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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) (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 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.

Submissions

Communication from the source

4. Mr. A is an Iranian citizen of Ahwazi Arab decent, born on 26 June 1980, in the Islamic Republic of Iran. Ahwaz Arabs, like Mr. A's family, have been allegedly persecuted by the authorities.

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

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

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

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

9. Following Mr. A's departure, his family were arrested on several occasions. Furthermore, an Iranian Criminal Court verdict dated 19 February 2013 was issued against Mr. A, announcing that as punishment for failing to appear on the specific date, 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 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 NMLA, had been arrested and killed for trying to flee Iran. Authorities had also raided the retail shops his friends had operated to check for NMLA materials.

11. On 11 October 2010, Mr. A arrived by boat as an Irregular Maritime arrival on Christmas Island. He was detained as an Offshore Entry Person under section 189(3) of the Migration Act 1958, in force at the time. The Act specifically provides in sections 189(1), 196(1) and 196(3) that unlawful non-citizen must be detained and kept in detention until they are: (i) removed or deported from Australia; or (ii) granted a visa. Section 196(3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention.

12. Whilst Mr. A remained in detention, on 6 May 2011, Government Refugee Status Assessment has found that he is not owed protection obligations. This finding was confirmed on 7 November 2011 by Government Independent Merits Review.

13. From 11 October 2010 to December 2011, Mr. A was detained at the Christmas Island Immigration 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. He has therefore spent 18 months deprived of his liberty during this first period of detention.

14. On 21 September 2012, the Darwin Registry of the Federal Magistrates Court has dismissed Mr. A's appeal against the finding that he is not owed protection obligations.

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

16. Mr. A's bridging visa was cancelled, and he was detained a second time on 4 August 2017. On this day, Mr. A was test-driving a car owned by a friend to decide whether to purchase it, when they were stopped by the police, who found a gun belonging to the car owner , as well as a laser pointer. Mr. A was charged with four offenses and attended a local court hearing on 13 April 2018, when he was found not guilty on the first three charges. Mr. A was found guilty on the fourth charge of having in custody a laser pointer in public place,

but without proceeding to conviction, the matter was dismissed. Nevertheless, Mr. A has remained in immigration detention at Villawood Immigration Detention Centre in New South Wales ever since.

17. The source further recalls that that on 15 September 2014, the Department of Home Affairs advised that it would reassess Mr. A's protection claims in light of the complementary protection provisions by undertaking an International Treaties Obligations Assessment (ITOA) to assess whether his circumstances engage Australia's non-refoulement obligations. However, the Department has suspended the ITOA process from 4 August 2017 to 16 April 2018 while Mr. A's criminal charges remained ongoing.

18. On 12 September 2019, the Commonwealth Ombudsman recommended that the Department expedites the finalisation of Mr. A's ITOA and that his case be referred to the Minister for reconsideration under section 195A of the Act for the grant of a bridging visa.

19. On 26 March 2020, the Minister for Home Affairs has agreed to intervene to lift the statutory bar under section 46A to allow Mr. A to make an application for a Temporary Protection visa (subclass 785) or a Safe Haven Enterprise Visa (subclass 790). On 30 April 2020, the Department received an application for a Safe Haven Enterprise Visa (subclass 790).

20. On 18 August 2020, a delegate of the Minister for Home Affairs refused to grant Mr. A the Safe Haven Enterprise Visa and on 20 August 2020, Mr. A's legal representatives lodged an appeal with the Administrative Appeals Tribunal (AAT) on his behalf for review of the decision. On 11 December 2020, the AAT affirmed the decision under review.

21. On 15 March 2021, Mr. A's legal representatives had initiated a Ministerial Intervention request under section 195A of the Act. This request remains pending before the Minister. On 16 March 2021, Mr. A applied for a Bridging E (class WE) visa on Ministerial Intervention grounds. On 18 March 2021, the Department promptly rejected Mr. B's application as invalid because it did not meet section 46A of the Act.

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

23. In his early 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 Iran. It was only in June 2011 that he felt reassured that it is safe to provide more information, Mr. A has tried his best to cooperate ever since.

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

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

26. Mr. A has been deprived of liberty as a result of the exercise of his rights guaranteed by 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 Covenant, 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 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 immediately detained on arrival in Australia from 2010-2012 and again since 2017, despite the dismissal of criminal charges, and who has lived peaceably and without incident in low-security facilities in immigration detention.

29. The UN Human Rights Committee in its General Comment No. 35 requires that detention must be justified as reasonable, necessary, and proportionate in light of the circumstances, and reassessed as it extends 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 as it extends in time. Unless Mr. A is released, he will be in detention indefinitely. Given that he cannot return to Iran, his detention is not reasonable.

31. Mr. A was not invited to apply for protection under section 46A of the Act until 26 March 2020, when he had been in closed detention for almost three years. During this time, he was not put forward for a 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 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 Act does not contravene Constitution. The effective result is that while citizens can challenge administrative detention, non-citizens cannot.

33. The UN Human Rights Committee in *Mr C v Australia* held that there is no effective remedy for people subject to mandatory detention. The judgment of *Commonwealth v AJL20* [2021] further entrenches the legality of indefinite immigration detention, even in circumstances where the Commonwealth 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, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group 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 notes that Mr. A is an Iranian citizen of Ahwazi Arab descent who entered Australia by sea on 11 October 2010 and became an unauthorised maritime arrival as defined in section 5AA of the Migration Act 1958 (the Act).

37. Mr. A was detained at Christmas Island Immigration Detention Centre under subsection 189(3) of the Act on the basis that he was an unlawful noncitizen pursuant to section 14 of the Act.

38. Mr. Ais currently at Villawood Immigration Detention Centre (V1DC) because he is an unlawful non-citizen, meaning he is a non-citizen who does not hold a visa that is in effect (sections 13 and 14 of the Act).

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 Ministerial Intervention (MI) for the Minister to consider exercising the powers in sections 195A and 197AB of the Act.

40. Mr. A underwent multiple external review processes relating to his immigration status. He currently has no substantive matters before the Department, tribunals, or the courts. Mr. A does have an ongoing request for MI under section 48B of the Act, however, this is not a legal barrier to his involuntary removal for Australia and the Department is currently

considering the claims raised in this request. If Mr. A is found to meet the Minister's guidelines for referral, it will only allow him to make a further protection visa application and not release him from immigration detention. It is open to Mr. A to 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 to engage Australia's protection obligations under the 1951 Refugees Convention.

42. On 10 December 2010, Mr. A lodged a request for a Refugee Status Assessment (RSA). On 6 May 2011, a delegate of the then Minister found that Mr. A did not engage Australia's protection obligations under the Refugees Convention.

43. On 20 May 2011, Mr. A requested an Independent Merits Review (IMR) of the negative RSA. On 7 November 2011, the Reviewer recommended that Mr. A did not meet the definition of a refugee under the Refugees Convention and therefore did not satisfy the criterion for a protection visa set out in subsection 36(2) of the Act.

44. On 6 December 2011, Mr. A sought judicial review of the IMR decision before, what is currently, the Federal Circuit and Family Court of Australia (FC'FC).

45. On 27 March 2012, the Department commenced a section 195A MI process for Mr A's case. On 5 April 2012, the Minister agreed to consider Mr. A's case under section 195A of the Act.

46. On 12 April 2012, the Minister intervened in Mr. A's case under section 195A of the Act to grant Mr. A Humanitarian Stay (Temporary) (subclass 449) visa (HSTV) and a Bridging E (subclass 050) visa (BVE). Mr. A was released from immigration detention on the same day. The HSTV was valid for seven days and the BVE for six months valid until 12 October 2012.

47. On 30 May 2012, as Mr. B's RSA and IMR processes were completed prior to 24 March 2012, when complementary protection provisions in the Act commenced, his case was assessed against the Minister's guidelines for Consideration of Post Review Protection Claims (PRPC), to determine whether his case should be referred to the Minister for consideration. On the same day, the Department found that Mr. B did not meet the criteria in the PRPC guidelines for referral to the Minister.

48. On 6 July 2012, the Department commenced a MI process for Mr. A's case to be assessed against the section 195A MI guidelines (section 195A Guidelines). On 6 July 2012, Mr. B's case was assessed as not meeting the section 195A Guidelines.

49. On 21 September 2012, Mr. A's appeal of the IMR decision was dismissed by what is currently FC'FC.

50. On 11 October 2012, the Department commenced a MI process for Mr. A's case under section 195A of the Act. On 17 October 2012, the then Minister intervened in Mr. A's case under section 195A of the Act.

51. On 14 January 2013, the Department commenced a MI process in relation to Mr. A under section 195A of the Act. On 21 January 2013, the then Minister intervened in Mr. A's case under section 195A of the Act. This process resulted in the grant of a BVE.

52. On 19 April 2013, the Department commenced a MI process for Mr. B's case under section 195A of the Act. On 24 April 2013, the then Minister intervened in Mr. A's case under section 195A of the Act. This process resulted in the grant of a BVE.

53. On 6 August 2013, Mr. A's case was identified for potential inclusion in a group submission for referral to the then Minister under section 195A of the Act. It was determined that Mr. A's case was not to be included and the MI process was withdrawn.

54. On 15 September 2014, due to legal developments and changes to departmental policy, the Department determined that it would no longer rely on its earlier PRPC assessment of May 2012. The Department commenced a reassessment of Mr. A's protection claims by undertaking an International Treaties Obligations Assessment (ITOA).

55. On 9 October 2014, the Department commenced a MI process in relation to Mr. A under section 195A of the Act. The then Minister decided to intervene in accordance with section 195A of the Act, granting Mr. A a further BVF with a number of conditions.

56. On 9 January 2015, Mr. A's BVE 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 (NSW) police with a number of criminal offences. On 5 August 2017, Mr. A was released from police custody, re-detained under subsection 189(1) of the Act (as he did not hold a visa) and transferred to VI DC.

58. On 16 April 2018, Mr. A was found to have in custody a laser pointer in public place but the matter was dismissed. Mr. A was charged with three other offences but was found not guilty on each of these charges.

59. On 16 April 2018, the Department commenced a MI process in relation to Mr. A under section 195A of the Act. On 23 October 2018, the then Minister declined to consider Mr. A's case under section 195 A of the Act.

60. On 28 March 2019, the Department commenced a MI process for Mr. A's case to be assessed against the section 195A Guidelines. On 27 February 2020. Mr. A's case was assessed as meeting the section 195A Guidelines for referral to the Minister.

61. Noting changes in Mr. A's circumstances since February 2020, a review of his previous MI guidelines assessment was undertaken. On 16 July 2021, the review found that Mr. A had no ongoing immigration processes since December 2020 (and therefore available for removal) and that International Health and Medical Services (II IMS) advised his health conditions could be managed in his current environment. It was also noted that Mr. A refused to depart Australia voluntarily. Therefore, his case was assessed as not meeting the section 195A Guidelines and the process was finalised by the Department as 'Not Met' and 'Not Referred to the Minister'.

62. On 10 May 2019, the Commonwealth Ombudsman recommended that the Department expedite the finalisation of Mr. A's ITOA. The Ombudsman also recommended that Mr. A's case be referred to the Minister for consideration under section 195A of the Act for the grant of a BVE.

63. On 5 August 2019, Mr. A lodged two BVE applications. 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. 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 Act.

64. On 7 August 2019. Mr. A's case was referred to the then Minister for consideration to intervene to lift the legislative bar imposed by section 46A of the Act which would then allow Mr. A to lodge a valid application for a Temporary Protection (TPV) or a Safe Haven Enterprise (SHEV) visa. On 24 December 2019, the Department referred the case to the Assistant Minister.

65. Between 28 January 2020 and 29 January 2020, Mr. A lodged six BVE applications. All of these applications were determined to be invalid as either as they were not made as specified by the Minister or as he was barred under section 46A of the Act.

66. On 26 March 2020, the then Minister lifted the bar under section 46A of the Act to allow Mr. A to lodge a TPV or a SHEV so his protection claims could be assessed through a statutory process.

67. On 29 March 2020, Mr. A lodged an application for a TPV and on 30 March 2020, for a SHEV. On 15 May 2020, Mr. A withdrew his application for a TPV.

68. On 18 August 2020, Mr. A's application for a SHEV was refused by a delegate of the Minister in accordance with section 65 of the Act on the basis that Mr. A 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 Act. On 20 August 2020, Mr. A sought merits review of the delegate's refusal decision with the Administrative Appeals

Tribunal (AAT). On 11 December 2020, the AAT affirmed the delegate's decision to refuse to grant a SHEV to Mr. A.

69. On 15 March 2021; the Department commenced a MI process for Mr. A's case to be assessed against the sections 195A and 197AB MI guidelines (the Guidelines). On 2 March 2022, Mr. A's case was assessed as not meeting the Guidelines, and the process was finalised.

70. On 11 June 2022. the Department commenced a MI process for Mr. A's case to be assessed against the Guidelines. On 4 July 2022, Mr. A's case was assessed as not meeting the Guidelines.

71. On 7 September 2022, Mr. A's migration agent made a request for MI under section 48B of the Act on Mr. A's behalf seeking the Minister's intervention to allow him to lodge a further protection visa application. This request remains ongoing before the Department.

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

73. In regard to his physical health, Mr. A has a history of several conditions which are being monitored and managed.

74. He 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 Act, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Under section 196 of the Act, an unlawful non-citizen will be subject to immigration detention for administrative purposes, until they are removed from Australia or they are granted a visa.

76. Section 195A of the Act enables the Minister 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 of the Act provides the Minister with the power to make a residence determination in respect of a person 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 has established guidelines that describe the types of cases that should or should not be referred for consideration under these intervention powers. Cases are only referred for Ministerial consideration if they are assessed as meeting these guidelines. MI is not an extension of the visa process.

78. Persons in Australia who make a valid application for a protection visa will have their claims assessed. Australia’s domestic legislation, namely the Act, and Australia's policies and practices, implement Australia's non-refoulement obligations under the Refugees Convention, 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 the visa and a visa is refused, they can seek to have the lawfulness of that decision 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 proceedings before courts to act as a model litigant, including acting fairly in handling claims, not taking advantage of a claimant who lacks the resources to litigate and assisting the court to arrive at the proper and just result.

81. The detention of an individual on the basis that they are an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary, and proportionate in 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 Act, detention is not limited by a set timeframe but is dependent on a number of factors based on an individual's circumstances, including identity determination, developments in country information, health, character, or security matters. Detention in an immigration detention centre is a last resort for the management of

unlawful noncitizens. 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 is required under section 486N of the Act to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been in immigration detention for a cumulative period of two years and every six months thereafter. Following receipt of the Department's section 486N reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 4860 of the Act. 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, with the most recent report 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 (HCA). Section 75(v) of the Australian Constitution provides that the HCA has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. Subsection 39B(1) of the Judiciary Ad 1901 (Cth) grants the Federal Court of Australia the same jurisdiction as the HCA under section 75(v) of the Constitution. It is these provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of their detention.

85. In *Al-Kaleb*, the Hight Court of Australia held that provisions of the Act requiring 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 *Al-Kaleb* does not alter a non-citizen's ability to challenge the lawfulness of their detention under Australian law. Further, non-citizens are also able to challenge the lawfulness of their detention through an application for a writ of habeas corpus. Mr. A has not sought to challenge the lawfulness of his detention through these domestic legal avenues.

86. The Universal Declaration of Human Rights is not a legally binding instrument. However, the Government recognises 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 by section 189 of the Act 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 UN Human Rights Committee has recognised in the Covenant’s context that it does not recognise 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 he given subject to conditions relating, few example, to movement, residence, and employment[2].

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

89. This 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 which is legitimate, based on reasonable and objective criteria, and is proportionate to the aim to be achieved.

[2] CCPR General Comment No. 15.

90. The differential treatment in the Act between citizens and non-citizens is for the legitimate aim of ensuring the integrity of Australia's migration program, 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 Act. He has no ongoing substantive matters before the Department. His request for MI under section 48B of the Act will be assessed and he will be notified of that decision once available.

93. There is no information in Departmental records to indicate that Mr. A's current placement is not appropriate.

94. Mr. A remains involuntary towards his removal from Australia to Iran. The Iranian Embassy is currently not issuing travel documents to Iranians who would be removed involuntarily. The Department continues to engage with Mr. A and continues to explore options to progress his removal.

95. The Government concludes that Mr. A is lawfully detained under subsection 189(1) of the Act, 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 Iran warrant a reconsideration of his protection claims, both as an Ahwaz Arab from Khuzestan, a persecuted minority group in Iran, and as an active member of the National Liberation Movement of Ahwaz (NLMA). Mr. A will be at serious risk of persecution, torture, or death, if he is not provided protection in Australia.

97. Recently several members of Mr. A’s family were shot and killed by Iranian security forces during protests in Ahwaz.

98. The Government refers to changes in Mr. A ’s circumstances since February 2020 causing a review of his previous MI guidelines assessment to be undertaken, but that these changes are not specified.

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

100. The source recalls that Mr. A’s latest Service for the Treatment and Rehabilitation of Torture and Trauma Survivors report, dated 24 June 2022, stated that his current visa immigration issues continue to play a significant impact on his psychological wellbeing. The ongoing detention environment similarly impacts on the Mr. A’s ability to maintain hope for the future.

101. The same report elaborates on Mr. A’s negative emotions associated with his ongoing detention status. Far from being managed in a detention facility as the Government asserts, Mr. A’s health conditions, namely, his acute mental distress and anxiety, 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 Department of Home Affairs’ (DHA) refusal decision, the Administrative Appeals Tribunal (AAT) concluded that Mr. A’s family continues to remain affluent, hence unlikely to have been discriminated against, 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 (Cth) (the Act) was once again finalised without referral by DHA because it did not meet the Guidelines. In a separate document explaining the reasons behind its decision, DHA states that it will continue to rely on the AAT’s findings 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 Mr. Ais at risk of serious and significant harm if he returns to Iran.

104. Mr. A, however, has provided considerable evidence over the years pertaining to his continued active membership in the NLMA, his family's property confiscations and continued harassment, and his social media activism. At the same time, 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 many long years of trying to be recognized 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. Mr. A has not received notification of DHA's reports or the Commonwealth Ombudsman's assessments and recommendations regarding his immigration detention arrangements since 30 September 2019, and the source believes his Ombudsman assessment number could have changed. He has discussed this issue with his case manager and has also made an FOI request for this advice pertaining to 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 of 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 the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[3]

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.[4] The Working Group once again reiterates its views on the Migration Act.[5]

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 these cases the Government has argued that the detention is lawful purely because it follows the stipulations of the Migration Act.

111. The Working Group once again wishes to emphasize that such arguments can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation confirms 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 of 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

[3] A/HRC/19/57, para. 58.

[4] Opinions 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.

[5] Opinion No. 35/2020, paras. 98-103.

rights bodies, including the Human Rights Committee,[6] the Committee on Economic, Social and Cultural Right,[7] the Committee on Elimination of Discrimination against Women,[8] the Committee on the Elimination of Racial Discrimination,[9] the Special Rapporteur on the human rights of migrants[10] and the Working Group.[11] The Working Group is concerned that the consistent views of these independent, international human rights mechanisms should 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 this and the numerous occasions on which the Working Group 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 1958 poses, 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 so many occasions by international human rights mechanisms, cannot be accepted as a valid legal basis for detention, especially noting the findings of the Working Group under categories II and V below.

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 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, but the charge was ultimately dismissed.

115. When Mr. A was arrested on 4 August 2017, he was detained at a police facility, and then, on 5 August 2017, Mr. A was released from police custody, and re-detained under subsection 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 based on the provisions of the Migration Act. The source argues that Mr. A is detained under the Migration Act 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 thereto. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.[12] Indeed, Mr. A arrived in Australia on 11 October 2010, was immediately detained. His detention in Australia is characterized by various visa applications, their rejections and appeals against the rejections. Mr. A's prolonged detention, of over six years, has reportedly left him very unwell.

[6] CCPR/C/AUS/CO/6, paras. 33-38.

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

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

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

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

[11] 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; and No. 17/2021, paras. 125-128; 68/2021, 69/2021, 28/2022, 32/2022 and 33/2022.

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

118. The Working Group notes in particular that the Government has made no indication as to when Mr. A's detention would cease but has indicated that he is not willing to be removed to 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.

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

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

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 clear to the Working Group that when Mr. A was initially detained, the Government did not engage in the assessment of the need to detain him and there was no attempt to ascertain if a less restrictive measure would have been suited to his individual circumstances, as required by international law. In fact, throughout his time in Australia, the Australian 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 but the fact that he was seeking asylum and arrived in Australia without a visa, therefore being 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,[13] it must nevertheless highlight that the Human Rights Committee, in the same general comment as cited by the Government, also makes it clear that: aliens 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.[14] 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."[15]

124. Mr. A is therefore entitled to the right to liberty and security of person as guaranteed in 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 is

[13] ICCPR Human Rights Committee, General Comment 15.

[14] See, for example, Opinions No. 28/2022, No. 32/2022, and No. 33/2022. See also Revised Deliberation No. 5 on deprivation of liberty of migrants; CCPR/C/GC/35, para. 21, 32.

[15] A/HRC/39/45, para 12.

subjected to de facto indefinite detention due to 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 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 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.[16] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[17] and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also migration detention.[18]

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 review satisfies the requirement of 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.[19] The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department to release a person from immigration detention, as clearly stipulated by the Government itself.

129. The Government has also argued that the Minister has reviewed the detention of Mr. A but once again, noting that this is a review by an executive, the Working Group observes, as it has on previous occasions,[20] that it does not satisfy the criteria of article 9 (4) of the Covenant. The Australian 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, their rejections, and challenges to these rejections since his detention on 5 August 2017. However, as the Working Group already observed, none of them has concerned the necessity to detain Mr. A or indeed the proportionality of such detention to his individual circumstances. Rather, they assessed Mr. A's claims against the legal framework set out by the Migration Act 1958. As is evident by the Working Group's examination above, the Migration Act is incompatible with the obligations of Australia under international law and therefore assessments carried out in accordance with the Migration Act 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

[16] A/HRC/30/37, paras. 2–3.
[17] Ibid, para. 11.
[18] Ibid, para. 47 (a).
[19] Opinion 33/2022.
[20] Opinion 32/2022.

arbitrary[21] which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings must be set by legislation and upon the expiry of the period for detention set by law, the detained person must be automatically released.[22] 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.[23]

132. Consequently, the Working Group finds that Mr. A is 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, the right encapsulated in article 9(4) of the Covenant. This is therefore arbitrary, falling under category IV. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee 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.[24]

iv. Category V

133. The Working Group notes 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 *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. In its reply the Government denies those allegations, arguing that in this case the High Court held that provisions of the Migration Act 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[25] since this 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 were 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 this decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[26]

[21] Revised Deliberation No. 5 at para 18, Opinions 42/2017; 28/2017; 7/2019 and 35/2020; see also A/HRC/13/30, para. 63.

[22] Revised Deliberation No. 5 at para 17, see also A/HRC/13/30, para 61; see also Opinion 7/2019.

[23] See Opinions 1/2019 and 7/2019.

[24] See *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

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

[26] See *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013) and *F.J. et al. v. Australia*, para. 9.3.

136. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[27] 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 health-care provision for Mr. A, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty, including 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 nonpunitive 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 Iran. According to his unrefuted submissions, Mr. A and his family have been persecuted by the Government of Iran because of this. 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 nonnationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.'[28] The Working Group recalls that individuals should not be expelled to another country when there are substitutional grounds for being that their life or freedom would be at risk, or they would be in danger of being subjected to torture or ill-treatment.[29]

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 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 into account all the circumstances of the case, the appropriate remedy would be to release Mr. A immediately and accord him an

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

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

[29] Opinion No. 12/2022 para. 84.

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.

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.[30]

[*Adopted on 15 November 2022*]

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