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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021

Opinion No. 69/2021 concerning Navanitharasa Sivaguru (Australia)*

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

2. In accordance with its methods of work,[1] on 5 August 2021 the Working Group transmitted to the Government of Australia a communication concerning Navanitharasa Sivaguru. The Government replied to the communication on 1 November 2021. 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).

* In accordance with paragraph 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

[1] A/HRC/36/38.

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Submissions

Communication from the source

4. Navanitharasa Sivaguru is a national of Sri Lanka, born in 1973. In 1990, Mr. Sivaguru was forcibly conscripted by the Liberation Tigers of Tamil Eelam (LTTE) and worked for the group until April 2004, when he was arrested, detained and tortured by police in Batticaloa. Mr. Sivaguru fears the Sri Lankan authorities will do him harm on the basis of his involvement with LTTE.

5. On about 19 December 2008, Mr. Sivaguru fled Sri Lanka, travelling through Thailand, Malaysia and Indonesia before arriving on Christmas Island on 10 December 2009. He arrived as an irregular maritime arrival and was detained as an offshore entry person under section 189 (3) of the Migration Act 1958. It is unknown if a warrant or other decision by a public authority was shown at the time of Mr. Sivaguru's arrest.

6. The Migration Act 1958 specifically provides in sections 189 (1) and 196 (1) and (3) that unlawful non-citizens must be detained and kept in detention until they are either removed or deported from Australia, or granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention (unless the person has been granted a visa).

7. After his arrival, Mr. Sivaguru was detained at:

(a) The Christmas Island Immigration Detention Centre from 10 December 2009 to 27 March 2020;

(b) The Vilawood Immigration Detention Centre, New South Wales, from 27 March 2009 to 25 March 2016;

(c) The Melbourne Immigration Transit Accommodation, Maygar Barracks, Broadmeadows, Victoria, from 25 March 2016 to 8 September 2020;

(d) The Melbourne Immigration Transit Accommodation, Broadmeadows Residential Precinct, Victoria, from 8 September 2020 to the present.

8. On 9 February 2010, a government refugee status assessment commenced in respect of Mr. Sivaguru. On 17 March 2010, the assessment found that Mr. Sivaguru was not owed protection obligations. On 15 July 2010, a government independent merits review found that Mr. Sivaguru was owed protection obligations.

9. On 16 February 2011, the Australian Security Intelligence Organisation issued Mr. Sivaguru with an adverse security assessment. A declassified copy of the assessment has not been provided to Mr. Sivaguru. It relates to Mr. Sivaguru's involvement with LTTE, which forcibly recruited Mr. Sivaguru as a child.

10. On 4 August 2015, the Minister for Home Affairs agreed to intervene to lift the statutory bar under section 46A of the Migration Act 1958 to allow Mr. Sivaguru to make an application for a temporary protection visa or a safe haven enterprise visa. On 25 August 2015, Mr. Sivaguru was thus invited to apply for either a temporary protection visa or a safe haven enterprise visa.

11. On 1 October 2015, the Department of Home Affairs received the application for a temporary protection visa from Mr. Sivaguru, but on 19 October 2015 the Australian Security Intelligence Organisation affirmed Mr. Sivaguru's adverse security assessment. On 24 August 2016, the Independent Reviewer of Adverse Security Assessments judged that the adverse security assessment was no longer appropriate and recommended that Mr. Sivaguru be issued with a qualified security assessment. On 28 November 2016, the Australian Security Intelligence Organisation issued Mr. Sivaguru with a qualified security assessment.

12. On 30 November 2016, the Department of Home Affairs initiated a ministerial intervention request under section 195A of the Migration Act, but on 24 January 2017 Mr. Sivaguru's case was returned from the office of the Minister for Home Affairs without action, due to an outstanding application for a temporary protection visa and ongoing consideration under section 501 of the Migration Act 1958, and his case was withdrawn from ministerial intervention consideration.

13. On 24 July 2017, a delegate of the Minister for Home Affairs found that Mr. Sivaguru was a refugee under section 5H (1) of the Migration Act 1958, but determined he was ineligible for the grant of a visa under section 36 (2C) of the Act because there were serious reasons for considering that Mr. Sivaguru had committed war crimes.

14. On 27 July 2018, Mr. Sivaguru sought a merits review of this decision at the Administrative Appeals Tribunal and on 22 February 2018, his case was referred to the Minister for Home Affairs for consideration under section 195A of the Migration Act 1958.

15. On 18 April 2018, the Minister declined to intervene in the case under section 195A of the Migration Act 1958. On 5 April 2019, the Administrative Appeals Tribunal affirmed the delegate's decision. Mr. Sivaguru sought a judicial review of the Tribunal's decision in the Federal Court.

16. On 8 April 2019, Mr. Sivaguru's case was referred to the Minister for Home Affairs for consideration under sections 195A and 197AB of the Migration Act 1958. In August 2019, by consent of Mr. Sivaguru and the Minister, the Federal Court set aside the decision of the Administrative Appeals Tribunal and remitted the matter back to the Tribunal for reconsideration. On 16 September 2019, the Minister declined to intervene in Mr. Sivaguru's case under section 195A of the Act.

17. In February 2020, the Commonwealth Ombudsman recommended that the Department of Home Affairs refer Mr. Sivaguru's case to the Minister for consideration of a community placement under section 197AB of the Migration Act 1958, noting medical advice and Mr. Sivaguru's vulnerability to coronavirus disease (COVID-19).

18. On 27 August 2020, the Minister advised that Mr. Sivaguru's case met the guidelines for referral under sections 195A and 197AB of the Migration Act 1958 and a submission would be prepared for the Assistant Minister. On 8 September 2020, the Department of Home Affairs referred the submission to the Assistant Minister.

19. In May 2021, the Administrative Appeals Tribunal reaffirmed the decision not to grant Mr. Sivaguru a protection visa and in July 2021 Mr. Sivaguru again sought a judicial review in the Federal Court. A hearing date was set for 7 and 8 October 2021. The source emphasizes the length of Mr. Sivaguru's ongoing detention, which is currently 11 years and 8 months.

20. The legal basis for Mr. Sivaguru's continued detention is enshrined in section 189 of the Migration Act 1958. Unauthorized maritime arrivals, such as Mr. Sivaguru, are prohibited from making a valid application for a protection visa unless they are first invited to do so by the Minister for Home Affairs or the Minister for Immigration (so-called lifting the bar under section 46A of the Act). The bar for Mr. Sivaguru was lifted on 4 August 2015.

21. Relevant ministers may exercise their non-delegable powers to release Mr. Sivaguru from detention at any time. Mr. Sivaguru's case was referred to the Minister of Home Affairs for consideration of a bridging visa or community placement under sections 195A and 197AB of the Migration Act 1958 on four occasions between 2011 and 2019. On each occasion, the Minister declined to intervene.

22. As of September 2020, a submission in respect of ministerial intervention was placed before the Assistant Minister for Home Affairs after Mr. Sivaguru's case was assessed as meeting the applicable guidelines. On 22 July 2021, the Department of Home Affairs stated in a letter to Mr. Sivaguru that his case did not meet the guidelines in sections 195A or 197AB of the Migration Act 1958 for referral to the Minister for his consideration, and that no further action would be taken in relation to the matter.

23. That is despite the statement tabled in the parliament, which noted that Mr. Sivaguru "has been found to meet the Minister's section 195A and section 197AB guidelines for the grant of a bridging visa or a community placement under a residence determination". This raises serious concerns that after nearly 12 years of detention, the Department of Home Affairs is not adequately focused on Mr. Sivaguru's case.

24. Since the commencement of his detention, Mr. Sivaguru has developed physical and psychological problems which cannot be properly cared for in closed detention.

25. On 26 November 2018, Mr. Sivaguru was diagnosed with chronic lymphocytic leukaemia. On 1 March 2021 he had an appointment at the haematology outpatient clinic at North Health. Mr. Sivaguru continues to manifest symptoms of chronic lymphocytic leukaemia.

26. On 9 July 2021, Mr. Sivaguru was hospitalized with complications from his condition. He has since been discharged back into detention.

27. Mr. Sivaguru also has a history of mental health issues that have developed as a result of his continued detention. On 9 November 2016, a counsellor at the Victorian Foundation for Survivors of Torture (Foundation House) concluded that Mr. Sivaguru was exhibiting symptoms of major depression. The counsellor recommended that Mr. Sivaguru be released from detention in order to prevent further damage to his mental health.

28. In June 2017, Mr. Sivaguru was admitted to the mental health unit of the Melbourne Clinic as an inpatient because of a progressive deterioration in his mood. On 9 August 2017, Mr. Sivaguru's psychiatrist wrote a letter to International Health and Medical Services, expressing her concerns about Mr. Sivaguru's ongoing detention, requesting that he be transferred to a less restrictive option and recommending an early transfer to the community.

29. On 7 February 2019, the same counsellor from Foundation House again confirmed that Mr. Sivaguru was displaying symptoms of a major depressive disorder and strongly recommended that he be released into the community.

30. On 14 August 2019, a psychiatrist from International Health and Medical Services supported a placement in the community for Mr. Sivaguru, stating that prolonged detention of over 10 years, combined with a recent diagnosis of chronic lymphocytic leukaemia was adversely impacting his mental health. On 1 July 2020, Mr. Sivaguru was again assessed by Foundation House, where the senior practitioner provided a similar view in respect of community detention, stating that he strongly recommended that Mr. Sivaguru be released into the community as soon as possible.

31. Mr. Sivaguru 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.

32. Mr. Sivaguru has also been deprived of his rights in contravention of article 26 of the Covenant, which notes that all people are entitled to equal protection under the law, without discrimination. Asylum seekers do not have the same rights under Australian law as Australian citizens, who can bring an action before a court for release when detained, while asylum seekers cannot.

33. Immigration detention is described by the Department of Home Affairs as being used as a last resort and for a very small proportion of people whose status requires resolution, sometimes through protracted legal proceedings. That is not the case for Mr. Sivaguru, who was immediately detained on arrival in Australia and who has lived peaceably and without incident in low-security facilities for the entirety of his over 11 years in immigration detention.

34. The Human Rights Committee in its general comment No. 35 (2014) states that detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. The very fact that Mr. Sivaguru has been held in administrative detention for over 11 years, 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 has extended in time.

35. Mr. Sivaguru was not invited to apply for protection under section 46A of the Migration Act 1958 until 25 August 2015, when he had been in closed detention for almost six years. During that time, he was not put forward for a bridging visa or community detention (under section 195A of the Act) despite his exemplary behaviour and consistently being assigned to low-security facilities.

36. The High Court of Australia has upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution. However, the Human Rights Committee in

Mr. C. v. Australia held that there was no effective remedy for people subject to mandatory detention in Australia.[2]

37. The recent judgment in *Commonwealth of Australia v. AJL20* [2021] further entrenches the legality of indefinite immigration detention, even in circumstances where the Government is not taking active steps to remove an individual as soon as is reasonably practicable. The majority of the High Court held that a failure by the executive diligently to perform the duties that give effect to the legitimate non-punitive purposes for which detention is authorized and required by the Migration Act 1958 erases neither those duties nor the statutory purposes which those duties support; and that the operation of sections 189 (1) and 196 (1) of the Act in authorizing the respondent's detention was not conditioned on the actual achievement of his removal as soon as was reasonably practicable by the executive.

38. Mr. Sivaguru has taken all necessary steps to seek protection and use the appeal avenues available to him by law.

Response from the Government

39. On 5 August 2021, the Working Group transmitted the allegations from the source to the Government of Australia under its regular communications procedure. The Working Group requested the Government of Australia to provide it with detailed information about Mr. Sivaguru by 5 October 2021 and clarify the legal provisions justifying his continued detention, as well as its compatibility with the country's obligations under international human rights law, and in particular with regard to the treaties ratified by the State. The Working Group also called on the Government of Australia to ensure Mr. Sivaguru's physical and mental integrity.

40. On 9 August 2021, the Government of Australia requested an extension in accordance with the Working Group's methods of work, which was granted, with a new deadline of 3 November 2021. On 1 November 2021 the Government submitted its reply, in which it stated that Mr. Sivaguru was a citizen of Sri Lanka who had arrived in Australia on 10 December 2009 as an unauthorized maritime arrival, having reached the Australian migration zone by boat. He was detained under section 189 (3) of the Migration Act 1958 as an unlawful non-citizen within the Australian migration zone, who did not hold a valid visa, and was initially transferred to the Christmas Island Immigration Processing and Reception Centre.

41. The Government stated that Mr. Sivaguru had been held in immigration detention facilities since his arrival and was currently located at the Melbourne Immigration Transit Accommodation.

42. Mr. Sivaguru's claims for protection had been considered. He was found to engage the country's protection obligations, but was determined to be ineligible for the grant of a protection visa under section 36 (2C) (a) of the Migration Act 1958 because there were serious reasons for considering that he had committed a war crime, as defined by international instruments prescribed by the Migration Regulations 1994.

43. Mr. Sivaguru's case was referred to a Portfolio Minister for ministerial intervention under section 195A and section 197AB of the Migration Act 1958 on five occasions. On 13 September 2021, the Minister indicated that he wished to consider Mr. Sivaguru's case under section 197AB of the Act. That process remains ongoing. On each other occasion, the Minister declined to consider or intervene in the case, or the submission was returned unsigned. The powers of portfolio ministers are discretionary and non-compellable, meaning that they are under no obligation to exercise those powers. The ministers are not bound by time frames and are not required to provide an explanation for their decisions.

44. Mr. Sivaguru currently has an ongoing judicial review of the decision to refuse him a temporary protection visa.

45. Sections 189 (1) and 196 (1) and (3) of the Migration Act 1958 provide that an unlawful non-citizen must be detained and kept in immigration detention until they are either removed or deported from Australia, or granted a visa. As a finding has been made that Mr.

[2] *Mr. C. v. Australia* (CCPR/C/76/D/900/1999).

Sivaguru engages the country's non-refoulement obligations, section 197C (3) of the Act provides that he is not subject to involuntary removal from Australia under section 198 of the Act. In addition, as a matter of policy, the Department of Home Affairs generally does not progress involuntary removals of unlawful non-citizens with outstanding judicial review proceedings.

46. On 28 January 2010, Mr. Sivaguru submitted a request for a refugee status assessment, a non-statutory assessment in place at that time for unauthorized maritime arrivals. On 17 March 2010, the assessment found that Mr. Sivaguru was not a refugee. He remained at the Christmas Island Immigration Processing and Reception Centre until 27 March 2010, when he was transferred to the Villawood Immigration Detention Centre.

47. On 29 March 2010, Mr. Sivaguru requested an independent merits review of the outcome of the refugee status assessment. On 15 July 2010, an independent merits reviewer recommended that Mr. Sivaguru be recognized as a refugee. Security checks were initiated on 23 July 2010 and Mr. Sivaguru was notified of the outcome of the independent merits review on 26 July 2010.

48. On 16 February 2011, the Australian Security Intelligence Organisation issued an adverse security assessment in respect of Mr. Sivaguru, in which it recommended a protection visa not be granted on security grounds.

49. On 3 January 2012, Mr. Sivaguru was assessed as not meeting section 197AB ministerial intervention guidelines and was not referred to the Minister for Home Affairs.

50. On 19 May 2014, Mr. Sivaguru sought a review of the adverse security assessment through the Independent Reviewer of Adverse Security Assessments. On 25 August 2014, the Independent Reviewer determined that the assessment was an appropriate outcome and recommended to the Australian Security Intelligence Organisation that it be maintained but reviewed in 12 months.

51. On 4 August 2015, the Minister for Immigration and Border Protection intervened to lift the statutory bar under section 46A of the Migration Act 1958, to allow Mr. Sivaguru to lodge an application for a temporary protection visa or a safe haven enterprise visa. The powers relating to lifting the section 46A bar are non-compellable, meaning the Minister is under no obligation to exercise or to consider exercising those powers. The Minister is not bound by any time frame when considering whether to lift the bar.

52. On 25 August 2015, Mr. Sivaguru was invited to apply for a temporary protection visa or a safe haven enterprise visa. On 1 October 2015, Mr. Sivaguru lodged a valid application for a temporary protection visa.

53. On 19 October 2015, a review of the adverse security assessment carried out by the Australian Security Intelligence Organisation resulted in a subsequent adverse security assessment in respect of Mr. Sivaguru. On 16 November 2015, Mr. Sivaguru was invited to comment on the outcome of the adverse security assessment.

54. On 25 March 2016, Mr Sivaguru was transferred from Villawood Immigration Detention Centre to the Melbourne Immigration Transit Accommodation.

55. On 13 May 2016, a further review was conducted by the Independent Reviewer of Adverse Security Assessments in relation to Mr. Sivaguru's adverse security assessment. On 24 August 2016, the Independent Reviewer provided a written opinion to the Director-General of Security, advising that the adverse security assessment was no longer appropriate, and recommended that the Australian Security Intelligence Organisation undertake a review of the assessment. On 28 November 2016, the Australian Security Intelligence Organisation issued a qualified security assessment in respect of Mr. Sivaguru. A qualified security assessment is issued when an applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, but in cases where it holds information relevant to security that the Department of Home Affairs may wish to consider in its decision-making.

56. On 1 December 2016, the Department of Home Affairs referred a submission under section 195A of the Migration Act 1958 to the Minister for Immigration and Border

Protection. On 24 January 2017, the submission was returned unsigned from the Minister's office as there were outstanding immigration matters in Mr. Sivaguru's case.

57. In December 2016, the Department of Home Affairs initiated an assessment of Mr. Sivaguru's application for a temporary protection visa. On 24 July 2017, a delegate assessed that, as a necessary and foreseeable consequence of Mr. Sivaguru being removed to Sri Lanka, there was a real risk that he would suffer significant harm. However, the delegate determined that Mr. Sivaguru was ineligible for the grant of a temporary protection visa under section 36 (2C) (a) (i) of the Migration Act 1958 because there were serious reasons for considering that he had committed a war crime. Accordingly, the delegate refused to grant Mr Sivaguru a temporary protection visa under section 65 of the Act.

58. On 27 July 2017, Mr. Sivaguru sought a merits review of the decision to refuse him a temporary protection visa at the Administrative Appeals Tribunal. On 5 April 2019, the Tribunal affirmed the decision.

59. On 22 February 2018, the Department of Home Affairs referred a submission under section 195A of the Migration Act 1958 to the Minister for Immigration and Border Protection. On 16 April 2018, the Minister declined to consider intervening under section 195A of the Act.

60. On 8 April 2019, the Department of Home Affairs referred a submission under sections 195A and 197AB of the Migration Act 1958 to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.[3] On 16 September 2019, the Minister declined to intervene or consider Mr. Sivaguru's case under sections 195A and 197AB of the Act.

61. On 19 May 2019, Mr. Sivaguru sought a review of the decision of the Administrative Appeals Tribunal at the Federal Court of Australia. On 30 August 2019, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs withdrew from the proceedings at the Federal Court. The Federal Court remitted the matter to the Tribunal for reconsideration. On 14 May 2021, the Tribunal affirmed the decision to refuse Mr. Sivaguru a temporary protection visa on the grounds that there were serious reasons for considering that he had committed a war crime and a crime against humanity, as defined by the international instruments prescribed by the regulations.

62. In February 2020, the Commonwealth Ombudsman recommended that the Department of Home Affairs refer Mr. Sivaguru's case to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs for consideration of a community placement under section 197AB of the Migration Act 1958, noting medical advice that Mr. Sivaguru might be vulnerable to COVID-19.

63. On 10 July and 20 August 2020, Mr. Sivaguru's case was assessed by the Department of Home Affairs as meeting the section 195A and 197AB guidelines. On 22 July 2021, the ministerial intervention referral was closed on instructions from the Office of the Minister for Customs, Community Safety and Multicultural Affairs.

64. On 8 September 2020, Mr. Sivaguru was transferred to the residential precinct of the Melbourne Immigration Transit Accommodation, where he is currently located. On the same day, the Department of Home Affairs referred a submission under sections 195A and 197AB of the Migration Act 1958 to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. On 4 March 2021, the submission was returned unsigned from the Minister's office due to ongoing immigration matters (judicial review proceedings). The submission was accordingly closed.

65. On 7 July 2021, Mr. Sivaguru lodged an appeal at the Federal Court against the decision of the Administrative Appeals Tribunal. The matter was heard by the Federal Court on 7 and 8 October 2021. Judgment will be handed down on a date to be advised.

[3] The title of the minister responsible for immigration cases appears to have changed several times over the period covered by the present opinion.

66. On 22 July 2021, Mr. Sivaguru's case was found not to meet the ministerial intervention guidelines, following an assessment initiated by the Department of Home Affairs.

67. On 27 August 2021, the Department of Home Affairs referred a submission under sections 195A and 197AB of the Migration Act 1958 to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. On 13 September 2021, the Minister declined to consider Mr. Sivaguru's case under section 195A of the Act, however he indicated that he would consider the case under section 197AB, which would allow for a residence determination to be made. The process is ongoing.

68. The ministerial intervention does not provide for an automatic assessment against the guidelines of the minister's intervention or the referral of cases under ministerial intervention powers for individuals in detention. Cases are referred for assessment against the guidelines based on the detainee's specific circumstances. The guidelines describe the types of cases that might be referred for consideration and all requests are assessed against the guidelines. Ministerial intervention is not an extension of the visa process.

69. Mr. Sivaguru has a number of current physical and mental health conditions that have been assessed. His health conditions are monitored and managed by detainee health service provider clinicians, in consultation with the external specialists and allied health service providers, who are treating him according to the hypertension and life-care plans that have been drawn up for him and in line with Australian community standards. Mr. Sivaguru currently receives daily carer support.

70. At the Melbourne Immigration Transit Accommodation residential precinct, Mr. Sivaguru is currently living in his own separate unit for infection control purposes, as required by his health condition and vulnerability to COVID-19.

71. On 26 November 2018, Mr. Sivaguru was assessed by a haematology consultant at the Northern Health haematology outpatient clinic. During the assessment, Mr. Sivaguru was diagnosed with chronic lymphocytic leukaemia. Mr. Sivaguru continues to attend regular review appointments where his condition is closely monitored.

72. On 23 November 2020, the haematology consultant noted that test results suggested that the disease had progressed and that treatment might soon be required. Mr. Sivaguru was referred for further investigations.

73. On 18 January 2021, Mr. Sivaguru attended a review with a haematology consultant at Northern Health. The haematology consultant noted that Mr. Sivaguru would likely require chemotherapy treatment within the following three to six months.

74. On 1 March 2021, Mr. Sivaguru was referred for further investigations. On 22 April 2021, his case was discussed at a multidisciplinary meeting and it was recommended that chemotherapy be started.

75. On 28 April 2021, Mr. Sivaguru was admitted to the Northern Health haematology unit for treatment. He was discharged on 3 May 2021. Mr. Sivaguru tolerated the treatment well and an ongoing treatment regime was documented.

76. On 9 July 2021, Mr. Sivaguru was admitted to the Northern Health haematology unit for management of complications from chemotherapy. He was treated and discharged from hospital on 11 July 2021.

77. Following this hospital admission, Mr. Sivaguru was noted to be at risk of further complications. The Detainee Health Service Provider therefore advised the Department of Home Affairs on 30 July 2021 that Mr. Sivaguru's health-care needs could no longer be properly fulfilled while he was held in detention and that a tier 4 placement recommendation was in the process of being prepared. A tier 4 placement in supported independent living accommodation would provide Mr. Sivaguru access to carer support 24 hours a day, 7 days a week.

78. Furthermore, Mr. Sivaguru receives mental support from mental health nurses, counsellors, psychologists and general practitioners from International Health and Medical

Services. Since his arrival, Mr. Sivaguru has attended consultations with psychiatrists on 29 occasions, including most recently on 20 September 2021.

79. On 5 July 2017, a psychiatrist referred Mr. Sivaguru to the mental health unit of the Melbourne Clinic for inpatient admission owing to his depression and to concerns regarding his worsening mood and despondency.

80. On 24 July 2017, Mr. Sivaguru was admitted to the Melbourne Clinic and discharged on 28 August 2017. Mr. Sivaguru was reviewed by mental health clinicians from the detainee health service provider on his return to the Melbourne Immigration Transit Accommodation. He has also participated in regular counselling with Foundation House and has been able to seek physical and mental health services at any time by submitting a medical request form.

81. On 14 August 2019, a psychiatrist from the detainee health service provider noted that they would support a placement in the community for Mr. Sivaguru.

82. A report dated 9 November 2016, provided by Mr. Sivaguru's Foundation House trauma counsellor, noted that Mr. Sivaguru was exhibiting symptoms of major depression.

83. Mr. Sivaguru's Foundation House counsellor provided a further report, dated 1 July 2020, following 13 trauma counselling sessions attended between 6 August 2019 and 23 June 2020. The counsellor recommended regular supportive counselling and release into the community.

84. The universal visa system in Australia requires all non-citizens to hold a valid visa to enter and/or remain in Australia. Under section 189 of the Migration Act 1958, an individual must be detained if an officer knows or reasonably suspects that the individual is an unlawful non-citizen. It is the view of the Department of Home Affairs that under section 196 of the Act, an unlawful non-citizen must be kept in immigration detention until they are removed from Australia or are granted a visa.

85. Section 195A of the Migration Act 1958 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. 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.

86. What is in the public interest is a matter for the Minister to decide. The Minister has established guidelines that set out 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 the guidelines. Section 195A considerations are one of the mechanisms through which the Department of Home Affairs ensures that the eligibility of individuals in immigration detention for visas is reviewed regularly to ensure fair access to options to regularize visa status.

87. Persons who make a valid application for a protection visa will have their claims assessed. The national legislation implements the non-refoulement obligations of Australia under the Convention Relating to the Status of Refugees, the Covenant and its Second Optional Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

88. The immigration detention of an individual on the basis that they are an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary and proportionate in the light of the particular circumstances of the case. Continuing detention may become arbitrary if it continues without proper justification. 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. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Sivaguru remains in immigration detention in accordance with Australian law. The level of risk posed to the community is one factor in determining whether the detention of an unlawful non-citizen is reasonable, necessary and proportionate.

89. Immigration detention is administrative and not punitive. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the country's international legal obligations.

90. According to the Government, Mr. Sivaguru's immigration detention is justifiable, reasonable and proportionate. Under the terms of the Migration Act 1958, detention is not limited by a set time frame, but is dependent upon a number of factors based on an individual's circumstances, including determination of his or her identity, developments in country information, health, character or security matters.

91. Mr. Sivaguru's detention is subject to ongoing independent assessment. The Secretary of the Department of Home Affairs is required under section 486N of the Migration Act 1958 to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been in immigration detention for a cumulative period of two years and every six months thereafter. The Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Commonwealth Ombudsman may make recommendations to the Minister regarding the circumstances of the individual, including their detention placement.

92. At the time of the present submission, the Department of Home Affairs has provided 20 reports to the Commonwealth Ombudsman during Mr. Sivaguru's time in detention. The Department first reported on Mr. Sivaguru's case after 24 months in detention on 27 November 2013 and every six months thereafter.

93. The Commonwealth Ombudsman has provided nine assessments under section 486O of the Migration Act in relation to Mr. Sivaguru and has made 15 recommendations.

94. The Minister tabled the most recent assessment in the parliament on 22 June 2021. In that assessment, the Commonwealth Ombudsman recommended that Mr. Sivaguru be granted a bridging visa or that the Minister make a residence determination to allow for community placement. If Mr. Sivaguru is not granted a bridging visa or placed in community detention, the Department of Home Affairs would engage with stakeholders and Mr. Sivaguru to develop an appropriate respite programme involving excursions and offsite activities.

95. In the Minister's response, tabled in Parliament, he stated that: "The Department considers this person's existing programs and activities and medical treatment regime appropriately supports their health and welfare in line with IHMS medical advice and within the current legislative and policy environment."

96. A person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia. Paragraph 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. Subsection 39B (1) of the Judiciary Act 1901 grants the Federal Court of Australia the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. It is these provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of their detention. In addition, under section 256 of the Migration Act 1958, the Department of Home Affairs must provide to an immigration detainee all reasonable facilities to take legal proceedings in relation to their immigration detention.

97. The decision of the High Court of Australia in the case of *Al-Kateb v. Godwin* [2004] HCA 37 held that the provisions of the Migration Act 1958 requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. That decision does not alter a non-citizen's ability to challenge the lawfulness of his or her detention under Australian law. Further, non-citizens are also able to challenge the lawfulness of their detention through applications such as habeas corpus.

98. Mechanisms are available for review of the visa decisions taken by the Government. Mr. Sivaguru has previously sought a merits review with the Administrative Appeals Tribunal in relation to the decision to refuse him a temporary protection visa and he currently

has ongoing judicial review proceedings in relation to the decision of the Tribunal to affirm the decision to refuse him a visa.

99. The Universal Declaration of Human Rights does not create legally binding obligations. Notwithstanding this, Mr. Sivaguru is detained, as required under section 189 of the Migration Act 1958, as he is an unlawful non-citizen, not as a consequence of seeking protection.

100. Articles 12 and 13 of the Covenant make it clear that States parties have the right to control the residence, entry and expulsion of aliens. Article 26 of the Covenant provides that all people are entitled to equal protection under the law without any discrimination. The object of the Migration Act 1958 is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". In that sense, the purpose of the Act is to differentiate between non-citizens and citizens, based on nationality. The Human Rights Committee has recognized that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.[4]

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

102. To the extent that there is differential treatment of citizens and non-citizens, in that Australian citizens are not subject to immigration detention, this differential treatment is not discriminatory and does not breach article 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.

103. The differential treatment in the Migration Act 1958 between citizens and non-citizens ensures the integrity of the country's migration programme, assessing the security, identity and health of unlawful non-citizens and protecting the community. That is consistent with articles 12 and 13 of the Covenant.

104. The treatment of Mr. Sivaguru amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant. He is lawfully detained under section 189 (1) of the Migration Act 1958.

Further comments from the source

105. The reply of the Government was submitted to the source for further comments, which were provided on 3 November 2021. The source reiterates its earlier arguments and reports that the compound in which Mr. Sivaguru is detained has been placed in lockdown for an indeterminate period due to COVID-19. Mr. Sivaguru's access to medical facilities and human interaction has thus been further restricted, with a resulting negative impact on his mental health.

Discussion

106. The Working Group thanks the source and the Government for their submissions.

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

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

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

Category I

108. The Working Group observes that this case is the latest in a line of recent jurisprudence that it has been asked to consider in relation to Australia. Since 2017, the Working Group has considered 16 cases, which all concern the same issue, namely mandatory immigration detention in Australia in accordance with the Migration Act 1958 (Act).[6] The Working Group reiterates its views on the Migration Act.[7]

109. The Working Group furthermore reiterates its alarm at the rising number of cases from Australia concerning the implementation of the Migration Act 1958. 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.

110. The Working Group once again wishes to clarify 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 conforms with the obligations that the State has undertaken under international human rights law. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations.

111. The Working Group wishes to emphasize that it is the duty of the Government to bring its national legislation, including the Migration Act 1958, in 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,[8] the Committee on Economic, Social and Cultural Rights,[9] the Committee on the Elimination of Discrimination against Women,[10] the Committee on the Elimination of Racial Discrimination,[11] the Special Rapporteur on the human rights of migrants[12] and the Working Group.[13] The Working Group calls upon the Government to urgently review the Migration Act in the light of its obligations under international human rights law.

112. Noting this and the numerous occasions on which the Working Group and other United Nations human rights bodies and mechanisms have alerted the Government of 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. Sivaguru under the said legislation was arbitrary under category I as it violated 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, cannot be accepted as a valid legal basis for detention, especially in the light of the findings below.

Category II

113. The present case involves an individual who has spent some 12 years in various detention settings. Notwithstanding the serious reservations the Working Group holds about the Migration Act 1958 and its compatibility with the obligations of Australia under international human rights law, the Working Group observes that it is not disputed that Mr. Sivaguru remains detained today based on the provisions of the Act. The source argues that Mr. Sivaguru is detained under the Migration Act purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights. The Government, while not

[6] 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 and No. 68/2021.

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

[8] CCPR/C/AUS/CO/6, paras. 33–38.

[9] E/C.12/AUS/CO/5, paras. 17–18.

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

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

[12] A/HRC/35/25/Add.3.

[13] See 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.

contesting that his detention is due to the migratory status of Mr. Sivaguru, argues that such detention is strictly in accordance with the provisions of the Act, although recognizing that it has been determined that Mr. Sivaguru's case engages the country's protection obligations under the Convention relating to the Status of Refugees.

114. The Working Group has consistently maintained that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees and its 1967 Protocol. The Working Group notes that these instruments constitute the international legal obligations of Australia.[14]

115. Mr. Sivaguru arrived on Christmas Island on 10 December 2009 and was immediately detained. Since then, his detention in Australia has been characterized by numerous unsuccessful applications for various visas and the appeals over such rejections. Mr. Sivaguru has now spent 12 years in detention and has become very unwell, apparently due to his prolonged detention. The Working Group notes in particular that in its response the Government did not indicate when Mr. Sivaguru's detention would cease.

116. As the Working Group has explained in its revised deliberation No. 5: "Any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt."[15]

117. This echoes the views of the Human Rights Committee, which argued in paragraph 18 of its general comment No. 35 (2014): "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."

118. It is clear to the Working Group that when Mr. Sivaguru was initially detained, the Government did not make an assessment of the need to detain him and there was no attempt to ascertain if a less restrictive measure would be suited to his individual circumstances, as required by international law. In fact, there has never been any attempt by the authorities to do so. The Working Group cannot accept that detention for over 12 years could be described as a "brief initial period". Furthermore, the Government has not presented any particular reason specific to Mr. Sivaguru, 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. While an adverse security assessment was issued on Mr. Sivaguru, the Working Group recalls that it is not contested that this was reversed.

119. These two failures by the Government lead the Working Group to conclude that there was no other reason for detaining Mr. Sivaguru except for the fact that he was seeking asylum and arrived in Australia without a visa, and was therefore subjected to the automatic immigration detention policy of Australia in accordance with the Migration Act 1958. The Working Group therefore concludes that Mr. Sivaguru was detained because of the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

120. Furthermore, while the Working Group agrees with the argument presented by the Government in relation to article 26, it must nevertheless emphasize that in its general comment No. 15 (1986), quoted by the Government, the Human Rights Committee 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. … Aliens have the full right to liberty and security of the person."[16]

121. This means that Mr. Sivaguru is entitled to the rights to liberty and to security of the person, as guaranteed in article 9 of the Covenant, and that in guaranteeing those rights to

[14] See opinions No. 28/2017, No. 42/2017 and No. 35/2020.
[15] A/HRC/39/45 (annex, para. 12).
[16] Paras. 2 and 7.

him, Australia must ensure that this is done without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Sivaguru is subjected to de facto indefinite detention due to his immigration status, in clear breach of article 2, read in conjunction with article 9, of the Covenant.

122. Consequently, noting that Mr. Sivaguru has been detained because of the legitimate exercise of his rights 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. In making this finding, the Working Group notes the submission of the Government that Mr. Sivaguru has always been treated in accordance with the stipulations of the Migration Act 1958. However, such treatment is not compatible with the obligations Australia has undertaken under international law. The Working Group also refers the present case to the Special Rapporteur on the human rights of migrants for appropriate action.

Category IV

123. The source has further argued that Mr. Sivaguru 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. Sivaguru has been reviewed by the Commonwealth Ombudsman.

124. The Working Group recalls that the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserving legality in a democratic society.[17] That right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[18] and applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings but also migration detention.[19]

125. The facts of Mr. Sivaguru's case, as presented to the Working Group, are characterized by various visa applications, their rejections and the challenges to those rejections. However, as already observed by the Working Group, none of those actions have concerned the necessity to detain Mr. Sivaguru or indeed the proportionality of such detention to his individual circumstances. Rather they assessed the claims of Mr. Sivaguru against the legal framework set out by the Migration Act 1958. As is evidenced by the Working Group's examination, the Migration Act is incompatible with the obligations of Australia under international law and therefore assessments carried out in accordance with it are equally incompatible with the requirements of international law.

126. The Government has argued that the case of Mr. Sivaguru is being periodically reviewed by the Commonwealth Ombudsman. However, it has not explained how such reviews satisfy the requirement of article 9 (4) of the Covenant for a review of the legality of detention by a judicial body. The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention, as clearly stipulated by the Government itself.

127. Finally, the Government has also argued that the Minister responsible has reviewed the detention of Mr. Sivaguru but once again, noting that this is a review by an executive, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

128. The Working Group therefore concludes that during his 12 years of detention, no judicial body has ever been involved in assessing the legality of Mr. Sivaguru's detention, noting that international human rights law requires that consideration by a judicial body necessarily involves an assessment of the legitimacy, necessity and proportionality of detention.[20]

[17] A/HRC/30/37, paras. 2–3.
[18] Ibid., para. 11.
[19] Ibid., para. 47 (a).
[20] Revised deliberation No. 5 (A/HRC/39/45, annex), paras. 12–13.

129. In this connection, the Working Group reiterates that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.[21] That is why the Working Group has required that the 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.[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] As stated by the Working Group in its 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."[24]

130. 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 (1) of the Covenant.[25] 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 this, alternatives to detention must be sought.[26] In the case of Mr. Sivaguru, the Working Group has already established that since he was first detained, no alternatives to detention have been considered.

131. Furthermore, despite the claims of the Government to the contrary, the Working Group considers that the detention of Mr. Sivaguru is punitive in nature which, as highlighted in its revised deliberation No. 5, should never be the case.[27] Mr. Sivaguru has been detained for a prolonged period of time, without a charge or a trial, in what was clearly punitive detention in breach of article 9 of the Covenant.

132. Presently, Mr. Sivaguru has been detained for over 12 years and the Government has not been able to indicate how long his detention will last, which means that it is de facto indefinite. The Working Group thus finds that Mr. Sivaguru is subjected to de facto indefinite detention because of his migratory status, without the possibility of challenging the legality of his detention before a judicial body, which is the right encapsulated in article 9 (4) of the Covenant. His detention is therefore arbitrary, falling under category IV.

Category V

133. The Working Group also notes the source's argument that Mr. Sivaguru as a non-citizen appears to be in a different situation from 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. The Government denies those allegations, arguing that in the present

[21] Ibid., para. 18, and opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020. See also A/HRC/13/30, para. 63.

[22] Revised deliberation No. 5 (A/HRC/39/45, annex), para. 17. See also A/HRC/13/30, para. 61, and opinion No. 7/2019.

[23] See opinions No. 1/2019 and No. 7/2019.

[24] See also opinion No. 45/2006; A/HRC/7/4, para. 48; A/HRC/10/21, para. 82; and A/HRC/13/30, para. 63.

[25] See *Mr. C. v. Australia*; *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 and Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *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).

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

[27] A/HRC/39/45, annex, paras. 9 and 14. See also opinion No. 49/2020, para. 87.

case the High Court held that the 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 explanations provided by the Government[28] since they only confirm 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 is not reasonably practicable in the foreseeable future. However, the Government fails to explain how such non-citizens can effectively challenge their continued detention after the decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. The Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee in which it examined the implications of the judgment of the High Court 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.[29]

135. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[30] and this remains the position of the Working Group in the present case. The Working Group emphasizes that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Sivaguru is arbitrary, falling under category V.

136. The Working Group expresses its very serious concern over the state of Mr. Sivaguru's mental and physical health, which has severely deteriorated following the detention which the Working Group has established to be indefinite arbitrary detention. The Working Group reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty are treated with respect for their human dignity and that this applies also to those held in the context of migration. As the Working Group has explained in its revised deliberation No. 5: "All detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings." The Working Group therefore 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, for appropriate action.

137. The Working Group notes the submissions of the Government that Mr. Sivaguru may be implicated in the commission of war crimes and crimes against humanity, with such a possibility being first determined on 24 July 2017. The Working Group observes that the Government has provided no further explanation of the investigation into the matter since that date or indeed indicated whether prosecution would be forthcoming. In that regard, the Working Group recalls the responsibility of all States to effectively investigate all allegations of war crimes and crimes against humanity.

Concluding remarks

138. The Working Group wishes to emphasize that the findings in the present opinion concern only the immigration detention of Mr. Sivaguru and are adopted without prejudice to any other proceedings to which he may or may not be subjected.

139. The Working Group also wishes to emphasize that in the light of the outbreak of COVID-19, it has called upon States to note the underlying conditions of detention as especially conducive to the spread of the infection. As highlighted in its deliberation No. 11,

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

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

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

detention in the context of migration is only permissible as an exceptional measure of last resort, which is a particularly high threshold to satisfy in the context of a pandemic or other public health emergency. The Working Group calls upon the Government to release Mr. Sivaguru, especially noting the trauma he has suffered as a result of the years of detention.

140. The Working Group welcomes the invitation of 27 March 2019 from the Government for the Working Group to conduct a visit to Australia and its offshore detention facilities 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

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

> The deprivation of liberty of Navanitharasa Sivaguru, 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.

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

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

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

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 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. Sivaguru has been released and, if so, on what date;

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

(c) Whether an investigation has been conducted into the violation of Mr. Sivaguru'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.[31]

[*Adopted on 18 November 2021*]

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