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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

Opinion No. 15/2023 concerning Mohammad Dadashy (Australia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.

2. In accordance with its methods of work,[1] on 30 November 2022 the Working Group transmitted to the Government of Australia a communication concerning Mohammad Dadashy. The Government replied to the communication on 1 March 2023. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Mohammad Dadashy is a national of the Islamic Republic of Iran, born on 16 March 1990. His family is of Azeri ethnicity. Although Mr. Dadashy was raised as a conservative Shia Muslim, he now identifies himself as a Christian.

5. In 2009, Mr. Dadashy participated in protests prior to the presidential election. He met university student activists and became engaged in their work. In particular, he collected the names of individuals detained on political grounds and assisted their families.

6. He also organized a workspace to hold meetings and prepare flyers alleging human rights violations of political detainees.

7. In 2011, the Iranian authorities interrogated him under torture and pressured him to confess to working with activists. He denied all the accusations. Given the absence of evidence, Mr. Dadashy was ultimately released.

8. On 21 November 2012, intending to support a protest against the execution of Baha'is and Christians, he planned to assist in printing pamphlets. On that day, however, Mr. Dadashy had to work and arranged for the guard watching over the workshop to let his fellow activists in during the evening. That same evening, the guard was arrested by the Iranian intelligence service.

9. Understanding that the arrest had occurred because of his activism, Mr. Dadashy was compelled to leave the Islamic Republic of Iran immediately.

10. On 27 November 2012, he fled to Australia. A summons dated the same day, ordering him to appear in court on 5 December 2012, was sent to his home address. On 13 June 2013, Branch 28 of the Islamic Revolutionary Court in Tehran found Mr. Dadashy guilty of insulting the founder of the Islamic Republic of Iran; holding unlawful public assemblies for the purpose of disturbing public peace and security; producing propaganda in favour of groups against the Islamic Republic of Iran; and publishing and distributing proclamations against the Islamic Republic of Iran. Mr. Dadashy was sentenced in absentia to 10 years of imprisonment.

11. Mr. Dadashy travelled on a genuine passport, which was taken by a smuggler in Indonesia and not returned. On 10 December 2012, Mr. Dadashy arrived as an irregular maritime arrival on Ashmore Reef, Australia, and was arrested immediately. It is unknown whether a warrant was presented. It is understood that he was then taken by the Australian authorities to Christmas Island, where he arrived on 20 December 2012 and was detained as an offshore entry person under section 189 (3) of the Migration Act 1958.

12. In November 2021, Mr. Dadashy submitted a freedom of information request regarding the route his boat had taken from Ashmore Reef to Christmas Island. Despite numerous requests for a response, none has been received. If Mr. Dadashy's boat entered the port area of Darwin, he would have access to a further merits review of his protection claim.[2] It is also noted that the Department of Home Affairs itself has identified Mr. Dadashy's boat as potentially affected by the case of *DBB16 v. Minister for Immigration and Border Protection*.

13. On 21 January 2013, Mr. Dadashy was transferred to the Nauru Regional Processing Centre for regional processing under section 198AD of the Migration Act. On 18 March 2013, following an attempt to self-harm, Mr. Dadashy was transferred to Australia for medical treatment and was detained at the Brisbane Immigration Transit Accommodation under section 189 (1) of the Act.

14. On 19 March 2013, Mr. Dadashy was transferred to the Villawood Immigration Detention Centre. On 2 July 2014, he applied for a bridging visa E, which was deemed to be an invalid request. From 30 September 2013 to 9 July 2014, Mr. Dadashy was held at the Melbourne Immigration Transit Accommodation.

[2] Federal Court of Australia, *DBB16 v. Minister for Immigration and Border Protection*, FCAFC 178, Judgment, 6 August 2018.

15. He stayed from 9 July 2014 to 27 January 2016 at the Maribyrnong Immigration Detention Centre. During his stay there, on 4 February 2015, Mr. Dadashy was withdrawn from the Nauru refugee status determination process.

16. On 27 January 2016, Mr. Dadashy was transferred to the Christmas Island Immigration Detention Centre, where he remained until 15 May 2018. On 18 April 2016, during his stay there, the bar for Mr. Dadashy was lifted, as the Minister for Immigration and Border Protection intervened under sections 46A and 46B of the Migration Act to allow Mr. Dadashy to make an application for a temporary protection visa (subclass 785) or a safe haven enterprise visa (subclass 790).

17. On 23 June 2016, Mr. Dadashy lodged a valid application for a safe haven enterprise visa (subclass 790), which was refused on 7 September 2016. The Department of Home Affairs found that Mr. Dadashy did not engage the protection obligations of Australia. The following day, the rejection was automatically referred to the Immigration Assessment Authority.

18. On 29 November 2016, the Immigration Assessment Authority affirmed the decision of the Department of Home Affairs not to grant Mr. Dadashy a visa. The decision of the Authority revealed that it had credibility concerns regarding Mr. Dadashy relating to a translation error in Mr. Dadashy's court ruling.

19. On 31 December 2016, Mr. Dadashy lodged an application for judicial review with the Federal Circuit Court of Australia. On 8 June 2017, the Federal Circuit Court ruled in favour of the Minister. Mr. Dadashy appealed the decision with the Full Federal Court of Australia on 27 June 2017. On 22 June 2018, the Full Federal Court dismissed the appeal. At the time, Mr. Dadashy was being held at the Perth Immigration Detention Centre, to where he had been transferred from the Christmas Island Immigration Detention Centre on 15 May 2018. He remained at the Perth Immigration Detention Centre until 2 July 2018.

20. On 2 July 2018, Mr. Dadashy was transferred to the Yongah Hill Immigration Detention Centre, where he stayed until 11 October 2018. Since 11 October 2018, Mr. Dadashy has been held at the Villawood Immigration Detention Centre.

21. On 2 April 2019, Mr. Dadashy was referred for involuntary removal. On 28 September 2021, he applied for a review by the Administrative Appeals Tribunal of the decision to refuse his safe haven enterprise visa application on the basis of his having first landed at Ashmore Reef. On 6 December 2021, the Tribunal determined that it did not have jurisdiction.

22. Mr. Dadashy has spent nearly 10 years in detention, a situation that is still ongoing. On 23 December 2014, he was charged with indecent assault and false imprisonment. On 5 May 2015, he received a three-month suspended sentence on each charge, to be served concurrently. On 18 December 2015, he was found not guilty of false imprisonment but convicted of indecent assault and ordered to pay a fine. On 9 July 2021, Mr. Dadashy's remaining conviction was overturned. Despite having no criminal record, Mr. Dadashy remains in immigration detention.

23. Relevant ministers with power under the Migration Act may exercise their non-delegable powers to release Mr. Dadashy from detention at any time. On 28 April 2016, Mr. Dadashy's case was referred to the Minister for consideration under section 195A of the Act. On 30 June 2016, the Minister indicated that he would consider the grant of a bridging visa E (subclass 050) and a humanitarian stay visa (subclass 449) but, that same day, declined to intervene.

24. On 28 September 2016, Mr. Dadashy's case was referred to the Minister for a second time for consideration of a bridging visa E under section 195A. No response was received from the Minister.

25. On 2 February 2017, Mr. Dadashy's case was referred to the Minister for a third time for consideration under section 195A for the granting of a bridging visa. On 12 May 2017, the submission was returned to the Department of Home Affairs, unactioned by the Minister, without explanation, and the referral was finalized.

26. On 31 October 2017, the Department of Home Affairs initiated an assessment of Mr. Dadashy's case for a fourth time against the section 195A guidelines, which he was found to meet on 28 November 2017. On 15 January 2018, the Minister declined to intervene.

27. On 10 April 2018, the Commonwealth Ombudsman recommended that Mr. Dadashy be considered under section 195A for the granting of a bridging visa. On 18 June 2018, the Minister responded in Parliament that he had considered Mr. Dadashy's case and declined to intervene.

28. On 28 June 2018, the Department of Home Affairs initiated a fifth request for assessment against the section 195A guidelines and, on 3 August 2018, Mr. Dadashy was once again found to meet the Minister's guidelines for referral. On 17 October 2018, a submission was sent to the Minister on behalf of Mr. Dadashy.

29. On 14 February 2019, Mr. Dadashy was included in a group submission to the Assistant Minister for Immigration and Border Protection under section 195A, requesting an alternative management option for those who had been detained for more than five years. On 28 February 2019, the Assistant Minister indicated that Mr. Dadashy should be referred for such an alternative management option. On 27 March 2019, the Minister again declined to intervene.

30. On 26 June 2019, the Department of Home Affairs initiated a seventh assessment of Mr. Dadashy's case against the section 195A guidelines. On 25 July 2019, the Commonwealth Ombudsman recommended that the consideration of Mr. Dadashy's case be expedited under section 195A for the granting of a bridging visa and under section 46A to lift the bar to allow him to lodge further bridging visa applications. On 8 November 2019, the Complex Case Resolution Section advised that Mr. Dadashy's case had not been allocated.

31. On 4 February 2020, Mr. Dadashy requested ministerial intervention under section 48B of the Migration Act. The ministerial intervention was finalized on 4 March 2020, with no subsequent application allowed. On 11 March 2020, Mr. Dadashy was assessed as meeting the section 195A guidelines and a submission requesting the Minister to consider alternative management options under sections 195A and 197AB was prepared. On 8 September 2021, however, the request was assessed as not meeting the Minister's guidelines and was not referred.

32. On 13 January 2022, Mr. Dadashy's legal representatives made a ministerial intervention request under section 195A, followed on 8 February 2022 by a request under section 197AB, both of which remain pending.

33. On 16 February 2022, Mr. Dadashy's legal representatives made a ministerial intervention request under sections 46A and 48B of the Migration Act. On 23 February 2022, the request was assessed as not meeting the Minister's guidelines and was not referred. When asked for the assessment against guidelines, the Department of Home Affairs responded, on 21 March 2022, that nothing had changed since the Immigration Assessment Authority reviewed Mr. Dadashy's case in 2016, specifically that there was no real chance that he would practise Christianity and therefore did not face a serious risk of harm in the Islamic Republic of Iran due to his religion. Moreover, Mr. Dadashy had not linked his mental health concerns to a clear form of significant harm and would be able to receive adequate treatment in the Islamic Republic of Iran, commensurate with that of any other Iranian citizen. Mr. Dadashy's legal representatives dispute this assessment.

34. Mr. Dadashy was baptized on 19 May 2013 and remains an active Christian.

35. Since being administratively detained, Mr. Dadashy has developed further severe mental health issues. He has a documented diagnosis of post-traumatic stress disorder, has been noted to have chronic stress and detention fatigue and has been formally diagnosed with mixed anxiety and depression, for which he has been medicated intermittently.

36. On 25 March 2013, following Mr. Dadashy's transfer from offshore detention in Nauru to onshore immigration detention in Australia for medical treatment, due to multiple attempts to self-harm, the International Health and Medical Services advised the Department of Home Affairs not to return Mr. Dadashy to Nauru as doing so would significantly increase his risk of suicide.

37. In 2014 and 2015, psychologists from Foundation House and the International Health and Medical Services reported on separate occasions that Mr. Dadashy's mental state was compromised due to protracted detention.

38. On 14 May 2018, Mr. Dadashy was admitted to hospital suffering from moderate to severe dehydration. He was discharged on 21 June 2018, still refusing to eat.

39. On 26 June 2018, Mr. Dadashy recommenced full food and fluid refusal, with the Health Service Manager of the International Health and Medical Services reporting that Mr. Dadashy saw no point in living. On 28 June 2018, the Department of Home Affairs advised Mr. Dadashy that he would not be considered for alternative placement while he refused food and fluids. After indicating that he was ready to cease the practice, having been told that he would be given a lawyer to appeal his criminal conviction, Mr. Dadashy was transferred to Royal Perth Hospital for treatment. He was discharged on 2 July 2018.

40. A special needs health assessment, received on 21 September 2018, diagnosed Mr. Dadashy with acute stress disorder and recommended his relocation, as his health conditions were likely to be aggravated by remaining in detention.

41. In January 2019, Mr. Dadashy's psychologist reported that the stressors associated with detention would continue to have a negative impact on Mr. Dadashy's psychological, emotional and physical health. The recommendation was approved by the Medical Director of the International Health and Medical Services on 20 February 2019 and noted in the reports of the Department of Home Affairs on Mr. Dadashy provided to the Ombudsman.

42. On 25 July 2019, the Ombudsman recommended that the Department of Home Affairs consider Mr. Dadashy's case for a specialized detention placement, given his significant mental health issues.

43. On 16 October 2019, the Minister responded to the Ombudsman in Parliament that, on the basis of medical advice, the Department of Home Affairs had determined that such a placement was currently not appropriate.

44. On 26 December 2019, the International Health and Medical Services reported that Mr. Dadashy had significant mental health issues likely to be adversely affected by the current placement and that the risk of suicide was high, as Mr. Dadashy had expressed the determination to end his life.

45. In January 2022, another assessment established that Mr. Dadashy was considered to be at risk of suicide and that his mental health would benefit greatly if he were released from detention and had access to ongoing, specialized psychological assessment and treatment in the community.

46. The continued deprivation of liberty of Mr. Dadashy is arbitrary. He has been deprived of liberty as a result of his exercise of the rights guaranteed under article 14 of the Universal Declaration of Human Rights, as he came to Australia to seek asylum. He 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. The source argues that asylum-seekers do not have the same rights under Australian law as Australian citizens, who are not subjected to administrative immigration detention.

47. Immigration detention is described by the Department of Home Affairs as a last resort that is used for a very small proportion of people whose status requires resolution, sometimes through protracted legal proceedings. This is not the case for Mr. Dadashy, who was immediately detained upon his arrival in Australia, in December 2012, and who remains in immigration detention to date.

48. In its general comment No. 35 (2014), the Human Rights Committee stated that detention had to be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extended in time. The fact that Mr. Dadashy has been held in administrative detention since December 2012 illustrates that his detention is not reasonable, necessary or proportionate and has not been properly or independently assessed as it extends in time.

49. The Australian Human Rights Commission and the Ombudsman have no power to enforce the release of a person from immigration detention. As such, there is no independent body to review the appropriateness of detention. Unless Mr. Dadashy is released from administrative detention, he will be in detention indefinitely, given that he maintains his protection claims and will not voluntarily return to his home country. The Islamic Republic of Iran does not accept involuntary returnees.

50. Mr. Dadashy was not invited to apply for protection under section 46A of the Migration Act until 18 April 2016, when he had been in closed detention for over three years. He was not put forward for a bridging visa (under section 195A of the Migration Act) until 28 April 2016.

51. In *Al-Kateb v. Godwin,*[3] the High Court of Australia upheld that the mandatory detention of non-citizens as a practice was not contrary to the Constitution, while the Human Rights Committee, in *Mr. C. v. Australia,* held that there was no effective remedy for people subject to mandatory detention in Australia.[4]

52. The recent judgment in *Commonwealth of Australia v. AJL20*[5] further entrenches the legality of indefinite immigration detention, even in circumstances in which the Government is not taking active steps to remove an individual as soon as reasonably practicable.

53. Australian citizens and non-citizens are not equal before the courts and tribunals. The decision of the High Court of Australia in *Al-Kateb v. Godwin* stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Act does not contravene the Constitution of Australia. The effective result is that, while Australian citizens can challenge administrative detention, non-citizens cannot. The decision in *Commonwealth of Australia v. AJL20* confirms that the indefinite detention of an individual does not offend the Constitution and is legal even in circumstances in which the Government has not taken any active steps to remove them as soon as reasonably practicable.

54. Mr. Dadashy has taken all necessary steps to seek protection in Australia and use the appeal avenues available to him under the law.

Response from the Government

55. On 30 November 2002, 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 30 January 2023, detailed information about Mr. Dadashy and to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of Australia under international human rights law, in particular with regard to the treaties ratified by the State.

56. On 1 December 2022, the Government requested an extension of time in accordance with paragraph 16 of the Working Group's methods of work and was granted a new deadline of 1 March 2023.

57. In its reply, dated 1 March 2023, the Government stated that, on 10 December 2012, Mr. Dadashy had entered Australia by sea, arriving on Ashmore Reef. He was taken to Christmas Island on 20 December 2012, where he was detained as an offshore entry person under section 189 (3) of the Migration Act. Mr. Dadashy was taken to Nauru, a regional processing country, on 21 January 2013. On 18 March 2013, Mr. Dadashy was brought back to Australia for medical treatment.

58. As Mr. Dadashy is an unauthorized maritime arrival, he is prevented by a statutory bar in section 46A of the Migration Act from making a valid visa application. As Mr. Dadashy was taken to Nauru under section 198AD of the Act, he is also a transitory person and thus is prevented by the statutory bar set out in section 46B of the Act from making a valid visa application.

59. Mr. Dadashy was found not to engage the protection obligations of Australia under the Migration Act, as affirmed by the Immigration Assessment Authority on 29 November 2016. On 31 December 2016, Mr. Dadashy sought a review at the Federal Circuit Court and, on 8 June 2017, the Court affirmed the decision of the Immigration Assessment Authority.

60. On 27 June 2017, Mr. Dadashy brought an appeal to the Full Federal Court to contest the decision of the Immigration Assessment Authority. On 22 June 2018, the Court dismissed the appeal. Mr. Dadashy is prevented by the statutory bar set out in section 48A of the Migration Act from making a further protection visa application. On 28 April 2016, 7 December 2017 and 17 October 2018, the Department of Home Affairs referred a

[3] High Court of Australia, Case No. A253/2003, Order, 6 August 2004.

[4] CCPR/C/76/D/900/1999.

[5] High Court of Australia, Case No. C16/2020, Judgment, 23 June 2021.

submission to the then Minister for Immigration for consideration under section 195A of the Act. On each occasion, the Minister declined to consider intervening under section 195A of the Act. In addition, on 2 February 2017, the Department referred a submission to the then Minister for Immigration for consideration under section 195A of the Act, which was returned to the Department unactioned on 19 April 2017.

61. On 17 November 2022, the Department of Home Affairs referred a submission to the Minister for consideration under sections 195A and 197AB of the Migration Act.

62. On 19 December 2022, the Minister intervened under section 197AB of the Migration Act to make a residence determination in respect of Mr. Dadashy.

63. Mr. Dadashy is an unlawful non-citizen, meaning he is a non-citizen who does not hold a visa that is in effect. He remains in immigration detention. He is prevented by sections 46A and 46B of the Migration Act from making a valid visa application. As an unauthorized maritime arrival who does not engage the protection obligations of Australia, Mr. Dadashy will not be settled in Australia.

64. Mr. Dadashy has no outstanding visa applications and is refusing to cooperate with the Department of Home Affairs and the authorities of the Islamic Republic of Iran for the purpose of obtaining a travel document to facilitate his removal from Australia. It is possible for Mr. Dadashy to end his ongoing detention by voluntarily departing Australia at any time and, if he chooses this option, Australia will expedite his removal as soon as practicable.

65. The Government further provides a detailed case history. In particular, it recalls that Mr. Dadashy entered Australia by sea and became an offshore entry person (and later an unauthorized maritime arrival, as defined in section 5AA of the Migration Act). Mr. Dadashy left the Islamic Republic of Iran on a passport that was reportedly taken by a people smuggler in Indonesia. He was taken to Christmas Island, where he arrived on 20 December 2012, and was detained as an offshore entry person under section 189 (3) of the Act.

66. Mr. Dadashy was taken to Nauru on 21 January 2013. On 19 March 2013, he was transferred to Australia for medical treatment following an attempt to self-harm. On 25 March 2013, the International Health and Medical Services advised the Department of Home Affairs not to return Mr. Dadashy to Nauru, as it would increase his risk of suicide. On 30 September 2013, Mr. Dadashy was transferred to the Melbourne Immigration Transit Accommodation. On 9 July 2014, Mr. Dadashy was involved in an alleged sexual assault and, as a result, was transferred to the Maribyrnong Immigration Detention Centre.

67. On 27 January 2016, Mr. Dadashy was transferred to the Christmas Island Immigration Detention Centre. Since being placed in immigration detention, Mr. Dadashy has been involved in 154 recorded incidents, including for aggressive behaviour, minor assault, serious assault, sexual assault, possession of contraband, minor damage, minor disturbance, food and fluid refusal, self-harm and possession of a weapon.

68. On 5 May 2015, he was convicted of false imprisonment (common law) and indecent assault and was sentenced to three months imprisonment on each charge, to be served concurrently. Mr. Dadashy appealed the sentence and was found not guilty of false imprisonment (common law). However, he was convicted of indecent assault and was ordered to pay a fine.

69. Mr. Dadashy was not taken to a regional processing country as he was subject to fast-track processing in Australia.

70. On 15 April 2016, the Department of Home Affairs referred a submission to the then Minister asking him to consider lifting the statutory bars of sections 46A and 46B of the Migration Act to allow Mr. Dadashy to lodge a safe haven enterprise visa (subclass 790) or a temporary protection visa (subclass 785) application.

71. On 18 April 2016, the Minister lifted the statutory bars of sections 46A and 46B. On 20 April 2016, the Department of Home Affairs notified Mr. Dadashy that he was eligible to access the Primary Application and Information Service to assist in lodging an application for a temporary protection or safe haven visa.

72. On 28 April 2016, the Department of Home Affairs referred a submission to the Minister under section 195A of the Migration Act to consider granting Mr. Dadashy a bridging visa E (subclass 050). On 4 May 2016, Mr. Dadashy accepted the Primary

Application and Information Service offer. On 23 June 2016, Mr. Dadashy lodged a valid safe haven visa application. On 24 June 2016, Mr. Dadashy attended an interview in connection with the visa application.

73. On 30 June 2016, the Minister declined to consider intervening under section 195A of the Migration Act. On 7 September 2016, the safe haven visa application was refused as Mr. Dadashy was found to not engage the protection obligations of Australia.

74. On 29 November 2016, the Immigration Assessment Authority affirmed the refusal decision. On 31 December 2016, Mr. Dadashy sought review of the refusal decision by the Federal Circuit Court and, on 8 June 2017, the Court affirmed the Authority's decision.

75. On 2 February 2017, the Department of Home Affairs referred a submission to the Minister for consideration under section 195A of the Migration Act. On 19 April 2017, the Minister declined to consider intervening under section 195A of the Act.

76. On 27 June 2017, Mr. Dadashy appealed the Federal Circuit Court decision to the Full Federal Court. On 22 June 2018, the Full Federal Court dismissed the appeal.

77. On 7 December 2017, the Department of Home Affairs referred a submission to the Minister for consideration under section 195A of the Migration Act. On 15 January 2018, the Minister declined to consider intervening under section 195A in Mr. Dadashy's case.

78. On 15 May 2018, Mr. Dadashy was transferred from the Christmas Island Immigration Detention Centre to the Perth Immigration Detention Centre.

79. On 2 July 2018, Mr. Dadashy was transferred to the Yongah Hill Immigration Detention Centre. On 10 October 2018, Mr. Dadashy was transferred to the Villawood Immigration Detention Centre after the International Health and Medical Services identified mental health risks relating to his placement at the Yongah Hill Centre.

80. On 17 October 2018, the Department of Home Affairs referred a submission to the Minister for consideration under sections 195A and 46A of the Migration Act. On 27 March 2019, the Minister declined to consider the case under section 195A of the Act to grant Mr. Dadashy a bridging visa E and lift the section 46A bar to allow bridging visa E applications. On 26 June 2019, the case was referred for assessment under the section 195A guidelines.

81. On 4 March 2020, Mr. Dadashy was found not to meet the guidelines under section 48B for referral to the Minister to consider lifting the bar in section 48A. In August 2021, Mr. Dadashy was involved in two incidents of serious damage to Commonwealth property. The police investigation into these incidents is ongoing.

82. On 1 November 2021, Mr. Dadashy's case was assessed as not meeting sections 195A and 197AB guidelines. On 16 February 2022, Mr. Dadashy's representative made a request for ministerial intervention under sections 46A and 48B of the Migration Act. On 22 February 2022, the request was found to not meet the guidelines for referral to the Minister under section 48B of the Act.

83. On 24 May 2022, Mr. Dadashy's representative made a further request for ministerial intervention under sections 46A and 48B of the Migration Act. On 29 June 2022, the request was finalized as not meeting the guidelines for referral to the Minister under section 48B of the Act.

84. On 23 June 2022, Mr. Dadashy was reportedly assaulted by another detainee and requested that the matter be referred to the Australian Federal Police. On 29 June 2022, the police advised they had determined not to investigate further, noting minor injuries and the management of the issue by the detention centre. However, on 1 August 2022, the police advised that the matter had been reopened for investigation. On 20 December 2022, the police advised the Australian Border Force that the matter was ongoing and was before the courts.

85. On 17 November 2022, the Department of Home Affairs referred a submission to the Minister for consideration under sections 195A and 197AB of the Migration Act. On 19 December 2022, the Minister intervened under section 197AB of the Act to make a residence determination. Once Mr. Dadashy has been residing at the place that is the subject of the residence determination for six months, his case can be referred for consideration under section 195A of the Act for the granting of a visa.

86. The Government further provides detailed information about Mr. Dadashy's health, and emphasizes that the Department of Home Affairs prioritizes the health and safety of all persons in immigration detention. Health examinations are routinely conducted by the Department's contracted health services provider. Psychological consultations are also undertaken, as necessary, to establish and monitor the mental health of detainees. Detainees have access to external scrutiny bodies with a mandate to oversee the operations of immigration detention facilities.

87. The Department of Home Affairs is aware of Mr. Dadashy's mental health issues, including post-traumatic stress disorder, his history of self-harm and voluntary food and fluid refusal, the most recent information covering the period 24–28 September 2021. He was monitored and managed with daily health and welfare reviews by members of both the primary care and mental health teams.

88. On 16 May 2018, Mr. Dadashy was admitted to hospital, where he remained until 21 June 2018. He was treated for acute starvation with malnutrition, deranged liver function, renal failure and hypoglycaemia.

89. During his time in immigration detention, Mr. Dadashy has been prescribed psychotropic medications. Furthermore, he has received counselling services and has engaged with an external psychologist.

90. Regarding all threatened or actual self-harm incidents, Mr. Dadashy was offered medical intervention and was managed with supportive monitoring and engagement by the mental health team.

91. Mr. Dadashy was also placed on constant Keep S.A.F.E. status (accessible or visible for visual monitoring at all times).

92. There have been no episodes of self-harm since September 2021, including since his placement into community detention on 20 December 2022. Mr. Dadashy has been encouraged to engage with a community-based general practitioner to be referred for ongoing mental health support.

93. The Government also provides legal and policy frameworks. The universal visa system of Australia requires all non-citizens to hold a valid visa to enter and remain in the country. 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 of the Act, unlawful non-citizens must be kept in immigration detention until they are removed or granted a visa.

94. Section 195A of the Migration Act provides the Minister with the power to grant a visa to a person in immigration detention. Section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention. Ministerial intervention is not an extension of the visa process. The Minister's powers under sections 195A and 197AB of the Act are non-delegable and non-compellable. The Minister is under no obligation to exercise these powers in a case.

95. Persons who make a valid application for a protection visa will have their claims assessed. The domestic legislation and policies and practices of Australia implement its non-refoulement obligations under the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, the Covenant and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

96. If a person makes a valid application for a visa and a visa is refused, the person can seek to have the lawfulness of that decision reviewed through judicial processes. Merits reviews and judicial reviews of administrative decisions are available to both Australian citizens and non-citizens. Mr. Dadashy has exercised these rights on multiple occasions, including on 31 December 2016 and 27 June 2017.

97. The Government's model litigant obligation requires the Commonwealth to act honestly and fairly in handling claims and litigation brought by or against it.

98. The immigration detention of an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary and proportionate in the particular circumstances. Continuing detention may become arbitrary if it is no longer reasonable, necessary and proportionate in the circumstances. In instances of continuing detention, the

determining factor is not the length of the detention, but whether the grounds for the detention are lawful and justifiable. Under the Migration Act, detention is dependent upon an individual's circumstances, including identity determination, developments in country information, health and character or security matters. Detention is a last resort for the management of unlawful non-citizens.

99. Mr. Dadashy remains in immigration detention because he is an unlawful non-citizen. In addition, on the basis of his individual circumstances, including the fact that he entered Australia with no valid passport, immigration detention is considered to be the most appropriate form of detention. While Mr. Dadashy was held in immigration detention, from 20 December 2012 to 19 December 2022, the Department of Home Affairs reviewed his case 119 times. These reviews did not identify any circumstances that warranted a change of placement for Mr. Dadashy. However, between December 2012 and December 2022, Mr. Dadashy's case was referred for ministerial consideration under section 195A of the Act on five occasions and was found to not meet the section 195A guidelines on one occasion. On the fifth occasion, the Minister intervened under section 197AB of the Migration Act on 19 December 2022 to make a residence determination.

100. As Mr. Dadashy is an unauthorized maritime arrival, he is prevented by section 46A of the Migration Act from making a valid visa application. He will therefore not be settled permanently in Australia.

101. Immigration detention is administrative in nature and not punitive. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the legal obligations of Australia. The ongoing detention of Mr. Dadashy is justifiable and not arbitrary and is consistent with the Covenant.

102. The Department of Home Affairs is required under section 486N of the Migration Act to provide the Ombudsman with reports detailing the circumstances of individuals who have been in immigration detention for a cumulative period of two years and every six months thereafter. Following receipt of the Department's section 486N report, the Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 4860 of the Act. The Ombudsman may make recommendations to the Department. The Department has reported on Mr. Dadashy on 16 occasions, with the most recent report having been sent to the Ombudsman on 5 September 2022.

103. Persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court. Section 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 grants the Federal Court the same jurisdiction as the High Court under section 75 (v) of the Constitution. It is these provisions that constitute the legal mechanism through which non-citizens may challenge the lawfulness of their detention.

104. Mr. Dadashy was identified for assessment under section 195A of the Migration Act for possible referral to the Minister for consideration to grant a bridging visa E (subclass 050). On 30 June 2016, the Minister declined to consider intervening in Mr. Dadashy's case. A person can write to the Minister to request ministerial intervention. Mr. Dadashy and his representative did not make any ministerial intervention requests until February 2020. Two additional requests were made, in May 2021 and in February 2022. The Minister's public interest powers under the Act are non-compellable. Only cases that meet the ministerial guidelines are referred to the Minister for consideration.

105. The Government disagrees with the statement that Australian citizens and non-citizens are not equal before the courts, stating that the effect of the decision in *Al-Kateb v. Godwin* was that non-citizens could not challenge administrative detention decisions. In *Al-Kateb v. Godwin*, the High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they were removed or granted a visa, even if removal was not reasonably practicable in the foreseeable future, were lawful. The decision in *Al-Kateb v. Godwin* does not alter non-citizens' ability to challenge the lawfulness of their detention under Australian law. Further, non-citizens are also able to challenge the lawfulness of their detention through an application for a writ of habeas corpus.

106. The Universal Declaration of Human Rights is not legally binding. However, the Government recognizes that it reflects international law, to the extent that it has been codified in other legally binding instruments. Mr. Dadashy is detained, as required by section 189 of the Migration Act, because he is an unlawful non-citizen, not because he is seeking protection.

107. 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 is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. The Act is thus aimed at differentiating, on the basis of nationality, between citizens and non-citizens. The Human Rights Committee has recognized in its general comment No. 15 (1986) that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that it is in principle a matter for the State to decide whom it will admit to its territory. The Government can thus 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.

108. The differential treatment of citizens and non-citizens 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 proportionate to the aim to be achieved. The treatment is consistent with articles 12 and 13 of the Covenant.

109. Equality and non-discrimination should not be understood simplistically as requiring identical treatment of all persons in all circumstances. Further, under international human rights law, not all differences in treatment will constitute discrimination. The treatment of Mr. Dadashy amounts to permissible, legitimate, differential treatment, consistent with the obligations of Australia under the Covenant.

Discussion

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

111. In determining whether the deprivation of liberty of Mr. Dadashy is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[6]

Category I

112. It is submitted by the parties that Mr. Dadashy arrived in Australia in December 2012 by boat. The Government submits that he was detained and, on 20 December 2012, transferred to the detention centre on Christmas Island. The Department of Home Affairs was the detaining authority and the reason for the arrest was unauthorized entry to Australia by boat. Since then, he has remained in immigration detention as an unlawful non-citizen and, for the past 10 years, he had been transferred between several immigration detention centres. The Government contends that the Universal Declaration of Human Rights, while proclaimed by the General Assembly, does not create binding legal obligations on signatories. Notwithstanding this, the Government submits that Mr. Dadashy is lawfully detained under the national legislation as an unlawful non-citizen.

113. The Working Group refers to its line of jurisprudence in relation to Australia. Since 2017, the Working Group has considered 20 cases, all of which concern the same issue, namely mandatory immigration detention in Australia in accordance with the Migration Act 1958.[7] The Working Group reiterates its views on the Migration Act.[8]

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

[7] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 69/2021, No. 28/2022, No. 32/2022 and No. 42/2022.

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

114. The Working Group furthermore reiterates its alarm that, in all these cases, the Government has argued that the detention is lawful purely because it follows the stipulations of the Migration Act. 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.

115. The Working Group again emphasizes that it is the duty of the Government to bring its national legislation, including the Migration Act, into alignment 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,[9] the Committee on Economic, Social and Cultural Rights,[10] the Committee on the Elimination of Discrimination against Women,[11] the Committee on the Elimination of Racial Discrimination,[12] the Special Rapporteur on the human rights of migrants[13] and the Working Group.[14] The Working Group calls upon the Government to urgently review the Migration Act in the light of its obligations under international human rights law.

116. 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 posed by the Migration Act 1958, and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. Dadashy 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

117. The Working Group observes that Mr. Dadashy arrived in Australia on 10 December 2012, having escaped the Islamic Republic of Iran, where he was sentenced in absentia to 10 years' imprisonment for his human rights activities. Thus, the present case involves an individual who has spent some 10 years in various detention centres so far and, given the Government's submissions, his detention appears to be indefinite. The Working Group is disturbed that the Government reproached him for a failure to cooperate with the Iranian authorities for the purpose of obtaining a travel document to facilitate his removal to the Islamic Republic of Iran, where he faces very serious risks of torture. It recalls that article 3 of the Convention against Torture sets out the obligation not to return anyone to a State where they might face torture.

118. Notwithstanding the views and findings of the Working Group 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. Dadashy remains detained today on the basis of that same Act. The source argues that Mr. Dadashy is detained in violation of article 26 of the Covenant.

119. As the Working Group has explained in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.[15] This echoes the views of the Human Rights Committee, which stated in paragraph 18 of its general comment No. 35 (2014), that asylum-seekers who unlawfully enter a State

[9] CCPR/C/AUS/CO/6, paras. 33–38.
[10] E/C.12/AUS/CO/5, paras. 17 and 18.
[11] CEDAW/C/AUS/CO/8, paras. 53 and 54.
[12] CERD/C/AUS/CO/18-20, paras. 29–33.
[13] See A/HRC/35/25/Add.3.
[14] Opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; 2/2019, paras. 115–117; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.
[15] A/HRC/39/45, annex, para. 12.

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

120. Furthermore, the Government has not presented any particular reason, under the national legislation, specific to Mr. Dadashy, 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. This is not altered by the fact that Mr. Dadashy has been involved in a number of incidents, including for aggressive behaviour, as it does not appear that these facts were assessed by the relevant authorities when deciding on his detention. The only reference to the fact that Mr. Dadashy was qualified as an "unauthorized maritime arrival" does not per se amount to any individual assessment.

121. The Working Group notes Mr. Dadashy's health problems as a weighty factor for his release. It concludes that there was no reason for detaining Mr. Dadashy other than his migration status and that he was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

122. Furthermore, while the Working Group agrees with the argument presented again by the Government in relation to article 26 of the Covenant, it must nevertheless emphasize that, in its general comment No. 15 (1986), the Human Rights Committee, quoted by the Government, also makes 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 the person".[16]

123. This means that Mr. Dadashy is entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and that, when guaranteeing these rights to him, Australia must ensure that it is done without distinction of any kind, as required by article 2 of the Covenant. Mr. Dadashy is subjected to de facto indefinite detention due to his immigration status, in clear breach of articles 2 and 9 of the Covenant.

124. Noting that Mr. Dadashy has been detained due to the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds his detention to be arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Mr. Dadashy has always been treated in accordance with the stipulations of the Migration Act 1958. Be that as it may, such treatment is not compatible with the obligations that Australia has undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

Category IV

125. The source has argued that Mr. Dadashy has been subjected to prolonged administrative custody without remedy. The Government denies these allegations, arguing that persons in immigration detention can seek review of the lawfulness of their detention, and that, between 2012 and 2022, the Department of Home Affairs reviewed the case of Mr. Dadashy 119 times. On five occasions his case was referred for ministerial consideration under section 195A of the Act.

126. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[17] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[18] and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also migration detention.[19]

[16] Paras. 2 and 7.
[17] A/HRC/30/37, paras. 2 and 3.
[18] Ibid., para. 11.
[19] Ibid., para. 47 (a).

127. In respect of the Government's arguments, the Working Group recalls that none of the reviews were judicial – as required by article 9 (4) of the Covenant – and, moreover, did not concern the necessity to detain Mr. Dadashy or indeed the proportionality of such detention to his individual circumstances. Rather, these actions assessed the claims of Mr. Dadashy against the legal framework set out by the Migration Act 1958. As is evident from the Working Group's examination, as set out above, the Act is incompatible with the obligations of Australia under international law, and the assessments carried out in accordance with the Act are therefore equally incompatible with the requirements of international human rights law.

128. Furthermore, and in view of the Government's argument that the case of Mr. Dadashy was reviewed by the Ombudsman 16 times, the Working Group notes that the Government has not explained how such a review satisfies the requirement of article 9 (4) of the Covenant for a review of legality of detention by a judicial body, a point that the Working Group has already explained to the Government in earlier jurisprudence.[20] The Working Group is particularly mindful that the Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention, as clearly stipulated by the Government itself.

129. The Government has also argued that the Minister has reviewed the detention of Mr. Dadashy. Once again, noting that this is a review by an executive body, the Working Group observes, as it has on previous occasions,[21] that it does not satisfy the criteria of article 9 (4) of the Covenant.

130. The Working Group therefore concludes that, during his over 10 years of detention, no judicial body has ever been involved in the assessment of the legality of Mr. Dadashy's detention and notes that international human rights law requires that such consideration by a judicial body necessarily involve an assessment of the legitimacy, necessity and proportionality of detention.[22]

131. The Working Group must therefore reiterate that the indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[23] which is why the Working Group has required that a maximum period for detention in the course of migration proceedings must be set by legislation and, upon the expiry of the period for detention set by law, the detained person must automatically be released.[24] 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.[25] As the Working Group stated in paragraph 27 of 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 – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.

132. The Working Group recalls the numerous findings by the Human Rights Committee that the application of mandatory immigration detention in Australia and the impossibility of challenging such detention is in breach of article 9 (1) of the Covenant.[26] Moreover, as the

[20] Opinion No. 69/2021, para. 126.
[21] Opinion No. 32/2022.
[22] A/HRC/39/45, annex, paras. 12 and 13.
[23] Ibid., para. 26. See also opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020; and A/HRC/13/30, para. 63.
[24] A/HRC/39/45, annex, para. 25; A/HRC/13/30, para. 61; and opinion No. 7/2019.
[25] See opinions No. 1/2019 and No. 7/2019.
[26] *C. v. Australia* (CCPR/C/76/D/900/1999); *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&1288/2004); *Bakhtiyari et al. v. Australia*

Working Group notes in its revised deliberation No. 5, detention in migration settings must be exceptional and, in order to ensure this, alternatives to detention must be sought.[27] In the case of Mr. Dadashy, the Working Group has already established that no alternatives to detention have been considered.

133. Moreover, despite the claims of the Government to the contrary, the Working Group considers that the detention of Mr. Dadashy is, in fact, punitive in nature which, as it highlighted in its revised deliberation No. 5, should never be the case[28] and is in breach of article 9 of the Covenant. Mr. Dadashy has currently been detained for over 10 years and, as the Government has not been able to identify how long his detention will last, it is de facto indefinite.

134. Consequently, the Working Group finds that Mr. Dadashy is subjected to de facto indefinite detention due to his migratory status without the possibility of challenging the legality of such detention before a judicial body, which is the right encapsulated in article 9 (4) of the Covenant. This is therefore arbitrary, falling under category IV. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee 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 of the Covenant.[29]

Category V

135. The Working Group notes the source's argument that Mr. Dadashy, as a non-citizen, appears to be in a different situation from Australian citizens in relation to his ability to effectively challenge the legality of his detention before the domestic courts and tribunals, owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. In its reply, the Government denies those allegations, arguing that, in this case, the High Court held that provisions of the Migration Act 1958 requiring the detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid. The decision in *Al-Kateb v. Godwin* does not alter non-citizens' ability to challenge the lawfulness of their detention under Australian law.

136. The Working Group remains perplexed by the repeated explanation submitted by the Government,[30] since this confirms only that the High Court affirmed the legality of the detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

137. However, as the Working Group has repeatedly noted, the Government is failing to explain how such non-citizens can effectively challenge their continued detention after this decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee, in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin*,

*(*CCPR/C/79/D/1069/2002); *D et al. 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).

[27] A/HRC/39/45, annex. 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.

[28] See also 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 et al. v. Australia*, *Nasir v. Australia* and *F.J. et al. v. Australia*.

[29] Ibid.

[30] 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 and 96; No. 70/2020, paras. 71–73; No. 17/2021, paras. 120–123; and No. 32/2022, paras. 72 and 73.

and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[31]

138. As in the past, the Working Group cannot but again concur with the views of the Human Rights Committee in this matter,[32] 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. Dadashy is arbitrary, falling under category V.

Concluding remarks

139. The Working Group wishes to place on record its very serious concern over the state of Mr. Dadashy's mental and physical health. Although the Working Group acknowledges submissions by the Government concerning the health-care provision for Mr. Dadashy, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty are to be treated with respect for their human dignity, and that this applies also to those held in the context of migration.[33] 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 detention in the course of migration proceedings.[34] 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.

140. The Working Group welcomes the Government's invitation of 27 March 2019 for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed owing to the worldwide coronavirus disease (COVID-19) pandemic, the Working Group looks forward to carrying out the visit as soon as practically possible. It views the visit as an opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

> The deprivation of liberty of Mohammad Dadashy, being in contravention of articles 2, 3, 7–9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

142. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Dadashy 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. Dadashy immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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. Dadashy and to take appropriate measures against those responsible for the violation of his rights.

[31] See *C. v. Australia*; *Baban and Baban v. Australia*; *Shafiq v. Australia*; *Shams et al. v. Australia*; *Bakhtiyari et al. v. Australia*; *D et al. v. Australia*; *Nasir v. Australia*; and *F.J. et al. v. Australia*, para. 9.3.

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

[33] See also deliberation No. 12 (A/HRC/48/55, annex).

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

145. The Working Group requests the Government to bring its laws, particularly the Migration Act 1958, into conformity with the recommendations made in the present opinion and with the commitments made by Australia under international human rights law.

146. 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.

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

Follow-up procedure

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

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

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

149. 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.

150. 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.

151. 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.[35]

[*Adopted on 29 March 2023*]

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