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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-seventh session, 28 August–1 September 2023

Opinion No. 44/2023 concerning Mr. Khaled el-Ali (Australia)

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

2. In accordance with its methods of work,[1] on 2 May 2023 the Working Group transmitted to the Government of Australia a communication concerning Khaled el-Ali. The Government replied to the communication on 31 July 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.

1. Submissions

(a) Communication from the source

4. Khaled el-Ali is a stateless person, born in 1986. He was born in Lebanon to parents of Palestinian descent. Raised as a Sunni Muslim, he attended the United Nations school for Palestinian refugees until the age of 13.

5. Mr. El-Ali's father was an officer in the Palestinian army. After retiring from the army for the safety of his family, he became a teacher at a Lebanese school but disappeared one day – most likely kidnapped – never to return.

6. Mr. El-Ali's mother has remarried. On 10 October 2001, she lodged an application offshore for an Australian Partner visa, which included Mr. El-Ali as a dependent applicant. On 22 April 2005, Mr. El-Ali was granted a dependent Partner (Provisional) visa (subclass 309), initially valid until 28 January 2009.

7. On 18 May 2005, Mr. El-Ali arrived in Australia on a Lebanese Palestinian Refugee passport as the holder of a Partner (Provisional) visa (subclass 309). The family settled in South Australia. However, Mr. El-Ali's stepfather subsequently expelled him from home without any identification documents. After living on the streets, Mr. El-Ali was offered accommodation by a group of Arab men he met, in exchange for looking after cannabis plants. He was arrested during a police raid and charged with the cultivation of cannabis.

8. On 26 February 2006, the Department of Immigration and Border Protection (renamed the Department of Home Affairs in December 2017) began processing the permanent Partner visa (subclass 100) of Mr. El-Ali's mother, which included Mr. El-Ali as a dependant. During the processing of the visa application, the Department was informed that Mr. El-Ali had a criminal record. On 16 June 2008, a delegate of the Minister of Home Affairs decided not to refuse Mr. El-Ali a dependent Partner visa under section 501 (1) of the Migration Act 1958 and issued him a warning.

9. On 22 October 2008, following the information that Mr. El-Ali had reoffended, the Department of Immigration and Border Protection requested his updated penal certificate. Between 2007 and 2010, Mr. El-Ali was arrested and charged in relation to theft, assault, affray, deceiving the police, resisting the police, failing to leave premises, motor vehicle offences, traffic offences, damaging property, taking part in the production of a controlled substance, failing to comply with bail conditions, failing to comply with domestic violence orders and weapon offences.

10. On 15 December 2008, Mr. El-Ali requested to be removed as a dependant from his mother's permanent Partner visa (subclass 100) application, his request only being received on 28 January 2009.

11. On 22 June 2009, Mr. El-Ali received a 28-month suspended sentence for failing to comply with the domestic violence restraining order and with the bail agreement.

12. On 31 October 2009, Mr. El-Ali was arrested by the police for threatening aggravated harm against his former partner and was remanded in custody. On 15 November 2010, he was sentenced to 28 months' jail for breach of his bail agreement and 20 months' jail for damaging property, dishonestly taking property without consent, committing an assault (aggravated offence), hindering police and threatening to harm a person (aggravated offence). His sentence was backdated to 31 October 2009, and he was given a non-parole period of 24 months. On 3 January 2013, Mr. El-Ali withdrew his request for parole.

13. Mr. El-Ali became an unlawful non-citizen on 29 October 2013, when his Bridging visa E (subclass 050) expired. The following day, on 30 October 2013, Mr. El-Ali was released from criminal custody and was immediately detained under section 189 (1) of the Migration Act. He was transferred to Melbourne Immigration Detention Centre. The Department of Immigration and Border Protection issued the decision to detain Mr. El-Ali. However, it is unknown if it was shown to Mr. El-Ali at that time.

14. The Migration Act specifically provides, in sections 189 (1) and 196 (1) and (3), that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. Section 196 (3) of the Migration Act

specifically provides that even a court cannot release an unlawful non-citizen from detention (unless the person has been granted a visa).

15. On 10 September 2014, Mr. El-Ali was transferred to the Christmas Island Immigration Detention Centre under section 189 (3) of the Migration Act. On 25 November 2014, Mr. El-Ali was arrested by the police and charged with assaulting a Serco officer, occasioning bodily harm, common assault (three charges), being armed in a way that may cause fear and making threats to harm. Mr. El-Ali was subsequently granted bail and transferred back to Christmas Island Immigration Detention Centre where he remained until 8 January 2015.

16. On approximately 3 December 2014, Mr. El-Ali was also charged with criminal offences related to possession of methylamphetamine and possession of a prohibited weapon without exemption in Victoria, Australia.

17. On 8 January 2015, Mr. El-Ali was arrested on additional assault charges and breach of his bail conditions by the police. He was transferred into criminal custody at the Perth Remand Centre. On 27 August 2015, Mr. El-Ali was convicted for the criminal charges of 25 November 2014 and 8 January 2015. He was sentenced to 12 months' jail, with a non-parole period of 6 months, for occasioning bodily harm, common assault (five charges), aggravated assault (five charges) and threatening behaviour (six charges). The court ruled that Mr. El-Ali's jail term would be backdated to 3 January 2015.

18. On 2 January 2016, Mr. El-Ali was released from criminal custody and then immediately detained under section 189 (1) of the Migration Act, but remained in prison under alternative place of detention arrangements due to the risk that he was considered to pose to the safety and order of an immigration detention centre environment. On 1 December 2016, he was transferred to an immigration detention facility.

19. On 26 April 2017, Mr. El-Ali absconded from immigration detention. On 29 April 2017, Mr. El-Ali was located by the police and charged with escaping from immigration detention. He was remanded in criminal custody. On 2 November 2017, Mr. El-Ali was sentenced to 10 months' jail (time served backdated to 29 April 2017) for absconding from immigration detention.

20. On 13 August 2018, Mr. El-Ali was released from criminal custody on bail and detained under section 189 (1) of the Migration Act. He was subsequently transferred to Yongah Hill Immigration Detention Centre. Mr. El-Ali remains in immigration detention under section 189 (1) of the Migration Act. He is currently in Villawood Immigration Detention Centre, where he has been since 16 June 2019.

21. Mr. El-Ali suffers from acute mental health conditions that have developed, and are worsening, due to his prolonged detention and uncertainty about his future.

22. On 13 December 2019, Mr. El-Ali was reviewed by a mental health nurse from International Health and Medical Services after Serco commenced enhanced monitoring because he was reported to be agitated and after he advised his status resolution officer that he could no longer endure his situation. He also stated that he was giving the Department of Home Affairs until 5 February 2020 to progress his immigration pathway.

23. During the mental health review conducted by International Health and Medical Services, Mr. El-Ali denied having any mental health issues and was noted to be distressed by the environment. He voiced his unhappiness with his prolonged detention and denied suicidal or homicidal thoughts. Mr. El-Ali was reported to be experiencing symptoms of detention fatigue; it was recommended that he continue to follow up with the Mental Health Team as clinically indicated.

24. On 22 January 2020, Mr. El-Ali was seen by a psychologist from International Health and Medical Services. He expressed his frustration at his continued detention and the delay in his being returned to Lebanon.

25. The status resolution officer met with Mr. El-Ali a week before 5 February 2020. Mr. El-Ali stated that he stood by the deadline but did not place so much stress on it as he had in previous interactions. During the meeting, Mr. El-Ali was reported to be more cooperative than previously. He stated that he had been drug free for two months and implied

that his previous behaviour had been due to his drug use at the time. On 4 February 2020, the status resolution officer had a phone conversation with Mr. El-Ali, and he was reported to be cooperative and polite; he did not mention the impending deadline.

26. On 24 January 2012, while Mr. El-Ali was still in criminal detention, officials of the Department of Immigration and Border Protection visited the Embassy of Lebanon in Canberra and obtained a summary of the process involved in getting a travel document. On 5 August 2013, the Department emailed the Australian Department of Foreign Affairs in Beirut, receiving a response that the process would likely take a couple of months. On 21 November 2013, Lebanese authorities advised that they had approved the issue of a three-month laissez-passer (return pass) by the Embassy of Lebanon in Australia, which was issued on 26 November 2013. Mr. El-Ali's planned removal was scheduled for 23 January 2014, but did not take place as he was still being considered for a Bridging visa at that time.

27. In 2014, Mr. El-Ali requested to be removed to Denmark, Kuwait, Jordan, the United States of America or the United Kingdom of Great Britain and Northern Ireland where he had extended family members. On 5 December 2014, Mr. El-Ali signed an application for a Lebanese travel document for Palestinian refugees. The application was signed by an immigration officer on 11 December 2014, with Mr. El-Ali signing the request for removal form the following day. On 16 December 2014, the Department of Immigration and Border Protection sent the Embassy of Lebanon an application for a Lebanese travel document, noting Mr. El-Ali was cooperating voluntarily with his removal.

28. On 21 December 2014, the Department of Immigration and Border Protection noted that it had commenced organizing Mr. El-Ali's travel document, which would take approximately two to three months. The following day, Mr. El-Ali reiterated, during an interview held at Christmas Island Immigration Detention Centre to plan his removal, that he would return to Lebanon if his demands were met, namely, to see his family before he left, to receive sufficient funds and to have his property returned. On 23 December 2014, the cost of Mr. El-Ali's flight was approved for 5 March 2015, but on 7 January 2015, his removal was put on hold as the Department was waiting for information from the Embassy of Lebanon regarding the validity of Mr. El-Ali's travel document.

29. On 13 January 2015, Mr. El-Ali's removal was cancelled until further notice. Although it was subsequently scheduled for 23 January 2015, it did not occur. On 4 February 2015, the Department of Immigration and Border Protection noted that the Embassy of Lebanon was checking whether it required a new approval for the three-month return pass from 2013. While various tentative dates for Mr. El-Ali's removal were proposed during March and April 2015, nothing eventuated.

30. On 7 January 2016, Mr. El-Ali was interviewed and agreed to voluntary removal if he was able to see his family beforehand. On 8 March 2016, the Department of Immigration and Border Protection noted that Mr. El-Ali could be considered for removal and, during an interview two days later to plan his removal, he asked to be removed to a third country, such as New Zealand, but not Lebanon. On 23 March 2016, Mr. El-Ali refused to sign his completed application for a Lebanese travel document. On 8 April 2016, the Department requested his pre-removal clearance, noting that Mr. El-Ali's removal would be involuntary. Although scheduled for 8 May 2016, Mr. El-Ali's removal was halted four days later.

31. On 4 November 2016, however, Mr. El-Ali made a voluntary request for removal. On 7 December 2016, he repeated this request for somewhere other than Lebanon. On 15 January 2017, Mr. El-Ali withdrew his request in writing.

32. On 17 March 2017, Mr. El-Ali signed a request for removal from Australia. The Department of Immigration and Border Protection maintained that it was working with Mr. El-Ali to facilitate his removal. According to the source, Mr. El-Ali, however, was allegedly induced to sign the request form by immigration officers. He orally withdrew the request for removal from Australia on 16 June 2017, confirming that withdrawal in writing on 28 August 2017.

33. On 23 June 2017, the Department of Immigration and Border Protection noted that, as an unlawful non-citizen in criminal custody without reasonable expectation of obtaining a

travel document, Mr. El-Ali was no longer available for either voluntary or involuntary removal.

34. On 21 January 2019, Mr. El-Ali requested removal from Australia under section 198 (1) of the Migration Act, signing a request form on 25 February 2019. However, he did not nominate a country of return. Therefore, the Department of Home Affairs considered Mr. El-Ali to be on an involuntary removal pathway. The following day, the Department commenced the process of obtaining a Lebanese travel document for Mr. El-Ali.

35. In April 2019, the Embassy of Lebanon advised that they were still waiting for approval from the Security General in Beirut before the matter could be processed. On 23 May 2019, the Department of Home Affairs sent a request to the Lebanese authorities for travel documents for Mr. El-Ali. On 22 July 2019, however, the Department was informed that the travel documents would not be provided for an unknown period. On 4 December 2019, departmental officers met with representatives of the Embassy of Lebanon, the outcome of which, according to the Department, was that the Embassy in Canberra would take over the assessment of Mr. El-Ali's application for Lebanese travel documents.

36. Mr. El-Ali subsequently advised the Department of Home Affairs that he had enquired at the Embassy of the State of Palestine in Australia about possible removal to the country. Mr. El-Ali verbally stated that he was willing to be removed to the State of Palestine if a travel document were issued, on the basis that the Lebanese application remained ongoing. On 6 February 2020, at Mr. El-Ali's request, the Department's officers commenced attempts to obtain a travel document for Mr. El-Ali to travel to the State of Palestine. On 3 March 2020, Mr. El-Ali wrote to the Department to proceed with lodging an application for a Palestinian travel document.

37. On 20 February 2020, Mr. El-Ali signed a removal request form, listing his preferred destination as Lebanon, the State of Palestine, Europe, New Zealand or Turkey. In March 2020, the removals officer responsible for coordinating the application for Mr. El-Ali's travel documents became aware that the Embassy of Lebanon in Canberra had closed. It did not reopen until mid-October 2020.

38. On 24 March 2020, Mr. El-Ali expressed concern about the coronavirus disease (COVID-19) pandemic and said that, on that basis, he should be released from detention. The officers wrongly treated this correspondence as a withdrawal of his request for removal. On 25 March 2020, the Department of Home Affairs determined that the removal of Mr. El-Ali should be considered involuntary and that communications with the Palestinian authorities should cease.

39. On 11 June 2020, Mr. El-Ali again requested removal from Australia under section 198 (1) of the Migration Act. The Department of Home Affairs maintained that it was making arrangements to effect Mr. El-Ali's removal as soon as was reasonably practical, stating that the Department was taking steps to effect Mr. El-Ali's removal to third countries, including to Lebanon, where he might have a right of entry and/or stay. On 20 October 2020, the departmental official responsible visited the Embassy of Lebanon and was informed that no progress had been made on Mr. El-Ali's application for travel documents. The Department followed up again with the Embassy of Lebanon on 22 April and 27 May 2021, with the latter stating that no update had been received from Lebanon.

40. On 9 December 2020, Mr. El-Ali filed in the Federal Court of Australia for release on the basis of unlawful detention. On 28 July 2021, however, Mr. El-Ali withdrew his case from the Court due to a change in the law.

41. On 2 September 2021, Mr. El-Ali's legal counsel wrote to the then Minister for Immigration, Citizenship and Multicultural Affairs of Australia, reiterating Mr. El-Ali's willingness to be removed to any safe third country and noting that the Minister's current approach of waiting for Lebanese travel documents did not seem to be effective. The counsel requested that evidence of the steps taken to remove Mr. El-Ali be provided by 30 September 2021; otherwise, Mr. El-Ali reserved the right to take legal action.

42. On 19 October 2021, the Government Solicitor responded, stating that, as Mr. El-Ali did not currently possess a valid travel document that extended to him a right of entry into any country, it had not been, and was not currently, reasonably practicable for the Department

of Home Affairs to remove him from Australia. It was also recalled that a valid Lebanese travel document was obtained for Mr. El-Ali in October 2017, but he was not removed at that time. An application for a new travel document was lodged with the Lebanese authorities in February 2019, which is still pending. The Department of Home Affairs continues to actively engage with the Lebanese authorities about the status of the pending travel document application. The Minister for Home Affairs is prepared to explore options to remove Mr. El-Ali to a third country other than Lebanon. Officers of the Department of Home Affairs have tried to engage Mr. El-Ali to obtain the additional information required to explore those options, but he has been unresponsive. The Minister therefore considers that the legal action is premature.

43. On 1 December 2021, Mr. El-Ali filed a lawsuit in the Federal Court of Australia to enforce his removal from Australia to a safe third country. Proceedings are ongoing.

44. To date, no travel document has been received. It is understood that Lebanon has not issued a travel document to someone in the position of Mr. El-Ali since May 2018 and the current policy on Palestinian refugees is not to grant them travel documents.

45. Furthermore, while Mr. El-Ali appears to be eligible for a Palestinian external passport, there is no guarantee that the Ministry of the Interior of the State of Palestine will approve the issuing of an external passport. The issuing of an external Palestinian passport is not a right by law and is only done as a last resort to temporarily facilitate the movement of persons in extremely difficult situations. Mr. El-Ali is not eligible for an authentic (as opposed to external) Palestinian passport because only Palestinians who were living in Palestine and were included in the 1967 census by Israel are officially recognized by Israel as Palestinians. The source is unaware of anyone in Mr. El-Ali's situation being admitted into the State of Palestine.

46. On 21 June 2022, Mr. El-Ali was issued with an Australian certificate of identity, on which his nationality was listed as "Lebanese". On 23 November 2022, the Government issued Mr. El-Ali with another certificate of identity, on which his nationality was listed as "unspecified". It is unclear how such a certificate can be used in practice. Clarification has been sought from the Government, but no response has been received.

47. The detention of Mr. El-Ali is arbitrary. Ministerial powers under section 195A of the Migration Act, which could be used to release Mr. El-Ali from detention, are discretionary.

48. Mr. El-Ali has been deprived of liberty as a result of the exercise of his rights guaranteed by articles 7 and 14 of the Universal Declaration of Human Rights. Mr. El-Ali came to Australia as a stateless man to find a permanent home with his family and avoid persecution in Lebanon and the State of Palestine on the basis of his being a stateless refugee and an undocumented Palestinian.

49. Mr. El-Ali has also been deprived of his rights in contravention of article 26 of the International Covenant on Civil and Political Rights, which stipulates that all persons are entitled to equal protection under the law, without discrimination. Asylum-seekers do not have the same rights under Australian law as Australian citizens, who are not subjected to administrative immigration detention. Immigration detention is described by the Department of Home Affairs as being used as a last resort and for a very small proportion of those whose status requires resolution, sometimes through protracted legal proceedings. This is not the case for Mr. El-Ali, who has been detained in either criminal or administrative detention since 31 October 2009.

50. The Human Rights Committee, in its general comment No. 35 (2014), states that detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. The fact that Mr. El-Ali has been held in administrative detention for so long, despite making consistent requests to be removed from Australia to a safe third country, illustrates that his detention is not reasonable, necessary or proportionate and that it has not been properly or independently assessed as it extends in time. The Australian Human Rights Commission and the Commonwealth Ombudsman have no powers to enforce release of a person from immigration detention. As such, there is no independent body to review the appropriateness of detention.

51. Unless Mr. El-Ali is released from administrative detention and granted a visa or removed from Australia to a safe third country, he will be in detention indefinitely, given that the Migration Act specifically provides, in sections 189 (1) and 196 (1) and (3), that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa.

52. The High Court of Australia has upheld mandatory detention of non-citizens as a practice that is not contrary to the country's Constitution.[2] The effective result is that, while Australian citizens can challenge administrative detention, non-citizens cannot. Australian citizens and non-citizens are therefore not equal before the courts and tribunals of Australia.

53. The Human Rights Committee has held that there is no effective remedy for persons subject to mandatory detention in Australia.[3] Another judgment of the High Court of Australia in 2021 further entrenched the legality of indefinite immigration detention, even in circumstances in which the Government was not taking active steps to remove an individual as soon as was reasonably practicable.[4]

54. Mr. El-Ali has taken all necessary steps to seek protection in Australia and use the avenues of appeal available to him in law.

(b) Response from the Government

55. On 2 May 2023, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 30 June 2023, detailed information about the current situation of Mr. El-Ali 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.

56. On 13 June 2023, the Government requested an extension of the time limit, in accordance with paragraph 16 of the Working Group's methods of work, and was granted a new deadline of 31 July 2023.

57. In its reply, dated 31 July 2023, the Government stated that Mr. El-Ali was born in Lebanon to parents of Palestinian descent and arrived in Australia on 18 May 2005 as a dependant on his mother's Partner (Provisional) visa (subclass 309). He has remained in Australia ever since.

58. Mr. El-Ali resided in Australia on a number of Bridging visas between 19 March 2009 and 29 October 2013. On 30 October 2013, Mr El-Ali was detained under section 189 of the Migration Act as he was an unlawful non-citizen.

59. Mr. El-Ali has a criminal history dating back to March 2007, which includes convictions for assault, drug-related matters, criminal damage and domestic violence.

60. Mr. El-Ali is affected by the section 501E statutory bar due to his previous visa refusal under section 501 of the Migration Act. Section 501E of the Migration Act prevents individuals who have had a visa refused or cancelled under section 501 from making a valid visa application in Australia, other than for a protection visa.

61. Mr. El-Ali has been held in immigration detention for a cumulative period of six years and 10 months. He was last detained under section 189 of the Migration Act on 13 August 2018 and is currently being held at Villawood Immigration Detention Centre.

62. Based on documentary evidence, Mr. El-Ali is a stateless Palestinian and Lebanon is his country of former habitual residence.

63. Mr. El-Ali lodged three Protection visa (subclass 866) applications and was consistently found to not engage the protection obligations of Australia. Mr. El-Ali presently has no ongoing immigration matters with the Government.

[2] *Al-Kateb v. Godwin* [2004] HCA 37.
[3] *C. v. Australia* (CCPR/C/76/D/900/1999).
[4] *Commonwealth of Australia v. AJL20* [2021] HCA 21.

64. On 18 May 2005, Mr. El-Ali first entered Australia with his family aged 18 years, as a dependant included in his mother's application for a permanent Partner visa (subclass 100). In February 2006, the Department of Immigration and Border Protection began processing the permanent Partner visa application of Mr. El-Ali's mother.

65. On 5 December 2007, Mr. El-Ali was convicted of common assault. He was subsequently discharged without penalty. On 14 February 2008, Mr. El-Ali was charged with failing to comply with a bail agreement, as well as taking part in the production of a controlled substance.

66. In October 2008, the Department of Immigration and Border Protection received allegations that Mr. El-Ali had committed a sexual assault. South Australia Police advised the Department that, as a statement had been made and then subsequently withdrawn, no charge had been laid.

67. On 28 January 2009, Mr. El-Ali withdrew from his mother's Partner (Migrant) visa (subclass 100) application and his Partner (Provisional) visa ceased.

68. On 31 October 2009, Mr. El-Ali was arrested for threatening aggravated harm and remanded in custody. On 15 November 2010, he was sentenced to a total of 48 months imprisonment with a non-parole period of 24 months for various crimes, including damaging property, aggravated assault and hindering police.

69. Mr. El-Ali became an unlawful non-citizen on 30 October 2013 when his Bridging visa E (subclass 050) expired. On that same day, Mr. El-Ali was released from criminal custody and immediately detained under section 189 (1) of the Migration Act. He was subsequently transferred to Melbourne Immigration Detention Centre.

70. On 10 September 2014, Mr. El-Ali was transferred to Christmas Island Immigration Detention Centre under section 189 (3) of the Migration Act.

71. On 25 November 2014, Mr. El-Ali was arrested by police on various charges, including assault of a Serco immigration detention centre officer, common assault and making threats to harm. On 8 January 2015, Mr. El-Ali was arrested on assault charges and breach of bail conditions. He was subsequently transferred to criminal custody at the Perth Remand Centre. On 27 August 2015, Mr. El-Ali was convicted of the charges laid on 25 November 2014 and was sentenced to 12 months' imprisonment with a non-parole period of 6 months.

72. On 2 January 2016, Mr. El-Ali was released from criminal custody and detained under section 189 (1) of the Migration Act. He was placed in a Western Australia correctional facility under alternative place of detention arrangements. On 1 December 2016, he was transferred back to immigration detention.

73. On 26 April 2017, Mr. El-Ali escaped from immigration detention while attending a medical appointment. He was subsequently located by police on 29 April 2017 and transferred to a correctional facility. On 2 November 2017, Mr. El-Ali was sentenced to 10 months' imprisonment (backdated to 29 April 2017) for absconding from immigration detention.

74. On 13 August 2018, Mr El-Ali was released on bail from criminal custody and detained under section 189 (1) of the Migration Act. Mr El-Ali was placed in Yongah Hill Immigration Detention Centre.

75. On 16 June 2019, Mr. El-Ali was transferred to Villawood Immigration Detention Centre, where he currently remains.

76. Since 2019, Mr. El-Ali has been involved in 91 incidents while in immigration detention, including a serious assault in April 2021.

77. On 5 October 2022, International Health and Medical Services reported that Mr. El-Ali had chronic lower back pain, epilepsy, asthma, a shoulder injury, left knee pain, a history of torture and trauma, depression, antisocial personality disorder, a history of self-harm, and anger and aggression issues. International Health and Medical Services advised that Mr. El-Ali's health conditions could be properly cared for in his current placement.

78. Mr. El-Ali has a history of epilepsy since childhood and is sporadically compliant with taking his prescribed medication. On 16 September 2022, Mr. El-Ali was reported to be non-compliant in taking his prescribed medication. International Health and Medical Services provided Mr. El-Ali with education sessions on taking his medication regularly. On 12 January 2023, a general practitioner from International Health and Medical Services reported that Mr. El-Ali had been granted approval to self-administer his medications and he seemed to be taking his medication regularly. That condition continues to be monitored and managed by the general practitioner.

79. Mr. El-Ali has a history of neck pain. On 22 September 2022, Mr. El-Ali was advised to continue with physiotherapy and take anti-inflammatories as needed. That condition continues to be monitored and managed by the general practitioner.

80. On 2 August and 8 December 2022, Mr. El-Ali was reviewed by the general practitioner for an asthma care plan review. His asthma was well controlled, and he was using his medication once a day while exercising. Mr. El-Ali was to continue with his current medication regime after being prescribed an additional inhaler in December 2022. Mr. El-Ali last attended an asthma care plan review on 1 June 2023, during which he reported that he had not had an asthma attack since 2011 and that he used an inhaler before exercise.

81. Mr. El-Ali has a history of mental health issues some of which predate his arrival in immigration detention. Those include detention fatigue and distress, as well as a documented history of anger and aggression issues towards International Health and Medical Services staff and stakeholders. In November 2018, he was diagnosed with an antisocial personality disorder. On 16 September 2022, Mr. El-Ali was reviewed by a mental health nurse from International Health and Medical Services to discuss his non-compliance with the prescribed medication. On review, it was reported that Mr. El-Ali expressed frustration regarding limited exercise equipment in the compound and frustration relating to his court case. Mr. El-Ali was last assessed by a counsellor from International Health and Medical Services on 26 May 2023. Those conditions continue to be monitored and managed by the general practitioner.

82. The visa system of Australia requires all non-citizens to hold a valid visa to enter and/or remain in the country. Under section 189 of the Migration Act, an individual must be detained in a situation in which an officer knows or reasonably suspects the individual is an unlawful non-citizen. Under section 196 of the Migration Act, an unlawful non-citizen must be kept in immigration detention until they are removed from Australia, or they are granted a visa.

83. Section 195A of the Migration Act provides the Minister for Home Affairs with the power to grant a visa to a person in immigration detention, if the Minister considers it is in the public interest to do so. In addition, section 197AB of the Migration Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing them to reside in the community at a specified place and under specified conditions, if the Minister considers it is in the public interest to do so.

84. The powers of the Minister for Home Affairs under sections 195A and 197AB of the Migration Act are discretionary. Furthermore, what is in the public interest is a matter for the Minister to determine.

85. If a person holds a visa and it is subsequently cancelled, he or she can seek to have the merits of that decision reviewed by the Administrative Appeals Tribunal in prescribed circumstances and through domestic judicial processes.

86. The detention of individuals on the basis that they are unlawful non-citizens is not arbitrary under international law if it is reasonable, necessary and proportionate in light of the particular circumstances of the individuals. 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 properly justifiable. Under the Migration Act, detention is not limited by a set time frame but is dependent on a number of factors based on an individual's circumstances, including identity determination, developments in country, health and character or security matters. At this time, as Mr. El-Ali has been found not eligible

for a protection visa, ministerial intervention remains the only avenue for him to be granted a Bridging visa or be placed in the community.

87. Mr. El-Ali has previously had a visa refused under section 501 of the Migration Act, and therefore is precluded from lodging a valid Bridging visa E application in accordance with section 501E of the Act. Mr. El-Ali's case has been assessed under sections 195A and 197AB of the Migration Act and the ministerial guidelines on several occasions. On 7 September 2020, his case was assessed as not meeting the ministerial intervention guidelines on sections 195A and 197AB. On 21 June 2021 and 23 May 2022, his case was found to not meet the requirements of section 195A. On 8 June 2022, a ministerial intervention process for Mr. El-Ali's case was commenced under sections 195A and 197AB of the Migration Act. That process is ongoing.

88. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. El-Ali remains in immigration detention, in accordance with Australian law, because he is an unlawful non-citizen (as he is not an Australian citizen, does not hold a visa that is in effect and is present in the Australian migration zone). The Department of Home Affairs maintains ongoing engagement with the relevant authorities in an effort to facilitate his voluntary removal.

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

90. 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. Following receipt of the Department's reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister for Home Affairs with a report under section 486O of the Act. While not a judicial body, the Commonwealth Ombudsman may make recommendations to the Minister and/or the Department regarding the circumstances and appropriateness of the individual's detention, including their detention placement.

91. Persons in immigration detention are able to seek judicial review of the lawfulness of their detention before the Federal Court of Australia or the High Court of Australia. Section 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to every matter in which 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 those provisions that constitute the legal mechanism through which non-citizens may challenge the lawfulness of their detention. Australian citizens and non-citizens can equally seek a remedy against an officer of the Commonwealth under the Constitution.

92. The Government disagreed with the statement of the source that "Australian citizens and non-citizens are not equal before the courts and tribunals of Australia" and that the effect of the decision of the High Court in *Al-Kateb v. Godwin* was that non-citizens could not challenge administrative detention decisions. In *Al-Kateb*, the Court held that provisions of the Migration Act requiring detention of unlawful 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* does not alter non-citizens' ability to challenge the lawfulness of their detention under Australian law. Furthermore, non-citizens are also able to challenge the lawfulness of their detention through an application for a writ of habeas corpus.

93. On 1 December 2021, Mr. El-Ali filed an application to the Federal Circuit and Family Court, which was later transferred to the Federal Court, seeking an order that the Department of Home Affairs must pursue the duty under section 198 of the Migration Act to remove him as soon as reasonably practicable. This matter remains ongoing and judgment is reserved.

94. While the Universal Declaration of Human Rights is not a legally binding instrument, its articles reflect international law, to the extent that they have been codified in other legally binding instruments. Notwithstanding that fact, Mr. El-Ali is detained as required by

section 189 of the Migration Act as he is an unlawful non-citizen, not as a consequence of seeking protection. Neither seeking asylum nor entering Australia unlawfully is a criminal offence under domestic law. Furthermore, Mr. El-Ali's claims for protection were assessed against the Protection visa criteria in the Migration Act and findings were made by the Department of Home Affairs that Mr. El-Ali did not engage the protection obligations of Australia.

95. It is a matter for Australia to determine, consistent with its obligations under international law, who may enter its territory and under which conditions, including by requiring that a non-citizen hold a visa in order to lawfully enter and remain in the country and that in circumstances in which a visa is not held, a non-citizen is subject to immigration detention. To the extent that there is differential treatment of citizens and non-citizens in that Australian citizens are not subject to immigration detention, this differential treatment is not discriminatory and is not inconsistent with article 26 of the Covenant because it is aimed at achieving a purpose that is legitimate, based on reasonable and objective criteria, and is proportionate to the aim to be achieved.

96. The differential treatment provided for in the Migration Act between Australian citizens and non-citizens is for the legitimate aim of ensuring the integrity of the country's migration programme, assessing the security, identity and health of unlawful non-citizens and protecting the Australian community. That is consistent with articles 12 (the right to liberty of movement and freedom to choose residence) and 13 (the right to expel aliens lawfully in the territory of a State party in accordance with the law) of the Covenant. The differentiation is reasonable because it is consistent with those aims, and no more restrictive than required. Therefore, any differential treatment between citizens and non-citizens is based on reasonable and objective criteria for a legitimate purpose and does not amount to prohibited discrimination under the Covenant.

97. Australia, as a party to the core 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 Government submits that the treatment of Mr. El-Ali amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant.

98. Mr. El-Ali does not engage protection obligations and has no ongoing immigration matters. On 15 June 2022, the Department of Home Affairs lodged a certificate of identity application with the Department of Foreign Affairs and Trade to enable Mr El-Ali to travel. A certificate of identity was issued in June 2022, however, there was an error on the document regarding his nationality. A new certificate of identity was issued on 23 November 2022 and is valid until 23 November 2023.

99. The Department of Home Affairs has also followed up on multiple third country options. Each of the countries approached that would allow entry on an Australian-issued certificate of identity also has visa requirements and a limited period of stay for holders of such certificates. Mr. El-Ali is unable to meet the visa requirements of any of the countries explored to date.

100. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the international legal obligations of Australia. Mr. El-Ali's immigration detention is lawful because he has been detained under the Migration Act as an unlawful non-citizen (as he does not hold a visa). The ongoing detention of Mr. El-Ali is justifiable, proportionate and not arbitrary in the context of the Covenant. It is justifiable and proportionate while the Department of Home Affairs is working to remove Mr. El-Ali's from Australia, considering all the circumstances of the case (including Mr. El-Ali's criminal history and removal options) and the country's international obligations. Mr. El-Ali has been found not to engage the protection obligations of Australia under the Migration Act both on refugee and complementary protection grounds. A ministerial intervention process for Mr. El-Ali's case under sections 195A and 197AB of the Migration Act is ongoing within the Department of Home Affairs. Mr. El-Ali has no ongoing substantive matters before the Department of Home Affairs.

101. There is no information in departmental records to indicate that Mr. El-Ali's current placement (in Villawood Immigration Detention Centre) is not appropriate. Mr. El-Ali has no health issues that cannot be managed in an immigration detention facility. Mr. El-Ali remains favourably disposed towards removal pathways. The Government continues to engage with international authorities to successfully facilitate his removal.

102. Thus, Mr. El-Ali is lawfully detained under section 189 (1) of the Migration Act, in accordance with the international obligations of Australia. It is the position of the Government that Mr. El-Ali's immigration detention is lawful and remains appropriate. It is a matter for the Government to determine who may enter its territory and under which conditions, including by requiring that non-citizens hold a visa in order 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.

(c) Further comments from the source

103. On 2 August 2023, the reply of the Government was sent to the source for further comments, which the source provided on 17 August 2023.

104. The source suggests that Australia does not have a separate visa category for stateless persons. As such, persons who are stateless are forced to apply for Protection visas, which are determined on the basis of refugee criteria. In situations in which stateless individuals do not meet the refugee criteria, as in Mr. El-Ali's case, they have no other way of formalizing their immigration status in Australia and cannot return to any other country. As such, stateless persons, such as Mr. El-Ali, are particularly at risk of indefinite administrative detention in Australia. That is contrary to the obligations of Australia to reduce statelessness under the Convention on the Reduction of Statelessness.

105. The source raises a concern that the Government used a prison for 11 months as an alternative place of administrative detention. One of the reasons that administrative detention is lawful under Australian law is because it does not have a punitive aim. Administratively detaining Mr. El-Ali for 11 months in a prison has clear punitive elements. The decision to administratively detain Mr. El-Ali in a prison for 11 months is contrary to the separation of powers under the Constitution of Australia and is arguably unlawful under the Migration Act.

106. The Government's statement that "Mr El-Ali has been involved in 91 incidents in immigration detention" is misleading. Neither Mr. El-Ali nor his legal representatives have been provided with the record of those 91 incidents. The incidents contain no detail as to the circumstances of the incidents and are not probative evidence of Mr. El-Ali's involvement.

107. Mr. El-Ali has not received consistent physical or mental health care while in immigration detention.

108. Mr. El-Ali is not eligible for a Protection visa because he is stateless. There is no other visa that Mr. El-Ali can apply for which addresses his stateless status. As such, he is reliant upon the discretionary powers of the Minister for Home Affairs to intervene. Due to Mr. El-Ali's criminal record, he does not meet the criteria for referral to the Minister.

109. Referring to the previous opinions of the Working Group on Australia, the source concludes that not only has the Government detained Mr. El-Ali for a cumulative period of almost seven years, but when Mr. El-Ali asked to be removed from Australia to bring his detention to an end, the Government refused to comply with such a request and has fought against this request in the courts. There are no other steps Mr. El-Ali can take to secure his freedom.

2. Discussion

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

111. In determining whether the deprivation of liberty of Mr. El-Ali is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon

the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[5]

(a) Category I

112. The Working Group refers to its line of jurisprudence in relation to Australia. Since 2017, the Working Group has considered 22 cases, all of which concern the same issue, namely mandatory immigration detention in Australia in accordance with the Migration Act.[6]

113. The Working Group reiterates its views on the Migration Act.[7]

114. The Working Group furthermore reiterates its alarm that, in all those 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 is in accordance 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 line with its obligations under international human rights law. Since 2017, the Government has been consistently and repeatedly reminded of those obligations by numerous international human rights bodies, including the Human Rights Committee,[8] the Committee on Economic, Social and Cultural Rights,[9] the Committee on the Elimination of Discrimination against Women,[10] the Committee on the Elimination of Racial Discrimination,[11] the Special Rapporteur on the human rights of migrants[12] and the Working Group.[13] The Working Group calls upon the Government to urgently review the Migration Act in the light of its obligations under international human rights law.

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, and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. El-Ali under the said legislation is arbitrary under category I as it violates article 9 (1) of the Covenant. Domestic law that violates international human rights law, and which has been brought to the attention of the Government on so many occasions, cannot be accepted as a valid legal basis for detention, especially in the light of the findings below.

(b) Category II

117. The Working Group observes that Mr. El-Ali arrived in Australia in May 2005, aged 19, with his mother who remarried an Australian man, and was granted a dependent Partner (Provisional) visa. Later, being expelled from home by his stepfather, he was engaged in different criminal activities and served several terms of imprisonment in the criminal justice

[5] A/HRC/19/57, para. 68.
[6] 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, No. 33/2022, No. 42/2022 and No. 14/2023.
[7] Opinion No. 35/2020, paras. 98–103.
[8] CCPR/C/AUS/CO/6, paras. 33–38.
[9] E/C.12/AUS/CO/5, paras. 17 and 18.
[10] CEDAW/C/AUS/CO/8, paras. 53 and 54.
[11] CERD/C/AUS/CO/18-20, paras. 29–33.
[12] See A/HRC/35/25/Add.3.
[13] See, among others, 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. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.

context until he was finally moved to immigration detention due to the mandatory cancellation of his visa as a result of his imprisonment.

118. Moreover, he is precluded from making a valid visa request by virtue of section 501 of the Migration Act. Furthermore, it is not possible for him to be removed to any third country – the Government admitted that Mr. El-Ali is unable to meet the visa requirements of any of the countries explored to date.

119. Notwithstanding the views and findings of the Working Group regarding the Migration Act and its compatibility with the obligations of Australia under international human rights law, the Working Group observes that it is not disputed that Mr. El-Ali remains detained today on the basis of that Act. The source argues that he is detained in violation of the Covenant and the Universal Declaration of Human Rights.

120. The Working Group notes that the Government has given no indication as to when Mr. El-Ali's detention could end. Noting that he has already been detained for approximately five years, the Working Group is bound to conclude that his detention appears to be indefinite.

121. 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.[14] That 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 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.

122. The Working Group cannot accept that detention for more than five years could be described as a brief initial period, to use the language of the Human Rights Committee. The Government has not presented sufficient reasons specific to Mr. El-Ali that would justify his detention. The Working Group also notes his health problems as a significant factor in favour of his release. The Working Group concludes – as not contested by the Government – that there was no reason for detaining Mr. El-Ali other than his migration status.

123. The Working Group thus finds that Mr. El-Ali was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

124. 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 the Human Rights Committee, in its general comment No. 15 (1986), quoted by the Government, also makes it clear that "aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof" and that "aliens have the full right to liberty and security of the person".[15]

125. Mr. El-Ali is therefore entitled to the right to liberty and security of person, as guaranteed in article 9 of the Covenant, and, 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. El-Ali has been subjected to de facto indefinite detention due to his immigration status, in clear breach of articles 2 and 9 of the Covenant.

126. Noting that Mr. El-Ali 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. El-Ali has always been treated in accordance with the stipulations of the Migration Act. Be that as it may, such treatment is not compatible with the obligations that Australia has

[14] A/HRC/39/45, annex, para. 12.
[15] Paras. 2 and 7.

undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

(c) Category IV

127. The source further argues that Mr. El-Ali has been subjected to administrative detention without remedy. The Government denies these allegations, arguing that persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court and the Commonwealth Ombudsman. In a recent case,[16] the Working Group examined those statements in detail, and came to the conclusion that, despite the claims of the Government to the contrary, the detention of the applicant was, in fact, punitive in nature, which, as it highlighted in its revised deliberation No. 5, should never be the case[17] and is in breach of article 9 of the Covenant.

128. Nothing in the present case would allow the Working Group to reach a different conclusion. Presently, Mr. El-Ali has been detained for more than five years and the Government has not been able to identify how long his detention will last, which means that it is de facto indefinite.

129. Consequently, the Working Group finds that Mr. El-Ali has been 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 arriving at 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 have been found to be in breach of article 9 of the Covenant.[18]

(d) Category V

130. The Working Group notes that the source, without explicitly invoking category V, argues that Mr. El-Ali, 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, the decision in *Al-Kateb v. Godwin* does not alter the ability of non-citizens to challenge the lawfulness of their detention under Australian law.

131. The Working Group has examined these arguments on numerous occasions. It has repeatedly noted that the Government is failing to explain how non-citizens can effectively challenge their continued detention after that decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee, in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.

132. As in the past, the Working Group cannot but again concur with the views of the Human Rights Committee on this matter,[19] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory

[16] Opinion No. 14/2023.

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

[18] *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/1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004 and 1288/2004); *Bakhtiyari et al. v. Australia* (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).

[19] See also 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.

and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. El-Ali is arbitrary, falling under category V.

(e) Concluding remarks

133. The Working Group wishes to place on record its very serious concern regarding the state of Mr. El-Ali's mental and physical health. It 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 also applies to those held in the context of migration. As the Working Group has explained in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.[20]

134. 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 coronavirus disease (COVID-19) pandemic, the Working Group looks forward to carrying out the visit as soon as is practicable. 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.

3. Disposition

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

> The deprivation of liberty of Khaled el-Ali, being in contravention of articles 2, 3, 7, 8, 9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

136. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. El-Ali without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

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

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

140. 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, for appropriate action.

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

4. Follow-up

142. 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:

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

(a) Whether Mr. El-Ali has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. El-Ali;

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

143. 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.

144. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as of any failure to take action.

145. 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.[21]

[*Adopted on 29 August 2023*]

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