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Human Rights Council
Working Group on Arbitrary Detention

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

Opinion No. 68/2021 concerning Said Said (Australia and Nauru)*

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

2. In accordance with its methods of work,[1] on 9 August 2021, the Working Group transmitted to the Governments of Australia and Nauru a communication concerning Said Said. The Government of Nauru has not replied to the communication while the Government of Australia replied to the communication on 3 November 2021. Australia is a State party to the International Covenant on Civil and Political Rights, while Nauru is not.

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,

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

[1] A/HRC/36/38.

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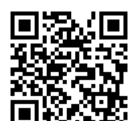

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Said Said is a national of Bangladesh, born in 1986. He left Bangladesh in 2008.

5. On 20 October 2013, Mr. Said arrived as an irregular maritime arrival on Christmas Island and was detained as an offshore entry person under section 189 (3) of the Migration Act 1958. The authorities presented him with an arrest warrant issued by the Department of Immigration and Citizenship.

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

7. On 20 October 2013, Mr. Said claimed asylum and was transferred to the North West Point Immigration Detention Centre. On 27 October 2013, Mr. Said was transferred to Nauru and detained at the Nauru Regional Processing Centre. While the date of the determination is not known, Mr. Said was found to be a refugee by the Government of Nauru.

8. On 27 February 2015, after harming himself, Mr. Said was transferred to Australia for psychiatric treatment and detained while in a hospital.

9. On 24 June 2015, he was transferred back to the Nauru Regional Processing Centre. There he continued to self-harm and was restrained on 31 December 2016 in order to stop him. Mr. Said was also reportedly hit over the head with an iron bar. On 18 December 2018, Mr. Said was transferred back to Australia for urgent medical care and detained in a hospital in Darwin.

10. On 31 March 2019, Mr. Said was released into the Australian community on a residence determination under section 197AD of the Migration Act 1958. On 28 May 2019, he had an overnight stay in accommodation with an approved carer but the Department of Immigration and Citizenship was unable to contact him. On 2 June 2019, the Department filed a missing person report. Mr. Said was located on 3 June 2019, but was unable to explain where he had been. On 4 June 2019, he was moved to accommodation with a carer. On 12 June 2019, his residence determination was cancelled and he was returned to closed detention. His detention is currently ongoing and he is being held at Brisbane Immigration Transit Accommodation. The relevant periods of detention are 20 October 2013 to 31 March 2019 and 12 June 2019 to the present.

11. On 28 June 2019 Mr. Said attended hospital and on 31 August 2019 he was admitted to a mental health ward under the Mental Health Act.

12. On 25 September 2020, a complaint to the Australian Human Rights Commission was filed on behalf of Mr. Said. The complaint is ongoing. On 24 November 2020, a freedom of information request was made. Because the Department of Immigration and Citizenship delayed the assessment of the request, a complaint was made to the Commonwealth Ombudsman. These documents were made available on 28 July 2021.

13. On 28 April 2021, Mr. Said’s lawyers became aware that he was to be imminently deported to Nauru and, after correspondence with the Department of Immigration and Citizenship on behalf of Mr. Said, his deportation was cancelled. On 13 May 2021, Mr. Said’s medical records, as held by the Department and International Health and Medical Services, were requested, but have not been made available yet.

14. There is no evidence that the Department is currently considering Mr. Said for a residence placement or granting him a visa.

15. Mr. Said has significant physical and mental health problems, including schizophrenia, post-traumatic stress disorder, internal bleeding from a duodenal ulcer and a bacterial gastrointestinal infection.

16. Given the fact that International Health and Medical Services has not provided Mr. Said's medical records, the source is unable to confirm what treatment Mr. Said has received. It is only known that Mr. Said requires regular injections to manage his mental health. There is no evidence of an investigation into Mr. Said's head injury.

17. The source expresses concern at the revocation of Mr. Said's residence determination by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs and at the refusal to allow Mr. Said to reside in more suitable accommodation with a carer. Having been returned to closed detention, Mr. Said's health has deteriorated significantly. He is reported to be non-verbal, talking in an infantile voice and shaking. The source has no information on how these issues are being managed. When Mr. Said was first detained on Nauru, he had no obvious signs of mental or physical illness.

18. There is a lack of information about what happened to Mr. Said while he was in detention on Nauru. Concerns exist that he might have been transferred to Australia in 2018 as a result of being assaulted on Nauru with an iron bar, while departmental records state that Mr. Said was transferred due to complications from dengue fever.

19. The Department of Immigration and Citizenship and International Health and Medical Services have delayed providing, or not provided, Mr. Said's detention and medical records, which raises serious concerns regarding whether he has received and is receiving proper treatment and how he obtained the brain injury. Given the lack of information, no legal action in relation to Mr. Said's treatment or detention could have been progressed.

20. Finally, the source expresses concern regarding the attempted deportation of Mr. Said scheduled by the Department of Immigration and Citizenship in early May 2021. Mr. Said's legal representatives were not officially informed of his imminent deportation. While the Department has reportedly stated that Mr. Said had consented to his removal via two removal consent forms in English, the source notes that the consent forms have someone else's name on them, are in English (which Mr. Said cannot read or understand), that there is no evidence a translator was used and two different people appear to have signed the forms.

21. Mr. Said has been deprived of liberty in breach of article 14 of the Universal Declaration of Human Rights. He came to Australia to seek asylum. Mr. Said has also been deprived of his rights in contravention of article 26 of the Covenant, which notes that all people are entitled to equal protection under the law, without discrimination.

22. Asylum seekers allegedly do not have the same rights under Australian law as Australian citizens, who are not subjected to immigration detention or deportation to a third country, such as Nauru. If Australian citizens are detained, they can bring an action before a court for release, asylum seekers cannot.

23. Immigration detention is described by the Department of Immigration and Citizenship as being used as a last resort and for a very small proportion of people whose status requires resolution, sometimes through protracted legal proceedings. That is not the case for Mr. Said, who was immediately detained on arrival in Australia and continues to be detained despite serious health concerns. Given the medical assessments provided in the ministerial intervention submissions, it is unlikely that Mr. Said will ever be capable of caring for himself or could be deported to any country. As such, the source questions the purpose of Mr. Said's current detention.

24. In its general comment No. 35 (2014), the Human Rights Committee states that detention "must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time" (para. 18). The fact that Mr. Said has been held in administrative detention for approximately eight years, has medical issues and no criminal record, demonstrates that his detention is not reasonable, necessary or proportionate, and has not been properly or independently assessed as it extends in time. There is no evidence that he is currently being assessed for a residential detention placement, for a visa, or for removal.

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

26. Mr. Said has been deprived of his liberty for reasons of discrimination. Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The decision of the High Court of Australia in *Al-Kateb v. Godwin* (2004) stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act 1958 does not contravene the Constitution. The result is that while citizens can challenge administrative detention, non-citizens cannot. The source reiterates the decision in Commonwealth of *Australia v. AJL20* [2021] that confirms that the indefinite detention of an individual does not offend the Constitution and is legal even in circumstances where the Government has not taken any active steps to remove them as soon as reasonably practicable.

Response from the Governments

27. On 9 August 2021 the Working Group transmitted the allegations from the source to the Governments of Australia and Nauru under its regular communications procedure. The Working Group requested the two Governments to provide it with detailed information about the situation of Mr. Said and clarify the legal provisions justifying his detention, as well as its compatibility with the obligations of Nauru under international human rights law and in particular with regard to the treaties ratified by the State. The Working Group also called upon the Government of Australia to ensure his physical and mental integrity.

28. The Working Group regrets that it did not receive a response from the Government of Nauru to this communication; neither did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

29. On 10 August 2021, the Government of Australia requested an extension, in accordance with the Working Group's methods of work, which was granted with a new deadline of 8 November 2021. On 3 November 2021, the Government of Australia submitted its reply in which it states that Mr. Said is a citizen of Bangladesh who entered Australia by sea on 20 October 2013 and became an unauthorized maritime arrival (as defined in section 5AA of the Migration Act 1958). He was detained under subsection 189 (3) of the Act and was taken to the Nauru Regional Processing Centre on 27 October 2013.

30. Mr. Said is currently at Brisbane Immigration Transit Accommodation because he is a non-citizen who does not hold a visa (see sections 13 and 14 of the Migration Act 1958).

31. Mr. Said was temporarily brought to Australia to receive medical treatment. Current medical advice confirms that he no longer needs to remain in Australia. Accordingly, there is a duty under the Migration Act 1958 to effect his removal as soon as reasonably practicable.

32. As Mr. Said is an unauthorized maritime arrival and a transitory person (as defined in subsection 5 (1) of the Migration Act 1958), he is prevented under sections 46A and B of the Act from making a valid visa application. In accordance with government policy, as a transitory person Mr. Said will not be settled in Australia.

33. Mr. Said has submitted a number of requests for removal from Australia to both Bangladesh and Nauru. His request for removal to Bangladesh means that there is no duty to return him to a regional processing country. The Department of Home Affairs is progressing Mr. Said's most recent request for voluntary removal to Bangladesh.

34. On 27 February 2015, Mr. Said was brought to Australia (in accordance with subsection 198B (1) of the Migration Act 1958) for psychiatric treatment of his diagnosed mental illness. He received treatment and returned to Nauru on 24 June 2015 (in accordance with subsection 198AD (2) of the Act).

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

35. On 18 December 2018, Mr. Said was again brought to Australia (in accordance with subsection 198B (1) of the Migration Act 1958) for medical treatment for dengue fever and blood loss from internal bleeding caused by an ulcer. He has since remained in Australia.

36. On 31 March 2019, the Minister of Immigration, Citizenship and Multicultural Affairs intervened under section 197AB of the Migration Act 1958 to make a residence determination to allow Mr. Said to reside in the community. However, Mr. Said reported finding it difficult to cope while living in the community and asked to return to “camp” in Nauru.

37. On 12 June 2019, Mr. Said’s residence determination was revoked under section 197AD of the Migration Act 1958 as a result of behavioural incidents in the community that were connected with a deterioration in his mental health.

38. Mr. Said returned to held immigration detention at Brisbane Immigration Transit Accommodation on 17 June 2019, reporting that he wanted to return to held immigration detention due to difficulty in caring for himself in the community. On 19 June 2019, Mr. Said underwent a comprehensive review with International Health and Medical Services, after which the psychiatrist noted Mr. Said was likely to respond positively to the structure and the low level of responsibility in held immigration detention. Mr. Said recommenced medication.

39. On 20 June 2019, Mr. Said was notified that he had been found to be a refugee by the Nauru Refugee Status Review Tribunal.

40. On 9 July 2019, Mr. Said signed a request for removal from Australia to Bangladesh and on 17 July 2019, the Australian Border Force lodged an application for a travel document with the Bangladesh High Commission.

41. On 8 January 2020, Mr. Said asked to return to Nauru. On 29 October 2020, the Australian Border Force advised Mr. Said that the application for a travel document was still being progressed with no time frame for completion. On 9 and 16 December 2020, Mr. Said asked to return to Nauru.

42. In February and March 2021, the Department commenced ministerial intervention processes under sections 195A and 197AB of the Migration Act 1958.

43. On 12 April 2021, the Medical Officer of the Commonwealth provided an opinion that Mr. Said no longer needed to remain in Australia. Accordingly, the duty arose to take Mr. Said to a regional processing country (Nauru) as soon as reasonably practicable, pursuant to subsection 198AD (2) of the Migration Act 1958.

44. On 21 April 2021, the section 195A process was withdrawn by the Department of Home Affairs, as his case was being progressed under section 197AB of the Migration Act 1958. On 29 September 2021, Mr. Said’s section 197AB process was withdrawn by the Department and is no longer being progressed, as Mr. Said’s case has been found not to meet the ministerial intervention guidelines.

45. On 27 April 2021, using a Bengali interpreter, Mr. Said was advised that arrangements had been made for his return to Nauru on 4 May 2021. On 1 May 2021, Mr. Said refused to undergo a mandatory coronavirus disease (COVID-19) test and the Department was unable to progress his return.

46. On 20 May 2021, the Department received a complaint from the Australian Human Rights Commission, which alleged a breach of Mr. Said’s human rights by Australia under the Covenant. That matter remains ongoing.

47. On 14 May 2021, International Health and Medical Services assessed Mr. Said as having the capacity to make immigration-related decisions. Between 27 May and 22 August 2021, he submitted numerous requests to return to either Bangladesh or Nauru.

48. On 6 July 2021, the Bangladesh High Commission confirmed that the application for a travel document had been accepted, but that it was still awaiting government approval. On 6 September 2021, Mr. Said confirmed that he wished to be returned to Nauru and that he would pursue voluntary return to Bangladesh from Nauru. Plans were progressed to take Mr. Said to Nauru on a commercial flight on 17 September 2021. On 15 September 2021, Mr.

Said advised that he no longer wanted to return to Nauru and as his departure was voluntary, the plans were cancelled.

49. On 20 September 2021, Mr. Said made a written request to be removed to Bangladesh pursuant to subsection 198 (1) of the Migration Act 1958. The effect of this request was that the requirement in subsection 198AD (2) of the Act for an official to take Mr. Said from Australia to a regional processing country as soon as reasonably practicable would not apply. That is because the Minister has determined under subsection 198AE (1) of the Act that section 198AD does not apply to unauthorized maritime arrivals who have requested to be removed from Australia.

50. Mr. Said has been involved in 21 behavioural incidents during his time in immigration detention. Those incidents include aggressive behaviour, refusing food, minor assault and damage to property, absconding from his community detention address, threatened and actual self-harm, and three medical incidents because of concerning behaviour.

51. Various factors are taken into account when planning a transitory person’s return to a regional processing country, including agreement by the regional processing country to receive the person, legal and health considerations and border restrictions related to COVID-19. Returns are managed carefully and compassionately, on a case-by-case basis.

52. Mr. Said has a history of schizophrenia, vulnerable personality and borderline low IQ. He has previously required treatment under the Queensland Mental Health Act 2016, owing to unusual and aggressive behaviour, poor self-care and lack of insight. He has been prescribed a psychotropic medication, which he takes willingly. His mental state has recently been described as stable by a psychiatrist from International Health and Medical Services.

53. On 2 March 2015, Mr. Said was admitted to hospital for 16 days due to a deterioration in his mental health. He was diagnosed with post-traumatic stress disorder and depression. He was discharged on medication and recommended to continue engaging with the mental health services.

54. On 10 October 2016, Mr. Said presented for medical treatment, stating he had been hit with a metal pole. He was provided with pain relief and intravenous fluids. He was admitted for neurological observation and had several follow-up appointments with a general practitioner. No abnormalities were found other than bruising and his back pain was addressed with pain relief.

55. On 31 December 2016, Mr. Said reported to security that he was having thoughts of self-harm related to waiting for his refugee status determination. He guaranteed his own safety, but later harmed himself. He was restrained and placed on a supportive management and engagement programme, was reviewed by a psychiatrist and had his medication reviewed.

56. On 18 December 2018, Mr. Said was transferred back to Australia for urgent medical care. He was treated for internal bleeding related to an ulcer and discharged on 24 December 2018. There are no residual issues.

57. Mr. Said was assessed by an International Health and Medical Services psychiatrist on 25 January 2019. The psychiatrist noted that Mr. Said had no ongoing psychotic symptoms but that he might have developed stress-induced psychotic symptoms in the context of his placement in Nauru.

58. Mr. Said was transferred to community detention in April 2019. However, he reported finding it difficult to cope while living in the community and asked to return to “camp” in Nauru. Owing to the symptoms Mr. Said exhibited during a review on 17 May 2019, he was referred to a hospital emergency for assessment of possible psychosis. He was diagnosed with acute stress disorder and assessed as being at low risk of self-harm. Following his discharge from hospital, Mr. Said was referred to a community psychiatrist. On 3 June 2019, International Health and Medical Services provided advice to the Department of Home Affairs, advising that “Mr. Said would benefit from being allocated a single room in a detention centre where there are other Bengali people”. Mr. Said returned to Brisbane Immigration Transit Accommodation on 17 June 2019, reporting that he wanted to return to held immigration detention due to difficulty in caring for himself.

59. On 28 June 2019, Mr. Said was transferred to the Royal Brisbane and Women's Hospital for a mental health assessment, after it was reported that he was displaying odd behaviour. Mr. Said stated that it was due to frustration and that he wished to return to Brisbane Immigration Transit Accommodation and eventually back to Bangladesh. His condition did not warrant admission and he was discharged back to the Transit Accommodation on 29 June 2019. Mr. Said was placed on a supportive management and engagement programme and followed up by the International Health and Medical Services mental health team.

60. On 30 July 2019, Mr. Said was assessed for possible psychosis. He was diagnosed with a relapse of a psychotic illness and admitted to hospital until 14 August 2019. His medication regimen was revised and he was placed under a treatment authority, which ended on 27 March 2020 when Mr. Said was encouraged to continue his treatment.

61. On 3 April 2021, an International Health and Medical Services psychiatrist documented Mr. Said's schizophrenia as being in remission. On 28 April 2021, the psychiatrist reported that Mr. Said was not suitable for transfer to Nauru, as he required management under the Queensland Mental Health Act 2016. However, on 29 April 2021, the psychiatrist determined that Mr. Said was suitable for transfer to Nauru, as if he became mentally unwell and required involuntary treatment, he could be treated under the Nauru Mentally-disordered Persons Act 1963.

62. On 30 April 2021, Mr. Said attended an assessment with the Queensland programme of assistance to survivors of torture and trauma. The programme counsellor reported that they had significant concerns about Mr. Said's cognitive ability and particularly his ability to understand the content of forms and provide informed consent. Mr. Said was again referred for torture and trauma counselling at his request and attended it on 10 and 24 June 2021.

63. Mr. Said has continued to engage with the International Health and Medical Services primary and mental health teams for support and treatment of his mental health issues.

64. International Health and Medical Services received a request from a lawyer for Mr. Said's medical records on 13 May 2021, which were provided on 11 August 2021, following receipt of a consent form.

65. Mr. Said was most recently reviewed by an International Health and Medical Services psychiatrist on 30 July 2021, when his mental state was documented as appearing stable. The psychiatrist also noted that he had the capacity to make immigration decisions and to instruct his lawyer. Mr. Said was not aware that his medical records had been requested by a lawyer and did not consent to their release. Mr. Said's mental health continues to be managed.

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

67. If an unauthorized maritime arrival is detained under section 189 of the Migration Act 1958, they will be liable to be transferred to a regional processing country in accordance with section 198AD of the Act, unless one of a limited number of exclusions apply. The exclusions are contained in sections 198AE, AF and AG of the Act. Section 198AE allows for the Minister to determine that section 198AD does not apply to an unauthorized maritime arrival. Sections 198AF and 198AG relate to situations where there is no regional processing country, or the country will not accept the unauthorized maritime arrival.

68. Section 195A of the Migration Act 1958 enables the Minister to grant a visa to a person in immigration detention if the Minister considers it is in the public interest to do so. In addition, section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing them to reside in the community at a specified place and under specified conditions, if the Minister considers it is in the public interest to do so. What is in the public interest is a matter for the Minister to decide.

69. The Minister has established guidelines that describe the types of cases that should or should not be referred for consideration under such intervention powers. Cases are only referred for ministerial consideration if they are assessed as meeting the guidelines. Ministerial intervention is not an extension of the visa process.

70. The Minister's powers under sections 195A and 197AB of the Migration Act 1958 are non-delegable and non-compellable. The Minister is under no obligation to exercise or to consider exercising the powers in a case.

71. Persons in Australia who make a valid application for a protection visa will have their claims assessed by the Government. Domestic legislation, namely the Migration Act 1958, and the country's policies and practices implement its non-refoulement obligations under the Convention relating to the Status of Refugees, the Covenant and its Second Optional Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

72. The immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary under international law. However, 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. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Said remains in immigration detention, in accordance with Australian law.

73. Immigration detention is administrative in nature and not for punitive purposes. 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. Said is justifiable and not arbitrary, consistent with the Covenant, as the Department of Home Affairs is progressing Mr. Said's removal from Australia.

74. The Department is required under section 486N of the Migration Act 1958 to provide the Commonwealth Ombudsman with reports detailing the circumstances of individuals who have been in immigration detention for a cumulative period of two years and every six months thereafter. Following receipt of the section 486N reports, the Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Ombudsman may make recommendations to the Minister regarding the circumstances of the individual's detention. The Department has reported on Mr. Said on two occasions, with the most recent report sent to the Ombudsman on 28 August 2020.

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

76. In the case of *Al-Kateb v. Godwin* (2004), the High Court held that the provisions of the Act requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The decision in the case does not alter a non-citizen's ability to challenge the lawfulness of their detention under Australian law. Further, non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus.

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

78. Article 26 of the Covenant provides that everyone is entitled to equal protection under the law without discrimination. The object of the Migration Act 1958 is to regulate, in the national interest, the entering into, and presence in, Australia of non-citizens. The purpose of

the Act is to differentiate, on the basis of nationality, between non-citizens and citizens. The Human Rights Committee has recognized in the context of the Covenant that: "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment."[3]

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

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

81. The differential treatment is aimed at 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 and 13 of the Covenant.

82. Under international human rights law, not all differences in treatment will constitute discrimination. The treatment of Mr. Said amounts to permissible, legitimate differential treatment. He is lawfully detained under subsection 189 (1) of the Migration Act 1958, which is consistent with the international obligations of Australia. Mr. Said's immigration detention is thus lawful and is reasonable, necessary and proportionate.

83. The Department of Home Affairs is monitoring and managing Mr. Said's health conditions in conjunction with International Health and Medical Services. The appropriateness of his placement is regularly reviewed by the Department and is based on expert medical advice.

Further comments from the source

84. The reply of the Government was submitted to the source for further comments, which were provided on 9 November 2021.

85. The source notes that significant concerns remain regarding Mr. Said's capacity to make decisions in his own best interest. There is no evidence that Mr. Said was supported in any of his discussions with departmental officers in relation to statements he apparently made that he was finding it difficult living in the community.

86. Mr. Said's lawyers are unaware of him engaging with the Bangladeshi authorities or the Department of Home Affairs in his attempt to be returned to Bangladesh, despite their repeated requests to be included in all communications regarding Mr. Said's placement.

87. Mr. Said's case is a clear example of constructive refoulement, in which the conditions of detention in the country of safety are so distressing that he has chosen to return to Bangladesh.

88. The source notes that the Nauru Mentally-disordered Persons Act 1963 is irrelevant; on the Department's own evidence, the Act is not functional.

89. The source disagrees that Mr. Said absconded from his community detention placement. That incident was the result of negligent care by the community detention service provider and the Department.

[3] General comment No. 15 (1986), paras. 5 and 6.

90. The review mechanisms mentioned by the Government have no power to compel it to release a person from immigration detention.

Discussion

91. Noting that the allegations concerning Mr. Said's detention concern two Governments, the Working Group proceeds to examine them separately.

Allegations concerning Australia

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

93. In determining whether the deprivation of liberty of Mr. Said is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[4]

Category I

94. The Working Group observes that the present case is the latest in a long line that it has been asked to consider in relation to Australia. Since 2017, the Working Group has considered 16 cases, which all concern the same issue, namely mandatory immigration detention in Australia under the Migration Act 1958.[5] The Working Group reiterates its views on the Act, as expressed in its opinion No. 35/2020 (paras. 98–103).

95. The Working Group reiterates its alarm at the rising number of cases from Australia concerning the implementation of the Migration Act 1958. The Working Group is equally concerned that in all these cases the Government has argued that the detention is lawful because it follows the stipulations of the Act.

96. The Working Group wishes to reiterate that such arguments cannot 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. No State can avoid its obligations under international human rights law by citing its domestic laws and regulations.

97. It is the duty of the Government to bring its national legislation, including the Migration Act 1958, into line with its obligations under international human rights law. Since 2017, the Government has been repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[6] the Committee on Economic, Social and Cultural Rights,[7] the Committee on the Elimination of Discrimination against Women,[8] the Committee on the Elimination of Racial Discrimination,[9] the Special Rapporteur on the human rights of migrants[10] and the Working Group.[11] The Working Group calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law.

98. Noting this and the numerous occasions on which the Working Group and other United Nations human rights bodies and mechanisms have alerted Australia to the affront posed by the Migration Act 1958 to its obligations under international human rights law, and

[4] A/HRC/19/57, para. 68.
[5] See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021 and No. 69/2021.
[6] CCPR/C/AUS/CO/6, paras 33–38.
[7] E/C.12/AUS/CO/5, paras 17–18.
[8] CEDAW/C/AUS/CO/8, para 53.
[9] CERD/C/AUS/CO/18-20, paras 29–33.
[10] A/HRC/35/25/Add.3.
[11] Opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 115–117; No. 74/2019, paras. 37–42; No. 35/2020, paras. 98-103; and No. 17/2021, paras. 125–128.

noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. Said 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 has been brought to the attention of the Government on so many occasions cannot be accepted as a valid legal basis for detention.

Category II

99. The present case involves an individual who has spent over eight years in various detention settings in Australia and Nauru. Mr. Said arrived on Christmas Island on 20 October 2013 and was arrested and transferred to Nauru, then to Australia for medical treatment on a number of occasions and finally remained in Australia in various detention facilities, with only brief periods of being allowed to live in the community in 2019.

100. Notwithstanding the serious reservations the Working Group holds about the Migration Act 1958 and its compatibility with the obligations of Australia under international human rights law, the Working Group observes that it is not disputed that Mr. Said remains detained today under the provisions of the Act. The source has alleged that the detention of Mr. Said is arbitrary and falls under category II, as he was detained due to his exercise of the right to seek asylum. In its reply, the Government has merely stated that Mr. Said was detained on 20 October 2013 as he entered Australia as unauthorized maritime entry. His detention was therefore required under subsection 189 (3) of the Act.

101. It is thus not disputed that the sole reason for Mr. Said's detention on 20 October 2013 was his unauthorized entry into Australia and claim of asylum. The Working Group reiterates that seeking asylum is not a criminal act, but a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees and its 1967 Protocol.[12] The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.

102. As the Working Group stated 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."[13]

103. Therefore, while detention in the course of proceedings for the control of immigration is not arbitrary per se, it must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.[14] It must not be punitive in nature[15] and should be based on the individual assessment of each individual. Moreover, any detention, including in the course of immigration proceedings, must be ordered by a judge or other judicial authority.[16]

104. In the present case, Mr. Said arrived on Christmas Island, Australia, by boat on 20 October 2013 to seek asylum and was immediately detained by the Australian authorities and transferred to Nauru, on the basis of the agreement between Nauru and Australia concerning the processing of asylum claims. It is thus clear to the Working Group that Mr. Said was not detained by the Australian authorities to document his entry or verification of identity but was rather subjected to the mandatory immigration detention policy employed by Australia.

105. The deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality.[17] As the Human Rights Committee argued in paragraph 18 of its general comment No. 35 (2014): "Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and

[12] See opinions 28/2017 and 42/2017, and revised deliberation No. 5 (A/HRC/39/45, annex), para. 9.

[13] Para. 12.

[14] See opinions 28/2017 and 42/2017. See also Human Rights Committee, general comment No. 35 (2014), para. 18.

[15] General comment No. 35 (2014), para. 18.

[16] Revised deliberation No. 5 (A/HRC/39/45, annex), para. 13.

[17] A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security."

106. Mr. Said was detained immediately upon arrival and has remained in detention for over eight years. In its response, the Government of Australia has argued that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. However, it has furnished no explanation as to how this threshold of last resort was achieved in the case of Mr. Said. The Government has thus failed to explain the individualized, specific reasons that would justify the need to deprive him of his liberty or, in fact, whether such an assessment took place.

107. It is thus clear to the Working Group that the Government did not engage in an assessment of the need to detain Mr. Said and there was no attempt to ascertain if a less restrictive measure would be suited to his individual circumstances, as required by international law. Throughout his time in Australia, there has never been any attempt by the authorities to do so. The Working Group cannot accept that detention for over eight years could be described as a "brief initial period". Furthermore, the Government has not presented any reason specific to Mr. Said that would have justified his detention.

108. The Working Group also rejects the argument by the Government that 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. To follow this logic would mean that de facto indefinite detention in the context of immigration proceedings would be permissible. That is not the case and the Working Group has made it clear that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.[18]

109. Consequently, the Working Group notes that the authorities followed a policy of automatic immigration detention, without any assessment of the need for it and without bringing Mr. Said before a judicial authority. Mr. Said was subjected to a mandatory immigration detention policy, which the Working Group has already determined to be arbitrary in a number of cases.[19] The Working Group therefore concludes that Mr. Said was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

110. Furthermore, while the Working Group agrees with the argument presented by the Government in relation to article 26, it emphasizes that in its general comment No. 15 (1986), the Human Rights Committee made it clear that: "Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. … Aliens have the full right to liberty and security of the person."[20]

111. Mr. Said is therefore entitled to liberty and security of the person, as guaranteed in article 9 of the Covenant and that in guaranteeing him those rights, Australia must ensure that this is done without distinction of any kind, as required by article 2 of the Covenant. Mr. Said is subjected to de facto indefinite detention due to his immigration status, in clear breach of article 2, read in conjunction with article 9, of the Covenant.

112. Noting that Mr. Said 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 arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Mr. Said has always been treated in accordance with the stipulations of the Migration Act 1958. Be that as it may, such treatment is incompatible with the obligations Australia has undertaken under international law, a point which the Working Group revisits once again

[18] Revised deliberation No. 5, para. 26. See also A/HRC/13/30, para. 63, and opinions No. 28/2017 and No. 42/2017.

[19] See opinions 17/2021, 28/2017, 42/2017 and 71/2017.

[20] Paras. 2 and 7.

later in the present opinion. The Working Group also refers the present case to the Special Rapporteur on the human rights of migrants for appropriate action.

113. In making these findings, the Working Group also wishes to emphasize that Mr. Said was transferred to the Nauru Regional Processing Centre at the behest of Australia and spent considerable periods of time there. Australia is therefore responsible for the violations of his rights that occurred there.

Category IV

114. The source has argued that Mr. Said has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government denies these allegations, arguing that persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court and that the case of Mr. Said has been reviewed by the Commonwealth Ombudsman.

115. The Working Group recalls that the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserving legality in a democratic society.[21] That right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[22] and to all situations of deprivation of liberty, including not only detention for the purposes of criminal proceedings but also migration detention.[23]

116. The facts of Mr. Said's case are characterized by various visa applications, their rejections and challenges to the rejections. However, none of these have concerned the necessity to detain Mr. Said or indeed the proportionality of detention to his individual circumstances. Rather, they assessed the claims of Mr. Said against the legal framework set out by the Migration Act 1958. As is evident by the Working Group's examination, the Act is not compatible with the obligations of Australia under international law and therefore assessments carried out in accordance with the Act are equally incompatible with the requirements of international law.

117. The Government has also argued that the case of Mr. Said has been reviewed by the Commonwealth Ombudsman. However, in doing so, 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. The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention.

118. The Working Group therefore concludes that during Mr. Said's detention, no judicial body has ever been involved in the assessment of its legality, noting that international human rights law requires that such consideration by a judicial body necessarily involves an assessment of the legitimacy, necessity and proportionality of the detention.[24]

119. The Working Group wishes to reiterate that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary[25] 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 that period, the detained person must be automatically released.[26] 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.[27] As the Working Group stated in its revised deliberation No. 5: "There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the

[21] A/HRC/30/37, paras. 2–3.
[22] Ibid., para. 11.
[23] Ibid., para. 47 (a).
[24] Revised deliberation No. 5 (A/HRC/39/45, annex), paras. 12–13.
[25] Revised deliberation No. 5, para. 18, and see opinions No. 28/2017, No. 42/2017 No. 7/2019 and No. 35/2020. See also A/HRC/13/30, para. 63.
[26] Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61, and opinion No. 7/2019.
[27] See opinions Nos. 1/2019 and 7/2019.

principle of non-refoulement or the unavailability of means of transportation – which render expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary."[28]

120. The Working Group also recalls findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[29] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in a migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[30] In the case of Mr. Said, the Working Group has already established that no alternatives to his detention have been considered.

121. Moreover, despite the claims of the Government to the contrary, the Working Group considers that the detention of Mr. Said is punitive in nature which, as highlighted in revised deliberation No. 5, should never be the case.[31] Mr. Said has been detained for over eight years, without a charge or a trial, in what has clearly been punitive detention in breach of article 9 of the Covenant.

122. The Government has not been able to state how long Mr. Said's detention will last, which means that his detention is de facto indefinite. Consequently, the Working Group finds that Mr. Said is subjected to de facto indefinite detention due to his migratory status, without the possibility of challenging the legality of his detention before a judicial body, the right encapsulated in article 9 (4) of the Covenant. This is therefore arbitrary, falling under category IV.

Category V

123. The Working Group notes the source's argument that Mr. Said 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 as a result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in this case the High Court held that the provisions of the Migration Act 1958 requiring the detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future, were valid.

124. The Working Group remains perplexed by the repeated explanations submitted by the Government[32] since they only confirm that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future. However, the Government fails to explain how such non-citizens can effectively challenge their continued detention after the decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. The Working Group once again recalls the consistent jurisprudence of the Human Rights Committee in which it examined the implications of the judgment of the High Court in the case of *Al-Kateb v. Godwin* and concluded that its effects

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

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

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

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

[32] Opinions No. 21/2018, para. 79; No. 50/2018, para. 81; No. 74/2018, para. 117; No. 1/2019, para. 88; No. 2/2019, para. 98; No. 74/2019, para. 72; No. 35/2020, paras. 95–96; and No. 70/2020, paras. 71–73

were such that there was no effective remedy to challenge the legality of continued administrative detention.[33]

125. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter[34] and this remains the position of the Working Group in the present case. The Working Group emphasizes that the situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Said is arbitrary, falling under category V.

126. The Working Group wishes to place on record its very serious concern over the state of Mr. Said's mental and physical health, which has deteriorated over the years of detention, which the Working Group has established to be indefinite arbitrary detention. The Working Group reminds the Government of Australia that article 10 of the Covenant requires that all persons deprived of their liberty are treated with respect for their human dignity and that this applies also to those held in the context of migration. As the Working Group has explained in its revised deliberation No. 5: "All detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings."[35] 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.

Concluding remarks

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

128. The Working Group also wishes to emphasize that in the light of the outbreak of COVID-19, it calls upon States to note the underlying conditions of detention as especially conducive to the spread of the infection. As highlighted in its deliberation No. 11, detention in the context of migration is only permissible as an exceptional measure of last resort, which is a particularly high threshold to satisfy in the context of a pandemic or other public health emergency. The Working Group calls upon the Government to release Mr. Said in the prevailing circumstances and especially noting the trauma he has suffered as a result of his years of detention.

129. The Working Group welcomes the invitation of 27 March 2019 from the Government for the Working Group to conduct a visit to Australia and its offshore detention facilities in 2020. Although the visit had to be postponed owing to the worldwide pandemic, the Working Group looks forward to carrying out the visit as soon as practically possible. It views the visit as an opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Allegations concerning Nauru

130. In the absence of a response from the Government of Nauru, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

131. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established 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.[36] In the present case, the

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

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

[35] Para. 38.

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

Government has chosen not to challenge the prima facie credible allegations made by the source.

132. Initially, the Working Group notes the scarcity of submissions concerning Mr. Said's detention in Nauru, exacerbated by the failure of the Government to engage on the matter. All that is known is that Mr. Said was transferred to the Nauru Regional Processing Centre on 27 October 2013 and that he remained there until 27 February 2015, when he was transferred to Australia for medical treatment. He was transferred back to the Nauru Regional Processing Centre on 24 June 2015 and was once again returned to Australia for urgent medical treatment on 18 December 2018.

133. It is clear that there was no other reason for Mr. Said's detention in the Nauru Regional Processing Centre than his claim for asylum in Australia. The Working Group therefore reiterates that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights. Detention purely due to peaceful exercise of the rights protected by the Declaration is arbitrary, as has already been established (see discussion under category II above). The Working Group therefore concludes that the detention of Mr. Said falls under category II.

Disposition

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

In relation to the Government of Nauru:

The deprivation of liberty of Said Said, being in contravention of article 14 of the Universal Declaration of Human Rights is arbitrary and falls within category II.

In relation to the Government of Australia:

The deprivation of liberty of Said Said, 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.

135. The Working Group requests the Governments of Nauru and Australia to take the steps necessary to remedy the situation of Mr. Said 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.

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

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

138. 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.

139. The Working Group requests both Governments to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

140. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the two Governments to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

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

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

(c) Whether an investigation has been conducted into the violation of Mr. Said'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 and Nauru with their international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

141. The two Governments are invited to inform the Working Group of any difficulties they 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.

142. The Working Group requests the source and the two Governments 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.

143. 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.[37]

[*Adopted on 18 November 2021*]

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