration of the good behaviour bond that he received. Even following a conviction, the level of risk that an unlawful non-citizen poses to the community is only one factor in determining whether detention is reasonable, necessary and proportionate. The Human Rights Committee has stated that, in circumstances in which a person is preventatively detained because he or she is feared to be a danger to the community, the State party should have demonstrated that the rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as a continuing obligation under article 10 (3), as well as under article 9 (1), of the Covenant.

42. The source reiterates that Mr. Ali's prolonged detention is also incompatible with the forensic psychological and neuropsychological assessment dated 10 November 2022. It was acknowledged in the assessment that Mr. Ali had no prior criminal history either in Australia or Pakistan.

43. The source recalls the jurisprudence of the Human Rights Committee, namely, its Views in *Tillman v. Australia* and *Fardon v. Australia*.[4] In *Tillman v. Australia*, notes the source, the author had received a conviction for sexual offences and had served his 10-year term of imprisonment in full, yet remained in detention beyond the term of his sentence and then continued to be held following a continuing detention order. In *Fardon v. Australia*, the author was sentenced to 14 years' imprisonment. After his sentence expired, on 30 June 2003, he was made the subject of a continuing detention order, which was rescinded on 4 December 2006. Both claimants argued that their post-sentence detention was incompatible with their rights under the Covenant, specifically, the prohibition of arbitrary detention under article 9 (1). In both cases, the Committee found that continued detention amounted, in substance, to a fresh term of imprisonment, which is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.

44. In this regard, the source observes that Mr. Ali received a criminal conviction and a one-year good behaviour bond but has now spent nine years in immigration detention. Mr. Ali's detention was prompted by his criminal conviction, but his ongoing immigration detention, which goes well beyond the terms of his criminal sentence, amounts to a fresh term of imprisonment, which is incompatible with the prohibition of arbitrary detention under article 9 (1) of the Covenant.

45. The resolution of Mr. Ali's immigration status is not a sufficient reason to hold him in indefinite detention, argues the source. In *A v. Australia*, *Shams et al. v. Australia* and *Kwok v. Australia*,[5] the Human Rights Committee deemed that four years in detention while awaiting the resolution of immigration status or consideration of deportation was arbitrary and a violation of article 9 of the Covenant. The ongoing de facto and mandatory detention of Mr. Ali can be considered arbitrary because it is not reasonable or proportionate to resolving his immigration status.

46. Mr. Ali has been found to be a person in respect of whom Australia has international protection obligations, as he faces a real chance of persecution involving serious harm for

[4] CCPR/C/98/D/1635/2007 and CCPR/C/98/D/1629/2007.

[5] CCPR/C/59/D/560/1993; CCPR/C/90/D/1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004 and 1288/2004; and CCPR/C/97/D/1442/2005.

reasons of religion. In these circumstances, Australia is prevented from removing Mr. Ali to his country of origin. At the same time, Mr. Ali does not hold a valid visa. Given that Australia will not return a person to his or her country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Migration Act produces a situation in which, if Mr. Ali's protection visa application is refused, he cannot legally reside in Australia but cannot be deported to Pakistan. The legal consequence is indefinite detention.

47. The source recalls that the Working Group has previously expressed the view that the indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.[6] The Working Group has also recognized that, where the obstacle to the removal of persons in an irregular situation from the territory is not attributable to them, including the principle of non-refoulement, indefinite detention could be arbitrary.[7] Mr. Ali's prolonged detention is neither reasonable nor proportionate. The deprivation of liberty of Mr. Ali is in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the Covenant and is therefore arbitrary.

b. Category II

48. In relation to category II, the source submits that Mr. Ali has been deprived of liberty for exercising his right under article 14 (1) of the Universal Declaration of Human Rights, namely, the right to seek and to enjoy in other countries asylum from persecution.

c. Category III

49. In relation to category III, the source recalls that article 9 (4) of the Covenant provides that anyone who is deprived of his or her liberty by arrest or detention is entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order his or her release if the detention is not lawful.

50. Nevertheless, section 196 (3) of the Migration Act specifically provides that "even a court" cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

51. In *A v. Australia*, the Human Rights Committee observed that judicial review of detention decisions by the Australian courts was limited to the question of whether detention was lawful in accordance with domestic law and did not include that of whether it was consistent with article 9 (1) of the Covenant. The Committee made clear that court reviews of the lawfulness of detention under article 9 (4) of the Covenant, which must include the possibility of ordering release, are not limited to mere compliance with domestic law.

52. The possibility of review by the Ombudsman does not constitute a remedy for persons subject to mandatory detention, as the Ombudsman can provide only recommendations and has no enforcement powers. The recommendation made by the Ombudsman in 2016 to resolve Mr. Ali's immigration status without delay had little to no impact on his continued detention, recalls the source.

53. The source concludes that, in Australia, there is currently no effective mechanism to challenge the legality of the detention of someone in Mr. Ali's circumstances. The requirement under article 9 (4) of the Covenant for review of the legality of the detention by a judicial body is therefore not satisfied.

d. Category IV

54. In relation to category IV, the source reiterates that the High Court of Australia, in *Al-Kateb v. Godwin*, held that the mandatory detention of non-citizens was a practice not contrary to the Constitution of Australia. The Human Rights Committee has examined the implications of that judgment and concluded that its effects were such that there was no

[6] A/HRC/39/45, annex, para. 26; opinions No. 28/2017, No. 42/2017, No. 7/2019, No. 35/2020 and No. 69/2021; and A/HRC/13/30, para. 63.

[7] Opinions No. 45/2006 and No. 69/2021; A/HRC/7/4, para. 48; A/HRC/10/21, para. 82; and A/HRC/13/30, para. 63.

effective remedy to challenge the legality of continued administrative detention.[8] The Working Group has on multiple occasions concurred with that view.[9]

55. In accordance with the decision of the High Court of Australia in *Commonwealth of Australia v. AJL20*, where the Commonwealth has a duty to remove a detainee from Australia pursuant to section 198 (1) of the Migration Act as soon as reasonably practicable, yet appears to be making minimal attempts to remove that detainee in pursuance of its statutory obligations, it does not follow that the detention is unlawful.[10] A breach of that duty by the executive (for example, in the form of a delay) does not erase the duty to remove the detainee from Australia. The *Al-Kateb* and *AJL20* cases demonstrate that judicial review by the High Court of Australia cannot serve as a remedy to indefinite detention. The only remedy in those circumstances is not a writ of habeas corpus commanding the release of the detainee, but a writ of *mandamus* commanding the Commonwealth to perform its duty to remove the detainee.[11]

e. Category V

56. Lastly, in relation to category V, the source submits that Mr. Ali is deprived of his liberty on the basis of his birth and nationality, as Australian citizens and non-citizens are not equal before the courts and tribunals in Australia. The decision of the High Court of Australia in *Al-Kateb v. Godwin* stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution of Australia. The effective result is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

57. The source argues that this situation is discriminatory and contrary to article 26 of the Covenant, according to which all persons are entitled without any discrimination to the equal protection of the law. De facto indefinite detention due to immigration status is a breach of article 26, read in conjunction with article 9, of the Covenant.

(b) Response from the Government

58. On 24 October 2023, 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 24 December 2023, detailed information about the current situation of Mr. Ali and to clarify the legal provisions justifying his continued detention and 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 of Australia to ensure Mr. Ali's physical and mental integrity.

59. On 14 November 2023, the Government requested an extension of the time limit, in accordance with paragraph 16 of the Working Group's methods of work, and was granted a new deadline of 24 January 2024.

60. The Government submitted its response on 25 January 2024, which was after the deadline. Consequently, the Working Group cannot treat the reply as if it had been presented in accordance with the Working Group's methods of work.

[8] See *C v. Australia* (CCPR/C/76/D/900/1999), *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001), *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002), *Bakhtiyari et al. v. Australia* (CCPR/C/79/D/1069/2002), *Shams et al. v. Australia*, *Shafiq v. Australia* (CCPR/C/88/D/1324/2004), *Nasir v. Australia* (CCPR/C/116/D/2229/2012) and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[9] 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 and No. 68/2021.

[10] See High Court of Australia, *Commonwealth of Australia v. AJL20*, Case No. HCA 21 of 2021, Judgment, 23 June 2021.

[11] Ibid.

2. Discussion

61. In the absence of a response from the Government within the deadline, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

62. In determining whether the deprivation of liberty of Mr. Ali 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 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.[12] In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source within the prescribed time limit.

(a) Preliminary observations

63. As a preliminary matter, the Working Group notes that, according to the Government's late reply, the High Court of Australia, in a decision of 8 November 2023 in the matter of *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs and Anor*, held that executive detention was valid under sections 189 and 196 of the Act but that the continuation of immigration detention was not validly authorized once a point had been reached where there was no real prospect of the detainee's removal from Australia becoming practicable in the reasonably foreseeable future. Mr. Ali was assessed as being affected by the decision of the High Court and was released from immigration detention on a Bridging (Removal Pending) (Subclass 070) visa on 17 November 2023, as soon as reasonably practicable following the decision. He is therefore no longer detained.

64. There is no provision in the Working Group's methods of work that precludes the consideration of a case in such circumstances. Indeed, the Working Group considers it necessary to render an opinion, given the serious allegations relating to Mr. Ali's deprivation of liberty.[13] The Working Group has therefore decided, in accordance with paragraph 17 (a) of its methods of work, to render the present opinion. The Working Group makes it clear that the present opinion concerns only Mr. Ali's immigration detention and is without prejudice to his detention in the criminal justice context.

65. The Working Group observes that the present case is one of numerous cases concerning Australia since 2017.[14] The cases follow the same pattern and concern the same issue, namely, mandatory immigration detention in Australia as provided for under the Migration Act. The Working Group reiterates its views on the Migration Act.[15]

66. In all those previous cases, the Working Group clearly stated its apprehension at the rising number of cases emanating from Australia concerning the implementation of the Migration Act that have been brought to its attention. The Working Group is equally alarmed that, in all those cases, the Government argued that the detention was lawful purely because it followed the stipulations of the Migration Act.

67. The Working Group reiterates that States have an obligation to respect, protect and fulfil all human rights and fundamental freedoms, including liberty of person, and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international and regional instruments. Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and indeed obliged to assess the circumstances of

[12] A/HRC/19/57, para. 68.
[13] Opinions No. 50/2017, para. 53 (c); and No. 55/2018, para. 59.
[14] 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. 69/2021, No. 28/2022, No. 32/2022 and No. 33/2022.
[15] Opinion No. 35/2020, paras. 98–103.

the detention and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.[16]

68. The Working Group has previously emphasized that it is the duty of the Government of Australia to bring its national legislation, including the Migration Act, 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 bodies, including the Human Rights Committee,[17] the Committee on Economic, Social and Cultural Rights,[18] the Committee on the Elimination of Discrimination against Women,[19] the Committee on the Elimination of Racial Discrimination,[20] the Special Rapporteur on the human rights of migrants[21] and the Working Group.[22]

(b) Category I

69. In relation to category I, the source alleges that the basis for Mr. Ali's deprivation of liberty is section 189 (1) of the Migration Act and judicial precedent. Under statute, the pressing of criminal charges against a bridging visa holder constitutes a prescribed ground for cancellation under section 116 of the Migration Act and regulation 2.43 (1) (p) (ii) of the Migration Regulations. Once a visa has been cancelled, the holder becomes an unlawful non-citizen who is liable to indefinite detention. Classification as an unlawful non-citizen under sections 13 and 14 of the Migration Act is the only component necessary for detention. Under common law, the High Court of Australia, in *Al-Kateb v. Godwin*, held that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act did not contravene the Constitution of Australia.

70. In its late reply, the Government maintains that at no point before Mr. Ali's release did his detention become arbitrary. Prior to the decision of the High Court of Australia in *NZYQ v. Minister for Immigration*, the Department of Home Affairs was administering the Act on the basis of the long-standing decision of the High Court in *Al-Kateb v. Godwin*. In that regard, the Department maintains that Mr. Ali's placement in immigration detention was reasonable, necessary and proportionate in the individual circumstances of his case.

71. The Working Group, noting this and the numerous occasions on which it and other United Nations human rights bodies and mechanisms have alerted Australia to the affront to its obligations under international human rights law that the Migration Act poses and noting the failure by the Government of Australia to take any action earlier, concludes that detention of Mr. Ali under the Act was arbitrary under category I, as it violated article 9 (1) of the Covenant. This domestic law, which violates international human rights law, as has been brought to the attention of the Government on numerous 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.

[16] See General Assembly resolution 72/180, preambular para. 5; and Human Rights Council resolution 41/2, preambular para. 2; resolution 41/6, para. 5 (b); resolution 41/10, para. 6; resolution 41/17, preambular para. 1; resolution 43/26, preambular para. 13; resolution 44/16, preambular para. 25; resolution 45/19, preambular para. 9; resolution 45/20, preambular para. 2; resolution 45/21, preambular para. 3; and resolution 45/29, preambular para. 3. See also Commission on Human Rights resolution 1991/42, para. 2; and resolution 1997/50, para. 15; Human Rights Council resolution 6/4, para. 1 (a); and resolution 10/9, para. 4 (b); and Working Group, opinions No. 41/2014, para. 24; No. 3/2018, para. 39; No. 18/2019, para. 24; No. 36/2019, para. 33; No. 42/2019, para. 43; No. 51/2019, para. 53; No. 56/2019, para. 74; No. 76/2019, para. 36; No. 6/2020, para. 36; No. 13/2020, para. 39; No. 14/2020, para. 45; and No. 32/2020, para. 29.

[17] CCPR/C/AUS/CO/6, paras. 33–38.

[18] E/C.12/AUS/CO/5, paras. 17 and 18.

[19] CEDAW/C/AUS/CO/8, paras. 53 and 54.

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

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

[22] 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. 74/2019, paras. 37–42; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.

(c) Category II

72. In regard to category II, the source argues that Mr. Ali has been deprived of liberty for exercising his right under article 14 (1) of the Universal Declaration of Human Rights, namely, the right to seek and to enjoy in other countries asylum from persecution.

73. The source explains that, on 19 June 2012, Mr. Ali arrived in Australia by boat, fleeing persecution by the Taliban in Pakistan. Upon arrival, he was administratively detained by the authorities under section 189 (1) of the Migration Act. Mr. Ali was held at the North West Point Immigration Detention Centre on Christmas Island. Mr. Ali promptly sought asylum in Australia on the ground of being the subject of persecution by the Taliban.

74. The Government describes Mr. Ali as an unlawful maritime arrival, who, upon arrival, was detained by the authorities under section 189 of the Migration Act and remained in various immigration detention centres over a period of months.

75. There is no dispute that, until his release, Mr. Ali had been detained and had remained in detention on the basis of the provisions the Migration Act. The source argues that Mr. Ali was detained under the Act purely for the exercise of his right under article 14 of the Universal Declaration of Human Rights. The Government does not contest that Mr. Ali's detention was due to his migratory status but nevertheless argues that such detention is strictly in accordance with the Migration Act.

76. The Working Group has consistently maintained that seeking asylum is not a criminal act; on the contrary, it 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.[23]

77. 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.[24] This echoes the views of the Human Rights Committee, which argued as follows in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

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

78. Since the cancellation, on 10 April 2014, of Mr. Ali's bridging visa by a delegate of the Minister of Immigration and Border Protection under section 116 (1) (g) of the Migration Act on the basis that he had been charged with an offence, he has been subject to the automatic immigration detention policy of Australia. The Working Group therefore concludes that Mr. Ali was detained due to the legitimate exercise of his right under article 14 of the Universal Declaration of Human Rights.

79. Consequently, noting that Mr. Ali was detained due to the legitimate exercise of his right under article 14 of the Universal Declaration of Human Rights and his rights under articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary, falling under category II.

(d) Category IV

80. In relation to category IV, the source reiterates that, in *Al-Kateb v. Godwin*, the High Court of Australia held that the mandatory detention of non-citizens is a practice not contrary to the Constitution of Australia. The Human Rights Committee has examined the

[23] See also, for example, opinions No. 28/2017, No. 42/2017 and No. 35/2020.
[24] A/HRC/39/45, annex, para. 12.

implications of that judgment and concluded that there was no effective remedy to challenge the legality of continued administrative detention.

81. In effect, Mr. Ali was thus subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

82. 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.[25] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[26] and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings but also migration detention.[27]

83. The facts of Mr. Ali's case since his immigration detention on 20 April 2014 evidently show that no assessment of the necessity to detain him or indeed the proportionality of such detention to his individual circumstances was ever carried out. The Government has not shown that an individualized assessment of the need for detention was carried out in Mr. Ali's case and by which judicial body it was carried out. His visa was cancelled, leading to his immediate immigration detention.

84. The Working Group therefore concludes that, during Mr. Ali's 10 years of detention, no judicial body was ever involved in the assessment of the legality of his detention, noting that international human rights law requires such consideration as part of the assessment of the legitimacy, necessity and proportionality of the detention.[28]

85. The Working Group once again reiterates that the indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[29] which is why the Working Group has required that a maximum period for 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.[30] 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.[31] As stated in 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, which render expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.[32]

86. The Working Group recalls the numerous cases in which the Human Rights Committee has found the application of mandatory immigration detention in Australia and the impossibility of challenging such detention to be in breach of article 9 (1) of the Covenant.[33] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in a migration setting must be exceptional and, in order to ensure that it is,

[25] A/HRC/30/37, paras. 2 and 3.
[26] Ibid., para. 11.
[27] Ibid., annex, para. 47 (a).
[28] A/HRC/39/45, annex, paras. 12 and 13.
[29] Ibid., para. 26; and opinions No. 42/2017, No. 28/2017, No. 7/2019 and No. 35/2020. See also A/HRC/13/30, para. 63.
[30] A/HRC/39/45, annex, para. 25. See also A/HRC/13/30, para. 61; and opinion No. 7/2019.
[31] See opinions No. 1/2019 and No. 7/2019.
[32] A/HRC/39/45, annex, para. 27.
[33] See *C. v. Australia*, *Baban and Baban v. Australia*, *Shafiq v. Australia*, *Shams et al. v. Australia*, *Bakhtiyari et al. v. Australia*, *D and E and their two children v. Australia*, *Nasir v. Australia* and *F.J. et al. v. Australia*.

alternatives to detention must be sought.[34] In the case of Mr. Ali, the Working Group has already established that, between his detention on 10 April 2014 and his release on 17 November 2023, no alternatives to detention were considered.

87. Consequently, the Working Group finds that Mr. Ali was potentially subjected to de facto indefinite detention due to his migratory status, without the possibility to challenge the legality of such detention before a judicial body, a right enshrined in article 9 (4) of the Covenant. This was therefore arbitrary, falling under category IV. In making this finding, the Working Group recalls that, in numerous cases, the Human Rights Committee has found the application of mandatory immigration detention in Australia and the impossibility of challenging such detention to be in breach of article 9 of the Covenant.[35]

(e) Category V

88. Furthermore, the Working Group notes the source's argument that Mr. Ali, as a non-citizen, appeared to have been in a different situation to 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 of Australia in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens could challenge administrative detention, non-citizens could not.

89. In its late reply, the Government refers to article 26 of the Covenant, which provides that all people are entitled to equal protection under the law without any discrimination. It argues that the object of the Migration Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In that sense, the purpose of the Act is to differentiate, on the basis of nationality, between non-citizens and citizens. The Government refers to the Human Rights Committee as having recognized that: "The Covenant 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."[36]

90. However, non-citizens such as Mr. Ali could not effectively challenge their continued detention after the decisions of the High Court of Australia in *Al-Kateb v. Godwin* and *NZYQ v. Minister for Immigration*, yet the ability to challenge detention is what the Government ought to show in order to show compliance with articles 9 and 26 of the Covenant.

91. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[37] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation was discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Ali was arbitrary, falling under category V.

(f) Concluding remarks

92. The Working Group welcomes the decision of the High Court of Australia in *NZYQ v. Minister for Immigration* and Mr. Ali's consequent release from detention. It notes, however, that this decision does not establish a basis for compensation or other reparations or a possibility to challenge the unlawfulness of detention. Mr. Ali therefore was still subjected to arbitrary detention.

93. The Working Group, moreover, expresses concern over the state of Mr. Ali's mental and physical health. The source reports that, following his prolonged detention, Mr. Ali's

[34] A/HRC/39/45, annex, para. 16. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/13/30, para. 59; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81. See further opinions No. 21/2018 and No. 72/2017.

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

[36] General comment No. 15 (1986), para. 5.

[37] 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.

mental health has been severely compromised and that he suffers from symptoms such as low mood, sleeping for up to 22 hours at a time and, at times, loss of faith.

94. 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.[38] The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of detention in the course of migration proceedings. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the human rights of migrants for appropriate action.

95. The Working Group welcomes the Government's invitation to the Working Group to conduct a visit to Australia in 2025. The Working Group looks forward to carrying out the visit, since it would be an opportunity to engage with the Government constructively and to offer its assistance in addressing concerns relating to instances of arbitrary deprivation of liberty.

3. Disposition

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

> The deprivation of liberty of Wajid Ali, being in contravention of articles 2, 3, 7, 8, 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.

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

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

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

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

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

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

4. Follow-up procedure

103. 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 compensation or other reparations have been made to Mr. Ali;

(b) Whether an investigation has been conducted into the violation of Mr. Ali's rights and, if so, the outcome of the investigation;

[38] A/HRC/39/45, annex, para. 38.

(c) 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;

(d) Whether any other action has been taken to implement the present opinion.

104. 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.

105. 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 of any failure to take action.

106. 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.[39]

[*Adopted on 26 March 2024*]

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