



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3–12 May 2021****Opinion No. 17/2021 concerning Mirand Pjetri (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 17 December 2020, the Working Group transmitted to the Government of Australia a communication concerning Mirand Pjetri. The Government replied to the communication on 17 March 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 case.

¹ A/HRC/36/38.



Submissions

Communication from the source

4. Mirand Pjetri is a national of Albania born in 1989 in the village of Rrile in north-western Albania.
5. On 10 September 2013, Mr. Pjetri reached Australia on a boat travelling from Indonesia. On the same day, the boat was intercepted north of Darwin by the Royal Australian Navy. Mr. Pjetri was promptly arrested. The arresting officers did not show a warrant or other decision from a public authority, however, they were identifiable by their uniform and the markings on their ship. The reason for the arrest alleged by the authorities was the unauthorized entry to Australia by boat.
6. The legal basis for the arrest is now known to be the Migration Act of 1958, which, in sections 189 (1), 196 (1) and 196 (3), provides that “unlawful non-citizens” must be detained and kept in detention until they are removed or granted a visa. Section 196 (3) provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa. The authority that issued the detention decision concerning Mr. Pjetri was the Department of Immigration and Citizenship (subsequently subsumed into the Department of Home Affairs).
7. Mr. Pjetri was taken to Darwin, where he stayed until 15 October 2013, when he was transferred to the immigration detention centre on Christmas Island.
8. In the years since his arrest, Mr. Pjetri has been held in the immigration detention centre on Christmas Island (15 October 2013–1 February 2015), Wickham Point Alternative Place of Detention in Darwin (1 February 2015–1 May 2016), the Melbourne Immigration Transit Accommodation in Broadmeadows (1 May 2016–16 March 2020) and Villawood Immigration Detention Centre (16 March 2020–present). There is a possibility that Mr. Pjetri will be moved back to the Melbourne Immigration Transit Accommodation.
9. The authority holding Mr. Pjetri in custody is the Department of Home Affairs. In 1997, various aspects of the operation of onshore detention centres were privatized. Service provision is currently primarily contracted to the companies Serco, for security and garrison services, and International Health and Medical Services, for medical services.
10. Mr. Pjetri remains detained as an unauthorized maritime arrival and an unlawful non-citizen under the Migration Act. Section 189 of the Act provides that, if an officer knows or reasonably expects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.
11. Throughout his detention, Mr. Pjetri was known to be of good character and has been held in low-security facilities. His detention record shows that he is a person with respectful relationships with other detainees, detention centre staff and the authorities.
12. Unauthorized maritime arrivals, such as Mr. Pjetri, are prohibited from making a valid application for protection unless they are first invited to do by the Minister for Home Affairs or the minister concerned with immigration, a process under section 46A of the Migration Act, often referred to as “lifting the bar”. The relevant Ministers may exercise their non-delegable and non-reviewable powers to release Mr. Pjetri from detention.
13. The bar for Mr. Pjetri was lifted in early 2016. On 6 May 2016, Mr. Pjetri applied for a safe haven enterprise visa, but his application was rejected.
14. Decisions were taken by the Immigration Assessment Authority (2 December 2016), the Federal Circuit Court (10 November 2017) and the Federal Court (7 December 2018) concerning the review of his protection visa application. The outcomes of those decisions were all negative for Mr. Pjetri.
15. In 2017 and in 2018, Mr. Pjetri was twice informed that he was being referred for ministerial consideration under section 195A of the Migration Act for a bridging visa, which would give him relief from detention while his immigration matters were being reviewed. Despite his record of exemplary behaviour, both applications were rejected.

16. Mr. Pjetri was repeatedly told that the existence of an Interpol Red Notice was a significant factor as to why he had not had a positive response to his applications. He was informed that he would need to prove that one did not exist. He had neither the means nor the knowledge to make such enquiries.

17. In late 2018, Mr. Pjetri's closest friends were granted protection visas and left the Melbourne Immigration Transit Accommodation, after which Mr. Pjetri became increasingly mentally and physically unwell and lost a lot of weight.

18. On 24 April 2019, Mr. Pjetri's application for special leave to apply to the High Court was denied. On 2 May 2019, a ministerial intervention request was submitted. It was refused on 20 May 2019. The situation had an adverse impact on Mr. Pjetri's health. By the end of July 2019, he had lost over 20 kilograms and, in August 2019, he was hospitalized at the Melbourne Clinic. He stayed there until 1 November 2019. On 23 August 2019, another ministerial intervention request was submitted. It was refused on 8 November 2019.

19. On 8 November 2019, the authorities attempted to deport Mr. Pjetri. Mr. Pjetri was asked to meet with the Australian Border Force in the property office of the Melbourne Immigration Transit Accommodation. When he arrived, he was informed that his ministerial intervention request had been rejected and that he would be leaving for Albania immediately. Four emergency response team members and four guards arrived with the deportation team, which included a doctor, nurse and three officers who would accompany him on the plane. Mr. Pjetri's legal representative was emailed a copy of the deportation notice as Mr. Pjetri was being transferred to Melbourne Airport.

20. Mr. Pjetri was not allowed to pack his bags or talk to other detainees. Upon arrival at the airport, he told the accompanying doctor that he had chest pains and felt severe anxiety. Nothing was done in response to that complaint. The deportation was aborted when Mr. Pjetri stood up in his seat on the plane and said several times that he was not fit to fly. He was allegedly pushed, grabbed and pulled by three guards before another passenger and an airline staff member intervened. He and his escorts were then asked to leave the plane.

21. Since the attempted deportation, Mr. Pjetri has lost further weight. He stopped exercising and social interaction and has stayed largely confined in his room, except for a one-week stay at the Melbourne Clinic, from 24 November to 1 December 2019. He is afraid to interact with the staff and is not accepting visits from friends.

22. His appointment at the Melbourne Clinic on 5 January 2020 was cancelled without notice, and his health subsequently declined to the point that he was admitted to the Northern Hospital three times between 23 and 27 January 2020 with the ultimate diagnosis of infected kidney stones. Mr. Pjetri has been diagnosed with severe major depressive illness and a mild neurocognitive disorder, the latter due to severe malnutrition. On 28 October 2020, a public guardian was appointed for Mr. Pjetri for 6 months.

23. On or about 3 February 2020, Mr. Pjetri's case manager confirmed that the Department of Home Affairs was no longer considering his case or his release from detention because Mr. Pjetri had been referred to the Australian Border Force for removal. Given the serious health concerns faced by Mr. Pjetri, there is no time frame within which that removal could occur.

24. The uncertainty about the status of any potential removal is causing Mr. Pjetri great distress. Given that Mr. Pjetri was provided with no notice on the first attempt to deport him, he fears that it could happen at any time. Mr. Pjetri remains on the list for removal, despite his serious health concerns.

25. The source notes that the company that provides assessments of whether someone is fit to travel, International Health and Medical Services, often issues a positive assessment without examining or talking to the person concerned. The source submits that it is unclear how International Health and Medical Services discharges its duty of care to such people.

26. The source submits that the continued deprivation of liberty of Mr. Pjetri is arbitrary and argues that, although the basis for the deprivation of liberty is authorized in domestic law (Migration Act, sects. 189 (1), 196 (1) and 196 (3)), the ministerial powers under section

195A of the Migration Act, which could be used to release Mr. Pjetri from detention, are non-compellable and non-reviewable.

27. In November 2019, Interpol confirmed that there was no Red Notice in Mr. Pjetri's name. Mr. Pjetri was distressed about the impact on his protection application and legal appeals of the claims that a Red Notice had been issued for him, and he raised those concerns with his case manager. He was told to contact his lawyer for further advice. The source emphasizes that the absence of a Red Notice effectively removes previously expressed concerns in relation to the granting of a bridging visa or community-based detention.

28. The source also submits that Mr. Pjetri 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. He came to Australia after providing information to the police about operations of an organized crime gang in Albania.

29. Mr. Pjetri has also been deprived of his rights in contravention of article 26 of the International Covenant on Civil and Political Rights, which provides that all people are entitled to equal protection under the law, without any discrimination.

30. The source notes that immigration detention is described by the Department of Home Affairs as being "used as a last resort and for a very small proportion of the people whose status requires resolution, sometimes through protracted legal proceedings". It is submitted that that is not the case for Mr. Pjetri, who was immediately detained upon arrival and who has lived peaceably and without incident in low-security facilities for the entirety of his immigration detention, but whose application for a bridging visa has been rejected.

31. In its general comment No. 35 (2014), the Human Rights Committee noted that the right to liberty and security of person required that detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. In that context, the source recalls that Mr. Pjetri has been continuously held in administrative detention, despite a removal notice being issued on 11 June 2019. Section 198 (2) (c) (ii) of the Migration Act prescribes removal as soon as is practicable after a person's case is finally determined.

32. The source submits that there is no mechanism in Australian law to challenge a person's detention, because such detention is authorized by the Migration Act and the relevant case law. A psychiatrist noted, in a report dated 2 September 2019, that return to detention would be damaging to the recovery of Mr. Pjetri and recommended his transfer to a less restrictive place, such as community detention, instead of an ongoing stay at the detention centre.

33. That recommendation appears to have been disregarded by the Department of Home Affairs, which returned him to the Melbourne Immigration Transit Accommodation on 1 November 2019 and attempted to deport him a week later, on 8 November 2019, triggering a renewed mental health crisis, which continues to the present day, marked by substantial weight loss, retreat into isolation, flashbacks and other serious health complications.

34. In January 2020, the authorities at the Melbourne Immigration Transit Accommodation requested that Mr. Pjetri accept another admission to the private psychiatric facility in Melbourne or a transfer to the Broadmeadows Residential Precinct, a group of houses within the Melbourne Immigration Transit Accommodation complex separated from the general population. Mr. Pjetri has refused both options on the grounds that, in his view, they still constitute deprivation of liberty and that he might as well stay in his room at the Melbourne Immigration Transit Accommodation.

35. While at the Melbourne clinic, Mr. Pjetri was constantly accompanied by at least two guards. There is no freedom of movement outside the Broadmeadows Residential Precinct, which is a secure facility.

36. Mr. Pjetri was not invited to apply for a protection visa under section 46A of the Migration Act until early 2016, when he had been in closed detention for almost two and a half years. During that time, he was not put forward for a bridging visa or community detention under section 195A of the Migration Act, despite his exemplary behaviour and despite consistently being assigned to low-security facilities.

37. The High Court of Australia has upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The Human Rights Committee, in its Views in *C v. Australia*,² held that there was no effective remedy for people subject to mandatory detention in Australia.

38. The source states that citizens and non-citizens are not equal before the courts and tribunals. In its decision in *Al-Kateb v. Godwin*, the High Court of Australia determined that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act did not contravene the Constitution. The source argues that the effective result of that decision is that, while citizens can challenge administrative detention, non-citizens cannot.

39. The source concludes by noting that Mr. Pjetri has taken all the steps necessary to seek protection in Australia and to use all the appeal avenues available to him by law.

Response from the Government

40. On 17 December 2020, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 16 February 2021, detailed information about the current situation of Mr. Pjetri and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Australia under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Australia to ensure the physical and mental integrity of Mr. Pjetri.

41. On 21 December 2020, the Government requested an extension in accordance with paragraph 16 of Working Group's methods of work, which was granted, with the new deadline of 18 March 2021. The Government submitted its reply on 17 March 2021, in which it explained that Mr. Pjetri was a citizen of Albania who had arrived in Australia in 2013 as an unauthorized maritime arrival. Mr. Pjetri was detained under section 189 (3) of the Migration Act.

42. Mr. Pjetri is currently at the Melbourne Clinic, where he voluntarily admitted himself on 11 January 2021. Upon his release, Mr. Pjetri will return to the Melbourne Immigration Transit Accommodation. Mr. Pjetri is in immigration detention because he is a non-citizen who does not hold a visa.

43. Mr. Pjetri's claims for protection have been considered, but his case has been found not to engage the protection obligations of Australia. Mr. Pjetri's case has been repeatedly referred for ministerial intervention under sections 195A and 197AB of the Migration Act. The ministerial intervention powers are discretionary and non-compellable.

44. Mr. Pjetri has undergone multiple external review processes concerning his immigration status. He currently has no matters before the Department of Home Affairs, tribunals or the courts and has been referred for involuntary removal. His removal has most recently been protracted due to travel restrictions owing to the coronavirus disease (COVID-19) pandemic.

45. On 16 September 2013, Mr. Pjetri arrived in Australia by boat without a visa, was determined to be an unauthorized maritime arrival and was detained in accordance with the Migration Act. He was initially taken to Darwin, where he stayed until 15 October 2013, and was then transferred to the immigration detention centre on Christmas Island. Section 198AD of the Migration Act imposes a duty on an officer to take an unauthorized maritime arrival to a regional processing country. The Minister made a determination under section 198AE that section 198AD does not apply to Mr. Pjetri, on the basis that it was in the public interest to do so in the light of his past criminal charges.

46. On 19 September 2013, the Department of Home Affairs became aware that, prior to his arrival in Australia, Mr. Pjetri had been arrested in Belgium and deported to Albania. On 30 April 2013, the court of first instance in Belgium had issued a European arrest warrant for

² Human Rights Committee, *C v. Australia* (CCPR/C/76/D/900/1999).

Mr. Pjetri. On 21 October 2013, Mr. Pjetri was sentenced in absentia to two years' imprisonment.

47. On 1 February 2015, Mr. Pjetri was transferred to Wickham Point Alternative Place of Detention. On 29 September 2015, the minister concerned with immigration and border protection intervened under section 46a of the Migration Act to allow Mr. Pjetri to lodge a valid application for a temporary protection visa, subclass 785, or a safe haven enterprise visa, subclass 790.

48. On 4 February 2016, the Department of Home Affairs assessed Mr. Pjetri against the section 195A guidelines and found that his case did not meet the requirements for referral to the relevant minister. On 1 May 2016, Mr. Pjetri was transferred from Wickham Point Alternative Place of Detention in Darwin to the Melbourne Immigration Transit Accommodation.

49. On 10 May 2016, Mr. Pjetri applied for a safe haven enterprise visa. On 26 September 2016, his case was found not to engage the protection obligations of Australia under the Migration Act and was refused such a visa. On 4 October 2016, Mr. Pjetri's case was referred to the Immigration Assessment Authority for the review of that decision. On 2 December 2016, the Authority affirmed the decision.

50. On 21 December 2016, Mr. Pjetri lodged an appeal of the Immigration Assessment Authority's decision with the Federal Circuit Court. On 23 March 2017, the Department of Home Affairs found that his case did not meet the section 195A guidelines for referral for ministerial consideration. The Court dismissed Mr. Pjetri's appeal of the Authority's decision on 10 November 2017.

51. On 1 December 2017, Mr. Pjetri sought judicial review by the Federal Court of the Federal Circuit Court's decision of 10 November 2017 to refuse to grant a safe haven enterprise visa, but the Federal Court dismissed the case on 7 December 2018. On 17 January 2018, the Department of Home Affairs again found that Mr. Pjetri's case did not meet the section 195A guidelines for referral for ministerial consideration.

52. On 17 August 2018, the Department of Home Affairs found that Mr. Pjetri's case met the section 195A guidelines for referral for ministerial consideration for a bridging visa E, subclass 50, for six months, and his case was referred on 8 October 2018. On 27 March 2019, the relevant minister decided not to consider intervening under section 195A of the Migration Act and Mr. Pjetri was notified of that on 7 May 2019.

53. On 21 August 2018, Mr. Pjetri's case was assessed as not meeting the section 197AB guidelines for referral for ministerial consideration of whether to allow him to reside in the community.

54. On 4 January 2019, Mr. Pjetri applied for special leave to appeal the judgment of the Federal Court to the High Court. On 17 April 2019, the High Court dismissed Mr. Pjetri's special leave application.

55. On 6 May 2019, Mr. Pjetri requested ministerial intervention under sections 195A and 48B of the Migration Act to allow for a further protection visa application to be made. On 7 May 2019, his case was assessed as not meeting the section 195A requirements. On 20 May 2019, Mr. Pjetri's case was assessed as not meeting the section 48B requirements. His case was therefore not referred for ministerial consideration.

56. On 23 August 2019, the Department of Home Affairs received a request for ministerial intervention on Mr. Pjetri's behalf. On 6 November 2019, his case was assessed as not meeting the section 195A requirements.

57. On 19 September and 2 October 2019, Mr. Pjetri was scheduled to be removed from Australia. On 11 September 2019 and 24 September 2019, he was assessed as not being fit to travel by the immigration detention health-care provider, International Health and Medical Services, which is responsible for assessing whether a detainee is physically and/or mentally capable of undertaking travel by air or road.

58. On 18 October 2019, Mr. Pjetri was assessed as being fit to travel with appropriate security and medical escorts. However, on 8 November 2019, Mr. Pjetri's removal was aborted due to his non-compliant behaviour on board the aircraft prior to departure.

59. He was transferred to Villawood Immigration Detention Centre on 16 March 2020. On 28 May 2020, the Department of Home Affairs initiated a referral to assess Mr. Pjetri's case against the section 195A guidelines. The Ombudsman made a recommendation on 20 August 2020 to assess that case against the section 197AB guidelines.

60. On 7 September 2020, the Department of Home Affairs initiated a referral for assessment of Mr. Pjetri's case against the section 197AB guidelines. On 21 December 2020, Mr. Pjetri was transferred back to the Melbourne Immigration Transit Accommodation.

61. On 11 January 2021, Mr. Pjetri voluntarily admitted himself to the Melbourne Clinic. He has been diagnosed with severe major depressive illness and a mild neurocognitive disorder, the latter due to severe malnutrition. While in immigration detention, Mr. Pjetri is under the care of International Health and Medical Services, which provides him with access to mental health nurses and psychiatry services as required. He had previously been admitted to the Northern Hospital, in Victoria, three times in January 2020, with a diagnosis of infected kidney stones.

62. The Department of Home Affairs cannot force a person in detention to undertake medical care. All instances of food and/or fluid refusal are appropriately documented, reported, escalated and monitored in accordance with Department policy. Detainees are made aware that engaging in food and/or fluid refusal will not affect the immigration decision-making processes or outcome. Psychological consultations are also undertaken to establish and monitor the mental competence of detainees. Detainees have access to external oversight bodies with a mandate to oversee the operations of immigration detention facilities.

63. Mr. Pjetri has been repeatedly offered treatment, which he has declined. In January 2020, International Health and Medical Services at the Melbourne Immigration Transit Accommodation requested that he accept another admission to the private psychiatric facility in Melbourne or a transfer to the Broadmeadows Residential Precinct. He refused both of those options on the grounds that they still constituted deprivation of liberty.

64. While accommodated at Villawood Immigration Detention Centre, International Health and Medical Services conducted frequent, regular outreach consultations, including reviews by a general practitioner and nurse daily. A night nurse undertook observations of Mr. Pjetri every 30 minutes and was made available to Mr. Pjetri should he have required assistance.

65. On 23 September 2020, the Department of Home Affairs received a notice for a guardianship hearing for Mr. Pjetri. On 24 September 2020, the guardianship hearing occurred at the New South Wales Civil and Administrative Tribunal, where Mr. Pjetri's situation was discussed, including his decision to refuse admission to hospital. On 19 October 2020, Mr. Pjetri completed an independent psychiatric review.

66. On 28 October 2020, the administrative tribunal hearing was held and a public guardian was appointed for Mr. Pjetri for six months. A public guardian can make decisions about accommodation and consent relating to medical and dental services (including legal services). The public guardian also has the authority to override objections to medical treatment, however, he or she must take all reasonable steps to bring an individual to an understanding of the issues and obtain and consider their views before making significant decisions.

67. International Health and Medical Services discussed Mr. Pjetri's case with the public guardian, who agreed to Mr. Pjetri's being transferred to hospital. On 28 October 2020, Mr. Pjetri was transferred from Villawood Immigration Detention Centre to Liverpool Hospital, in New South Wales. He underwent psychiatric review and a medical assessment, whereby he was deemed mentally capable of making decisions and not in immediate danger of death or in immediate need of invasive refeeding.

68. On 4 November 2020, Mr. Pjetri was medically cleared, and the public guardian requested that he be transferred to Westmead Hospital for an additional mental health

assessment. He was transferred and admitted under the New South Wales Mental Health Act of 2007. The Westmead Hospital psychiatric team reported that Mr. Pjetri did not have a mental health condition, and he was deemed to have the capacity to make decisions.

69. On 9 November 2020, Mr. Pjetri was discharged from Westmead Hospital and transferred back to immigration detention at Villawood Immigration Detention Centre. The Department of Home Affairs proposed two potential hospital admissions, one to Saint Vincent's Hospital and the other to the Melbourne Clinic in Victoria, on the basis of medical advice.

70. On 25 November 2020, the Department of Home Affairs received correspondence that Saint Vincent's Hospital was not willing to accept assuming care for Mr. Pjetri, due to there being no immediate health concerns. The Melbourne Clinic requested to speak to Mr. Pjetri directly to assess and triage accordingly.

71. On 10 December 2020, the public guardian met with Mr. Pjetri, who agreed to a transfer to the Melbourne Immigration Transit Accommodation and was willing to engage with the Melbourne Clinic so that his case could be triaged for potential admission. On 21 December 2020, he was transferred by air ambulance from Villawood Immigration Detention Centre in Sydney to the Melbourne Immigration Transit Accommodation in Melbourne. Due to Victoria State COVID-19 quarantine requirements, he was required to be in mandatory quarantine for a period of 14 days within his Broadmeadows Residential Precinct unit, which was completed on 5 January 2021.

72. On 11 January 2021, Mr. Pjetri was voluntarily admitted to the Melbourne Clinic. The Victoria Civil and Administrative Tribunal advised that the interstate guardianship order was registered and that they would notify the New South Wales Civil and Administrative Tribunal. To date, in the assessments conducted by International Health and Medical Services medical personnel, they have found that Mr. Pjetri retains decision-making capacity with regard to his health care.

73. The visa system of Australia requires that all non-citizens hold a valid visa. Under section 189 of the Migration Act, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Under section 196, an unlawful non-citizen must be kept in immigration detention until they are removed or they are granted a visa.

74. Section 195A of the Migration Act enables the relevant minister to grant a visa to a person in immigration detention if the relevant minister considers that it is in the public interest to do so. Under Section 197AB, the relevant minister has the power to make a residence determination in respect of a person in immigration detention, allowing her or him to reside in the community at a specified place and under specified conditions, if the relevant minister considers that it is in the public interest. The Minister's powers under sections 195A and 197AB are non-compellable.

75. Persons who make a valid application for a protection visa will have their claims assessed. The Migration Act and the policies and practices of Australia reflect its non-refoulement obligations under the Convention relating to the Status of Refugees and the Protocol thereto, the Covenant and the Second Optional Protocol thereto, aiming at the abolition of the death penalty, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

76. The immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary per se under international law. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Pjetri remains in immigration detention because he is an unlawful non-citizen without a valid visa.

77. The Government does not dispute that legally binding obligations, including those regarding non-refoulement, arise from the Convention relating to the Status of Refugees. Furthermore, the Government acknowledges and does not dispute that the effect of article 31 (1) of the Convention is that a person determined to be a refugee cannot be penalized on account of their illegal entry or presence, if they have come directly from a territory where their life or freedom was threatened, have presented themselves without delay and show good

cause for their illegal entry or presence. Mr. Pjetri's claims for protection have been considered, but his case has been found not to engage the protection obligations of Australia.

78. Immigration detention is not punitive. The Government is committed to ensuring that all in immigration detention are treated in a manner consistent with the international human rights obligations of Australia. Mr. Pjetri's detention is regularly reviewed, and his case has been considered for referral for ministerial intervention under the sections 195A and 197AB of the Migration Act.

79. The Secretary of the Department of Home Affairs is required under section 486N of the Migration 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. The Ombudsman prepares independent assessments of such individuals' circumstances and provides the Minister for Home Affairs with a report under section 486O of the Act. The Ombudsman may make recommendations to the Minister for Home Affairs regarding the circumstances of the individual, including his or her detention placement. The Department has reported on Mr. Pjetri on 11 occasions, with the most recent report sent to the Ombudsman on 25 September 2020.

80. The Ombudsman has provided the Minister for Home Affairs with four assessments under section 486O of the Migration Act, the most recent assessment being on 20 August 2020. The Ombudsman made two recommendations in that assessment. The de-identified version of the assessment and the relevant minister's response to the recommendations were tabled in Parliament on 26 October 2020 and are available online.

81. Mr. Pjetri's detention continues to be reviewed monthly by the Case Management and Detention Review Committee of the Department of Home Affairs. The Ombudsman also continues to provide an assessment every six months of the ongoing conditions under which Mr. Pjetri is detained.

82. A person in immigration detention can seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court. 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 of 1901 grants the Federal Court the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. Those provisions 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, the Department of Home Affairs must provide to an immigration detainee all reasonable facilities to undertake legal proceedings in relation to their immigration detention.

83. The Government refutes claims that citizens and non-citizens are not equal before the courts and tribunals and that the effect of the decision of the High Court in *Al-Kateb v. Godwin* was that non-citizens cannot challenge administrative detention decisions. In that case, the High Court held that provisions of the Migration Act requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The decision in *Al-Kateb v. Godwin* does not alter a non-citizen's ability to challenge the lawfulness of their detention. Furthermore, non-citizens are also able to challenge the lawfulness of their detention through applications such as habeas corpus.

84. Article 14 of the Universal Declaration of Human Rights provides for the right to seek and to enjoy in other countries asylum from persecution. It does not create legally binding obligations. Mr. Pjetri is detained as required by section 189 of the Migration Act, because he is an unlawful non-citizen.

85. Article 26 of the Covenant provides that all people are entitled to equal protection under the law. The object of the Migration Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In that sense, the purpose of the Act is to differentiate, based on nationality, between non-citizens and citizens. That legitimate differential treatment is consistent with the international legal obligations of Australia. In its general comment No. 15 (1986), the Human Rights Committee recognized that it was a matter for the State to decide who it would admit to its territory. However, in certain

circumstances, an alien might enjoy the protection of the Covenant, even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arose.

86. It is therefore 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 to lawfully enter and remain in Australia and that, in circumstances when a visa is not held, a non-citizen is subject to immigration detention.

87. To the extent that there is differential treatment of citizens and non-citizens in that citizens are not subject to immigration detention, that 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.

88. Australia, as a party to the international human rights treaties, takes steps to respect, protect, promote and fulfil the right to non-discrimination. However, equality and non-discrimination should not be understood simplistically as requiring identical treatment of all persons in all circumstances. Furthermore, under international human rights law, not all differences in treatment will constitute discrimination. The treatment of Mr. Pjetri amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant.

89. On the basis of consistent principles applied by the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, the test for legitimate differential treatment requires that the treatment is aimed at achieving a purpose which is legitimate, based on reasonable and objective criteria and proportionate to the aim to be achieved.

90. Section 189 of the Migration Act allows for the differential treatment of individuals which constitutes permissible legitimate differential treatment, and not impermissible discrimination, because it is aimed at achieving a purpose which is legitimate, based on reasonable and objective criteria and proportionate to the aim to be achieved. Mr. Pjetri is therefore lawfully detained under section 189 of the Act, and his detention is appropriate and consistent with the international obligations of Australia.

91. Pending his removal, Mr. Pjetri's immigration detention is justifiable, reasonable and proportionate. It is a matter for the Government to determine who may enter its territory and under what conditions, including by requiring that non-citizens hold a visa to lawfully enter and remain in Australia, and that in circumstances in which a visa is not held, a non-citizen is subject to immigration detention.

Additional comments from the source

92. The reply of the Government was submitted to the source for further comments, which were provided on 30 March 2021. The source states that Mr. Pjetri's weight has dropped to such a low point that he now suffers from a mild neurocognitive disorder, due to severe malnutrition. His lack of food intake is a symptom of his severe major depressive illness. Independent medical assessments have consistently advised that Mr. Pjetri's health will only improve if he is not taken back into closed detention. To date, there is no indication that he will be allowed entry into the community.

93. Contrary to the Government's submission, the public guardian made no request on 4 November 2020 that Mr. Pjetri be transferred to Westmead Hospital. It appears that Villawood Immigration Detention Centre did not want Mr. Pjetri to return there. The Department of Home Affairs therefore transported Mr. Pjetri from the emergency department of one hospital to the emergency department of another. Mr. Pjetri was not consulted on those movements.

94. The Government's claim that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens is not correct. Under section 189 of the Migration Act, officers must detain an unlawful non-citizen. The Government response also relies on the fact that it has determined that Mr. Pjetri is not entitled to protection following

a protection assessment process. That does not address the fact that Mr. Pjetri was detained for 2 and a half years prior to being invited to apply for protection and remained detained during the protection determination assessment process.

95. There is no independent review body, not even the Ombudsman, which can order the Department of Home Affairs to release Mr. Pjetri. Mr. Pjetri, as an unlawful non-citizen, is lawfully detained under Australian law and, it is argued by the source, such lawful detention is arbitrary and open-ended.

Discussion

96. The Working Group thanks the source and the Government for their timely and detailed submissions.

97. In determining whether the deprivation of liberty of Mr. Pjetri 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.³

i. Category II

98. The Working Group observes that the present case involves an individual who has spent eight years in various detention settings, since his arrival in Australia by boat in September 2013. Since then, as detailed by the source and not contested by the Government, he has lived in various immigration detention facilities, with some periods of hospitalization in medical facilities, which is where he is currently. The Government confirms that, upon completion of his medical treatment, Mr. Pjetri will be returned to an immigration detention facility.

99. Notwithstanding the serious reservations that the Working Group holds about the Migration Act of 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. Pjetri remains detained today on the basis of provisions of the Act. The source argues that Mr. Pjetri is detained under the Act purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights. The Government, while not contesting that the detention is due to the migration status of Mr. Pjetri, argues that such detention is strictly in accordance with the Act and that Mr. Pjetri's case has been determined not to engage the protection obligations of Australia under the Convention relating to the Status of Refugees.

100. The Working Group has consistently maintained that seeking asylum is not a criminal act, but a universal human right enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees and the Protocol thereto. Those instruments constitute international legal obligations that Australia has undertaken.⁴

101. Mr. Pjetri's detention in Australia is characterized by numerous unsuccessful applications for various visas and the appeals of such rejections. He has now spent eight years detained and has become very unwell, apparently due to his prolonged detention. The Working Group notes that the Government has made no indication as to when Mr. Pjetri's detention would cease.

102. 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.⁵

³ A/HRC/19/57, para. 68.

⁴ Opinions No. 28/2017, No. 42/2017 and No. 35/2020.

⁵ A/HRC/39/45, annex, para. 12.

103. This echoes the views of the Human Rights Committee, which, in paragraph 18 of its general comment No. 35 (2014), has 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 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.

104. When Mr. Pjetri was initially detained and transferred to Darwin, and then to Christmas Island, it is clear to the Working Group that the Government did not engage in the assessment of the need to detain Mr. Pjetri and that there was no attempt to ascertain if a less restrictive measure would have been suited to his individual circumstances, as required by international law. Throughout his time in Australia, there has never been an attempt on behalf of the Australian authorities to do so. The Working Group cannot accept that detention for over eight 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 reason specific to Mr. Pjetri, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would justify his detention.

105. This leads the Working Group to conclude that there was no other reason for detaining Mr. Pjetri but the fact that he was seeking asylum and arrived without a visa, thereby being subjected to the automatic immigration detention policy under the Migration Act. The Working Group concludes that Mr. Pjetri was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

106. Furthermore, while the Working Group agrees with the argument presented by the Government in relation to article 26 of the Covenant, it must nevertheless highlight that, in the same general comment cited 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, and that aliens have the full right to liberty and security of person.⁶

107. Mr. Pjetri is therefore entitled to the right to liberty and security of person, as guaranteed in article 9 of the Covenant; when guaranteeing those rights to him, Australia must ensure that it is done without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Pjetri 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.

108. Consequently, noting that Mr. Pjetri has been detained due to the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and 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 takes note of the submission of the Government that Mr. Pjetri has always been treated in accordance with the stipulations of the Migration Act. Such treatment is however 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.

ii. *Category IV*

109. The source has argued that Mr. Pjetri has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government denies those 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. Pjetri has been reviewed by the Commonwealth Ombudsman, as well as the Case Management and Detention Review Committee.

110. 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

⁶ Ibid. paras. 2 and 7.

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 preserving legality in a democratic society.⁷ That right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty⁸ and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also migration detention.⁹

111. The facts of Mr. Pjetri's case since his detention in September 2013 are characterized by various visa applications, their rejections and challenges to those rejections. However, none of them have concerned the necessity to detain Mr. Pjetri or indeed the proportionality of such detention to his individual circumstances. Rather, they assessed the claims of Mr. Pjetri against the legal framework set out in the Migration Act. As is evident by the Working Group's examination below, the Act is not compatible with the obligations of Australia under international law and therefore assessments carried out in accordance with the Act are equally incompatible with the requirements of international law.

112. There have also been numerous reviews of Mr. Pjetri's case by the Case Management and Detention Review Committee, which, according to the Government, has repeatedly examined the legality and reasonableness of his detention. However, as the Working Group has already clearly stated in previous opinions,¹⁰ the Case Management and Detention Review Committee is not a judicial body as required by article 9 (4) of the Covenant. The Working Group observes the repeated failure on behalf of the Government to explain how those reviews satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.¹¹

113. The Government has also argued that the case of Mr. Pjetri is being periodically reviewed by the Commonwealth Ombudsman. However, once again, in doing so, the Government has not explained how such a review satisfies the requirement of article 9 (4) 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.

114. The Government has also argued that the relevant minister has reviewed the detention of Mr. Pjetri but, once again, noting that that is a review by an executive entity, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

115. The Working Group therefore concludes that, for the eight years of his detention, no judicial body has ever been involved in the assessment of the legality of Mr. Pjetri's detention, noting that international human rights law requires that such consideration by a judicial body necessarily involves the assessment of the legitimacy, necessity and proportionality to detain.¹²

116. In that connection, the Working Group reiterates that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,¹³ 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.¹⁴ 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. That is a situation akin to indefinite detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.¹⁵ As the Working Group has noted, in its revised deliberation No. 5:

⁷ A/HRC/30/37, paras. 2–3.

⁸ *Ibid.*, para. 11.

⁹ *Ibid.*, para. 47 (a).

¹⁰ Opinions No. 20/2018, para. 61; No. 50/2018, para. 77; No. 74/2018, para. 103; No. 1/2019, para. 80; and No. 70/2020, para. 102.

¹¹ *Ibid.*

¹² A/HRC/39/45, annex, paras. 12–13.

¹³ *Ibid.*, para. 18; and see opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020; see also A/HRC/13/30, para. 63.

¹⁴ A/HRC/39/45, annex, para. 17; see also A/HRC/13/30, para. 61; and opinion No. 7/2019.

¹⁵ See opinions No. 1/2019 and No. 7/2019.

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-refoulement¹⁶ or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.¹⁷

117. In addition, the Working Group recalls the numerous findings of the Human Rights Committee, in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.¹⁸ Moreover, as the Working Group noted in its revised deliberation No. 5, detention in migration settings must be exceptional and, in order to ensure that, alternatives to detention must be sought.¹⁹ In the case of Mr. Pjetri, the Working Group has already established that, in the eight years since he was first detained, no alternatives to his detention have been considered.

118. Moreover, despite the claims of the Government to the contrary, the Working Group considers that the detention of Mr. Pjetri is in fact punitive in nature, which, as it highlighted in its revised deliberation No. 5, should never be the case.²⁰ Mr. Pjetri has been detained for over eight years, without a charge or a trial in what clearly was a punitive detention, in breach of article 9 of the Covenant.

119. Although Mr. Pjetri has been detained for over eight years, and the Government has not been able to identify how long his detention would last, which means that the detention of Mr. Pjetri is de facto indefinite. Consequently, the Working Group finds that Mr. Pjetri is subjected to de facto indefinite detention due to his migratory status without the possibility to challenge the legality of his detention before a judicial body, a right encapsulated in article 9 (4) of the Covenant. The detention of Mr. Pjetri is therefore arbitrary, falling under category IV.

iii. Category V

120. The Working Group takes note of the source's argument that Mr. Pjetri, 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, although Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that, in Mr. Pjetri's case, the High Court held that provisions of the Migration Act requiring 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, were valid.

121. In the Working Group's view, the repeated explanation submitted by the Government²¹ only confirms that the High Court affirmed the legality of the detention of non-

¹⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3; and Convention relating to the Status of Refugees, article 33.

¹⁷ A/HRC/7/4, para. 48; A/HRC/10/21, para. 82; A/HRC/13/30, para. 63; and see opinion No. 45/2006.

¹⁸ See Human Rights Committee, *C v. Australia; Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255–1256, 1259–1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari et al. 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).

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

²⁰ A/HRC/39/45, annex, paras. 9 and 14; see also opinion No. 49/2020, para. 87.

²¹ 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; and No. 70/2020, paras. 71–73.

citizens until they are removed, deported or granted a visa, even if removal was not reasonably practicable in the foreseeable future.

122. The Government does not explain how such non-citizens can effectively challenge their continued detention, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. The Working Group 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.²²

123. In the past, the Working Group has concurred with the views of the Human Rights Committee on the subject,²³ 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. Pjetri is arbitrary, falling under category V.

124. The Working Group expresses its serious concern over the state of Mr. Pjetri's mental and physical health, which has severely deteriorated following eight years of 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 be treated with respect for their human dignity and that this applies also to those held in the context of immigration detention. As the Working Group 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.²⁴ 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.

iv. *Migration Act of 1958*

125. The Working Group observes that the present case is the latest in a number of cases emanating from Australia that have come before the Working Group since 2017, all of which concern the same issue, namely, the mandatory immigration detention in Australia under the Migration Act.²⁵ The Working Group reiterates its views on the Act.²⁶

126. The Working Group is concerned about the rising number of cases emanating from Australia concerning the implementation of the Migration Act that are being brought to its attention. The Working Group is equally concerned that, in all those cases, the Government has argued that the detention is lawful because it follows the stipulations of the Migration Act.

127. The Working Group once again wishes to clarify that such an argument cannot be accepted as legitimate under international human rights law. The fact that a State is following its own domestic legislation does not in itself approve that legislation as conforming with the obligations that that State has undertaken under international human rights law. No State can legitimately avoid its obligations arising from international human rights law by quoting its domestic laws and regulations.

²² See Human Rights Committee, *C v. Australia; Baban and Baban v. Australia; Shafiq v. Australia; Shams et al. v. Australia; Bakhtiyari et al. v. Australia; D and E and their two children v. Australia; Nasir v. Australia*; and *F.J. et al. v. Australia*, para. 9.3.

²³ 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 and No. 72/2020.

²⁴ A/HRC/39/45, annex, para. 38.

²⁵ 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 and No. 72/2020.

²⁶ Opinion No. 35/2020, paras. 98–103.

128. The Working Group wishes to emphasize that it is the duty of the Government to bring its national legislation, including the Migration Act, into line with its obligations under international human rights law. Since 2017, the Government has been consistently reminded of those obligations by numerous international human rights bodies, including the Human Rights Committee,²⁷ the Committee on Economic, Social and Cultural Rights,²⁸ the Committee on Elimination of Discrimination against Women,²⁹ the Committee on the Elimination of Racial Discrimination³⁰ and the Special Rapporteur on the human rights of migrants,³¹ as well by the Working Group.³² The Working Group once again reiterates the voices of those independent, international human rights mechanisms and calls upon the Government to urgently review that legislation in the light of its obligations under international human rights law, without delay.

129. The Working Group welcomes the invitation of 27 March 2019 from the Government for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed due to the global COVID-19 pandemic, the Working Group looks forward to carrying out the visit as soon as 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

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

The deprivation of liberty of Mirand Pjetri, 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 II, IV and V.

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

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

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

134. 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.

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

²⁷ CCPR/C/AUS/CO/6, paras. 33–38.

²⁸ E/C.12/AUS/CO/5, paras. 17–18.

²⁹ CEDAW/C/AUS/CO/8, para. 53.

³⁰ CERD/C/AUS/CO/18-20, paras. 29–33.

³¹ See A/HRC/35/25/Add.3.

³² 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; and No. 35/2020, paras. 98–103.

Follow-up procedure

136. 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. Pjetri has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Pjetri;
- (c) Whether an investigation has been conducted into the violation of Mr. Pjetri'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.

137. 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.

138. 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.

139. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³³

[Adopted on 7 May 2021]

³³ Human Rights Council resolution 42/22, paras. 3 and 7.