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# Advance Edited Version

Distr.: General  
27 January 2020

Original: English

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**Human Rights Council**  
Working Group on Arbitrary Detention

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019**

### **Opinion No. 74/2019 concerning Sayed Akbar Jaffarie (Australia)\***

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 19 July 2019 the Working Group transmitted to the Government of Australia a communication concerning Sayed Akbar Jaffarie. The Government replied to the communication on 17 September 2019. 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).

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

## Submissions

### *Communication from the source*

4. Sayed Akbar Jaffarie, born in 1987, is a national of Afghanistan who legally entered Australia on 15 November 2008 on a spousal visa sponsored by his wife. The source notes that the granting of such a visa required Mr. Jaffarie to pass identity, health and security checks.
5. According to the source, on 17 June 2013 the Australian Security Intelligence Organisation issued Mr. Jaffarie with an adverse security assessment, having found him to be directly or indirectly a risk to security within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979.
6. The source adds that the adverse security assessment was based on allegations that Mr. Jaffarie had been involved in smuggling people to Australia and was a key Australia-based member of the maritime people smuggling syndicate linked to Sayed Abbas based in Indonesia. Under division 73.1 of the Australian Criminal Code Act 1995, people smuggling is a criminal offence punishable by up to 20 years' imprisonment.
7. The source notes that the Australian Federal Police, the authority responsible for laying criminal charges, had stated in a report that it had insufficient evidence to charge Mr. Jaffarie with people smuggling. As such, Mr. Jaffarie has not been charged with any criminal offence.
8. On 19 June 2013, as a result of the adverse security assessment, Mr. Jaffarie's spousal visa was cancelled by the Department of Home Affairs under section 116 of the Migration Act 1958. Consequently, Mr. Jaffarie became an unlawful non-citizen (sect. 14) and liable for immediate detention (sect. 189 (1)).
9. The source specifies that section 189 of the Migration Act provides that a person known or reasonably suspected of being an unlawful non-citizen must be detained. As Mr. Jaffarie's visa was cancelled, he became an unlawful non-citizen. Under section 196 (1) of the Act, unlawful non-citizens must be detained until they are removed from Australia or granted a visa.
10. According to the source, the Department of Home Affairs issued an arrest warrant and, on 19 June 2013, Mr. Jaffarie was arrested in Sydney. The source assumes that the authorities showed an arrest warrant at that time but also notes that no copy of such a warrant has been made available.
11. According to the source, Mr. Jaffarie was initially held at Villawood Immigration Detention Centre, New South Wales. In June 2018, Mr. Jaffarie was transferred to Yongah Hill Immigration Detention Centre, Western Australia. For a short period of time in September 2018, Mr. Jaffarie was detained on Christmas Island, due to damage to Yongah Hill Immigration Detention Centre.
12. The source submits that on 1 May 2015, while in detention, Mr. Jaffarie applied for a permanent protection visa. It also submits that the detention of Mr. Jaffarie since 1 May 2015 is the result of Mr. Jaffarie seeking protection in Australia. However, the adverse security assessment issued by the Australian Security Intelligence Organisation meant that Mr. Jaffarie did not meet the character requirements for the granting of such a visa. Mr. Jaffarie did not seek the reinstatement of his spousal visa. He has exhausted all domestic remedies to secure his release into the Australian community.
13. According to the source, Mr. Jaffarie has suffered physical and psychological damage as a result of his detention.
14. The source, in arguing that the arrest and detention of Mr. Jaffarie is arbitrary, draws attention to the legal basis for the deprivation of his liberty. As such, it specifies that sections 189 (1), 196 (1) and 196 (3) of the Migration Act provide that unlawful non-citizens must be detained and kept in detention until they leave Australia or are granted a

visa. Section 196 (3) expressly prohibits a court from releasing a detained unlawful non-citizen. The High Court of Australia, in *Al-Kateb v. Godwin*, has upheld that the mandatory detention of non-citizens is constitutionally permissible.<sup>1</sup> The source argues that the effect of that decision is that non-citizens have no means of challenging detention decisions, and recalls that the Human Rights Committee has noted that there is no effective remedy for people subject to mandatory detention in Australia.<sup>2</sup>

15. The source further argues that, since 1 May 2015, Mr. Jaffarie has been deprived of his liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights. In fact, Mr. Jaffarie would have been deported to Afghanistan but for his seeking asylum, which prevents his deportation on the basis of non-refoulement. The source specifies that Mr. Jaffarie claims asylum in Australia as a Shia Hazara man who fears being harmed by the Taliban or Islamic State in Iraq and the Levant (ISIL). He further fears being harmed by what he perceives to be Western influences from living in Australia, as well as by the release of personal data on the website of the Department of Home Affairs.

16. The source submits that Mr. Jaffarie has been deprived of his liberty, in contravention of article 26 of the International Covenant on Civil and Political Rights, because, as a non-Australian citizen, he is subject to administrative detention. Australian citizens in the same position as Mr. Jaffarie, in other words Australian citizens against whom an adverse security assessment has been issued, are not subject to administrative detention.

17. Finally, the source submits that Mr. Jaffarie has not been guaranteed the possibility of administrative or judicial review or remedy. The source recalls that sections 189 (1), 196 (1) and 196 (3) of the Migration Act specifically provide that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia (which, in Mr. Jaffarie's case, would constitute refoulement); or (b) granted a visa. Section 196 (3) specifically provides that "even a court" cannot release an unlawful non-citizen from detention (unless the person has been granted a visa).

18. In that regard, the source notes that there is no effective remedy for people subject to mandatory detention in Australia, as ruled by the High Court of Australia, which has upheld that the mandatory detention of non-citizens does not contravene the Constitution of Australia.<sup>3</sup> The source also notes that the effective result of that decision is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

19. According to the source, Mr. Jaffarie has applied for several "bridging" visas. The applications have been rejected by the Department of Home Affairs. The source notes that under the Migration Act the Minister for Home Affairs has non-reviewable and non-compellable powers to grant a visa or community detention placement. Given Mr. Jaffarie's adverse security assessment, however, the source submits that it is extremely unlikely that the Minister will exercise those powers.

20. The source notes that Mr. Jaffarie has unsuccessfully appealed the adverse security assessment and the reliance on it by the Minister for Home Affairs.<sup>4</sup> Given that insufficient information could be provided to Mr. Jaffarie regarding the security assessment, Mr. Jaffarie has been unable to fully exercise his rights of review.

21. The source reports that, although the Inspector-General of Intelligence and Security wrote to the Director General of Security in April 2018, presumably to express concern regarding Mr. Jaffarie's adverse security assessment, the assessment stands and Mr. Jaffarie is thus liable for detention.

<sup>1</sup> High Court of Australia, *Al-Kateb v. Godwin* (case No. A253/2003), 6 August 2004.

<sup>2</sup> *C v. Australia* (CCPR/C/76/D/900/1999), para. 7.4.

<sup>3</sup> High Court of Australia, *Al-Kateb v. Godwin*.

<sup>4</sup> Federal Court of Australia, *Jaffarie v. Director General of Security and Migration Review Tribunal* (case No. NSD 2374), 18 August 2014.

*Response from the Government*

22. On 19 July 2019 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 17 September 2019, detailed information about the situation of Mr. Jaffarie 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, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Australia to ensure Mr. Jaffarie's physical and mental integrity.

23. On 17 September 2019 the Government of Australia submitted its reply.

24. The Government states that Mr. Jaffarie remains in immigration detention because he is an unlawful non-citizen. On 29 October 2018, Mr. Jaffarie was transferred from Yongah Hill Immigration Detention Centre to Melbourne Immigration Transit Accommodation, where he currently resides. The Government notes that Mr. Jaffarie has been found not to engage the non-refoulement obligations of Australia. It is thus up to Mr. Jaffarie to end his detention by withdrawing the request he made under section 48B of the Migration Act for the Minister for Home Affairs to intervene and lift the bar preventing Mr. Jaffarie from applying for a valid permanent protection visa (subclass 866), thereby facilitating his removal from Australia by the Department of Home Affairs.

25. In this context, the Government recalls that measures exist to ensure that all detained persons understand the reason for their detention and the choices and pathways that may be available to them to resolve their immigration status, including choosing to return to their country of origin or pursuing legal remedies.

26. The Government also recalls the timeline of events relevant to the case, as set out below.

27. The Government explains that, on 15 November 2008, Mr. Jaffarie arrived in Australia holding a partner (provisional) visa (subclass 309). On 17 June 2013, the Australian Security Intelligence Organisation issued an adverse security assessment in relation to Mr. Jaffarie, having found him to be, directly or indirectly, a risk to security within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979.

28. On 19 June 2013, Mr. Jaffarie's partner (provisional) visa was cancelled under section 116 of the Migration Act. Mr. Jaffarie was detained as an unlawful non-citizen under section 189 (1) and transferred to Villawood Immigration Detention Centre.

29. On 21 June 2013, Mr. Jaffarie sought a review of the merits of the cancellation decision. On 19 July 2013, the Migration Review Tribunal found that his application for review did not meet the statutory time frames and that the Tribunal did not therefore have jurisdiction to undertake the review.

30. On 25 June 2013, Mr. Jaffarie's application for a partner (migrant) visa (subclass 100) was refused, as he did not hold a partner (provisional) visa at the time of the decision. On 26 August 2013, the Migration Review Tribunal affirmed that refusal. On 1 July 2013, Mr. Jaffarie lodged an application for a bridging visa E, which was refused on 26 September 2013 (sect. 501 of the Migration Act).

31. On 10 October 2013, Mr. Jaffarie sought judicial review by the High Court of Australia of the adverse security assessment, during which the decision to refuse the application for the bridging visa E was discussed.

32. On 21 November 2013, the High Court remitted that part of the matter to the Federal Court that related to the decision to refuse the application for the bridging visa E.

33. On 8 September 2014, the Federal Court dismissed the matter. On 15 September 2014, Mr. Jaffarie made an application for special leave to appeal to the High Court the judgment of the Federal Court. On 13 February 2015, the High Court refused the special leave application. On 4 March 2015, the High Court dismissed the remainder of the matter still before it.

34. On 28 April 2015, Mr. Jaffarie lodged an application for a permanent protection visa (subclass 866). On 15 June 2016, Mr. Jaffarie was found not to engage the protection obligations of Australia and, for this reason, the application was refused.
35. On 27 June 2016, Mr. Jaffarie applied for the merits of the decision to refuse his application to be reviewed by the Administrative Appeals Tribunal; the Tribunal affirmed the refusal decision on 22 September 2016. Mr. Jaffarie applied for judicial review of the Tribunal's decision on 27 October 2016; that application was dismissed by the Federal Circuit Court on 10 March 2017. Mr. Jaffarie lodged an appeal to a full Federal Court on 27 March 2017, which was dismissed on 16 October 2018.
36. On 15 March 2017, following Mr. Jaffarie's involvement in an incident while in detention, he was charged by the New South Wales police with one count of affray. On 7 February 2018, Mr. Jaffarie pleaded guilty to the charge and received a two-year good behaviour bond with no conviction recorded. On 14 February 2018, the criminal justice stay certificate preventing Mr. Jaffarie's removal from Australia was cancelled.
37. On 19 January 2018, Mr. Jaffarie was referred for assessment under section 197 AB of the Migration Act, which provides that the Minister for Home Affairs may determine that a person is to reside at a specified place rather than being held in a detention centre (known as a residence determination).
38. On 14 February 2018, Mr. Jaffarie was assessed as not meeting the relevant criteria because he is someone against whom the Australian Security Intelligence Organisation has issued an adverse security assessment.
39. On 19 November 2018, Mr. Jaffarie requested that the Minister for Home Affairs exercise his non-compellable power to substitute a Tribunal's decision with a more favourable decision (sect. 417 of the Migration Act).
40. On 20 November 2018, the request was assessed as inappropriate, due to the applicant's receipt of an adverse security assessment. The request was dealt with without referral to the Minister for Home Affairs.
41. On 19 November 2018, Mr. Jaffarie lodged a request for the Minister for Home Affairs to lift the bar and allow him to apply for a permanent protection visa (subclass 866) (sect. 48B of the Migration Act). This request is being considered in the light of the Minister's guidelines.
42. On 14 February 2019, Mr. Jaffarie's case was included in a submission to the former Assistant Minister for Home Affairs on a number of cases involving long-term detention. The submission provided the former Assistant Minister an opportunity to indicate whether she was willing to consider the cases on an individual basis and to transmit them for possible intervention by the Minister for Home Affairs under section 195A of the Migration Act.
43. On 26 February 2019, the former Assistant Minister indicated that Mr. Jaffarie's case should not be referred for possible consideration under section 195A of the Migration Act.
44. In relation to Mr. Jaffarie's physical and psychological well-being, the Government reports that his health and welfare are continually managed and monitored by International Health and Medical Services. Mr. Jaffarie has received extensive and ongoing care and advice from clinicians in response to reported incidents. He has had access to a range of physical and psychological health-care services and made use of them as required.
45. The Government turns to the source's assertion that Mr. Jaffarie fears persecution by the Taliban or ISIL as he is a Shia Hazara man and that Mr. Jaffarie also fears being harmed by what he perceives to be Western influences from living in Australia and by the release of personal data on the website of the Department of Home Affairs. While acknowledging the subjective fear of persecution that Mr. Jaffarie may continue to have, the Government notes that the person who refused to grant Mr. Jaffarie a permanent protection visa on 15 June 2015 had found no indication that the Taliban would actively pursue Mr. Jaffarie for seeking asylum in Australia.

46. The Government adds that in February 2014 a routine report released on the website of the Department of Home Affairs unintentionally enabled access to some personal information about people who were in immigration detention in Australia on 31 January 2014. That information was accessible online for only a short period of time before it was removed from the website. When reviewing Mr. Jaffarie's application for a permanent protection visa on 22 September 2016, the Administrative Appeals Tribunal found that there was no evidence to suggest that any information related to Mr. Jaffarie's claims for protection had been published or accessed by anyone. Furthermore, even if the Tribunal were to accept that the publication of Mr. Jaffarie's personal information had somehow identified him as having sought protection in Australia, it was not satisfied that returned asylum seekers were targeted by the Taliban for seeking protection in Australia.

47. In reference to the source's claim that Mr. Jaffarie's adverse security assessment stands despite the Inspector-General of Intelligence and Security having written to the Director General of Security, the Government recalls that, as previously noted, the courts have upheld the assessment of the Australian Security Intelligence Organisation. The role of the Inspector-General is to assist Ministers in overseeing and reviewing the legality and propriety of the activities of the Australian intelligence agencies, the effectiveness and appropriateness of the activities of those agencies relating to the legality or propriety of their activities and to ensure that these activities are conducted in a way that is consistent with human rights. While the outcomes of many inquiries appear in annual reports, the inquiries of the Inspector-General are conducted in private and much of the information involved remains classified and cannot be released publicly.

48. The Government recalls the legal and policy framework and refers to section 501 of the Migration Act. It also recalls that its universal visa system requires all non-citizens to hold a valid visa in order to enter or remain in Australia. The Australian mandatory detention framework provides that unlawful non-citizens must be detained until they are removed from Australia (as soon as reasonably practicable) or until they are granted a visa. Individuals who have exhausted all avenues to remain in Australia must depart. Unlawful non-citizens who do not depart voluntarily may be detained and may be involuntarily removed from Australia, in which case removal would not breach the country's non-refoulement obligations.

49. The Government's position is that the immigration detention of an individual on the basis that they are an unlawful non-citizen is not arbitrary per se under international law. However, continuing detention may become arbitrary after a certain period of time if it continues without proper justification. In instances of continuing detention, the determining factor is not the length of the detention but whether the grounds for the detention are justifiable. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. As Mr. Jaffarie has been issued an adverse security assessment, he is not eligible for community placement under current Government policy. He has been assessed to be a risk to the Australian community and so remains in detention.

50. The Government also recalls that detention imposed while the Government is assessing an unlawful non-citizen under the Migration Act is administrative in nature, not punitive. The Government is committed to ensuring that all people in immigration detention are treated in a manner consistent with the international legal obligations of Australia.

51. With regard to review mechanisms, the Government recalls section 486N of the Migration Act, pursuant to which the Commonwealth Ombudsman is provided with a report relating to the circumstances of every person who has been in administrative immigration detention for more than two years, and every six months thereafter. The Ombudsman is required to provide the Minister for Home Affairs with an assessment of the appropriateness of the arrangements for the detention of such persons. On 19 June 2019, a (72-month) report was submitted by the Department of Home Affairs to the Commonwealth Ombudsman in relation to Mr. Jaffarie's ongoing detention.

52. The Government adds that it holds regular consultations with stakeholders to review Mr. Jaffarie's placement. Mr. Jaffarie's detention has been reviewed 69 times by the Case Management and Detention Review Committee of the Department of Home Affairs. The most recent review was conducted on 14 August 2019. Detention review managers ensure

the lawfulness and reasonableness of each detention by reviewing all detention-related decisions. Detention review committees meet monthly to review all cases in detention to ensure the ongoing lawfulness and reasonableness of the decision to detain a person, taking into account all the circumstances of the case, including adherence to legal obligations. These periodic reviews take into account any changes in the detainee's circumstances that may have an impact on immigration pathways, including those related to return to the country of origin and removal, to ensure the continued lawfulness of detention and that alternative placement options have been duly considered. Each review to date has found that Mr. Jaffarie's detention continues to be appropriate and his current placement to be suitable.

53. Therefore, the Government argues that persons in immigration detention can seek judicial review of the lawfulness of their detention before the Federal Court or the High Court of Australia. The Government refers to paragraph 75 (v) of the Constitution of Australia and the Judiciary Act 1901 (Commonwealth), noting that these provisions constitute the legal mechanism through which non-citizens may challenge the lawfulness of their detention.

54. The Government disagrees with the source's claim that, as a result of the decision of the High Court in *Al-Kateb v. Godwin*, non-citizens have no means of challenging administrative detention decisions. In *Al-Kateb v. Godwin* the High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they are removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The right to seek a remedy against an officer of the Commonwealth under the Constitution is still available to non-citizens. Therefore, the Government argues that the decision in *Al-Kateb v. Godwin* 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 actions such as habeas corpus.

55. Moreover, the Government argues that Mr. Jaffarie is detained, as required by section 189 of the Migration Act, because he is an unlawful non-citizen. He is being detained as a result of the implementation of the domestic laws of Australia, not as a consequence of seeking protection under the country's international obligations, as the source claims by stating that Mr. Jaffarie has been deprived of his liberty as a result of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights.

56. With regard to the source's claim that Mr. Jaffarie has been deprived of his liberty in contravention of article 26 of the Covenant, the Government submits that the object of the Migration Act is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. In that sense, the purpose of the Migration Act is to differentiate on the basis of nationality between non-citizens and citizens. The Government refers to the Human Rights Committee's general comment No. 15 (1986) on the position of aliens under the Covenant, arguing that it is a matter for the Government to determine who may enter its territory and under what conditions. Thus, to the extent that citizens and non-citizens are treated differently, in that Australian citizens are not subject to immigration detention, the Government's view is that such differential treatment is based on reasonable and objective criteria for a legitimate purpose and therefore does not amount to a violation of the Covenant.

*Additional comments from the source*

57. The reply of the Government was transmitted to the source on 18 September 2019. The source submitted additional comments on 20 September 2019.

58. The source contests the Government's claim that Mr. Jaffarie is perpetuating his own detention and that his request under section 48B of the Migration Act to the Minister for Home Affairs is preventing his removal from Australia. To the contrary, such a request does not prevent the Government from removing Mr. Jaffarie to Afghanistan. Mr. Jaffarie made the request under section 48B because the circumstances in Afghanistan had changed in such a way as to allow the possibility that his refugee status would be recognized if his application for a permanent protection visa were to be assessed now. The source argues that

the statutory duty of the Department of Home Affairs under the Migration Act to remove Mr. Jaffarie remains regardless of the involvement of Mr. Jaffarie.

59. The source states that the Government sets out the inflexible application of policies and guidelines relating to persons subject to an adverse security assessment. According to the source, no person with such an assessment has been referred for or released as a result of a ministerial intervention regarding the granting of a visa or a community detention placement.

60. With regard to the Government's statement that "detention in an immigration detention centre is a last resort for the management of unlawful non-citizens", the source reports that, quite to the contrary, detention is the first resort for unlawful non-citizens: under section 189 of the Migration Act, unlawful non-citizens must be detained.

61. Furthermore, the source notes that the various situations in which detainees can challenge their detention, as described by the Government, do not currently apply to Mr. Jaffarie, to whom those options are not available. The source underscores that Mr. Jaffarie's detention is currently lawful under Australian law and his arbitrary open-ended detention is authorized by Australian law (both legislation and case law).

62. The source contests the Government's discussion on the detention review mechanisms. As previously noted, those mechanisms operate within the legal framework of Australia, which permits arbitrary detention. They also operate within a set of referral criteria that Mr. Jaffarie is extremely unlikely to meet given his adverse security assessment.

### **Discussion**

63. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in the present matter. The source has argued that the detention of Mr. Jaffarie is arbitrary without invoking any of the categories employed by the Working Group. The Government denies that the detention of Mr. Jaffarie is arbitrary.

64. The Working Group observes that it is not contested that Mr. Jaffarie entered Australia legally on a spousal visa sponsored by his wife on 15 November 2008. It is also not disputed that a security assessment on Mr. Jaffarie was carried out at the time. However, it was some five years later, on 17 June 2013, that an adverse security assessment was issued against him. The Working Group accepts that it is possible that someone who has initially passed the requisite security assessment may later fail to pass it, for reasons linked to the behaviour of the individual and to changes in circumstances.

65. In the present case, however, the result of the adverse security assessment in relation to Mr. Jaffarie on 17 June 2013 was the cancellation of his visa on 19 June 2013 and his detention as an illegal non-citizen on the same date. The Working Group observes that this is not contested by the parties, which means that the detention of Mr. Jaffarie has taken place due to his migratory status. First and foremost, it falls upon the Working Group to examine whether the detention of Mr. Jaffarie falls under category IV, in other words whether Mr. Jaffarie is being subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

66. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>5</sup> That right, which in fact constitutes a peremptory norm of international law, applies to all forms of arbitrary deprivation of liberty<sup>6</sup> and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law,

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<sup>5</sup> A/HRC/30/37, paras. 2–3.

<sup>6</sup> *Ibid.*, para. 11.

including migration detention.<sup>7</sup> Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>8</sup>

67. The Working Group underscores that, although the Government argues that the detention of Mr. Jaffarie has been reviewed some 69 times by the Case Management and Detention Review Committee, the Committee is not a judicial body as required by article 9 (4) of the Covenant.<sup>9</sup> The Working Group observes the repeated failure on behalf of the Government to explain how the reviews carried out by the Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.<sup>10</sup> The Working Group therefore finds that Mr. Jaffarie's right to challenge the legality of his detention before a judicial body, the right enshrined in article 9 (4) of the Covenant, has been violated. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.<sup>11</sup>

68. Moreover, the Working Group observes that the detention of Mr. Jaffarie appears to be indefinite. He has been in detention since 19 June 2013, a lengthy period of over six years, and the Working Group is mindful that the Government in its response has failed to give any indication as to when this detention might come to an end or indeed what steps it is taking or intends to take to bring it to an end.

69. In that connection, the Working Group addresses the argument presented by the Government that the length of detention is not a determining factor and that the continuing detention in the context of migration is lawful under international law as long as the grounds for detention are justifiable. This is a plain misinterpretation of the applicable international human rights law. The Working Group must once again underscore that the indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,<sup>12</sup> which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings must be set by legislation and that, once the period for detention set by law has expired, the detained person must be automatically released.<sup>13</sup> The Working Group therefore rejects the Government's submission that the length of detention in itself is not a determining factor and that, as long as reasons justifying detention are present, the detention may legally continue. Following the reasoning of the Government would entail accepting that individuals could be 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 that cannot be remedied, not even by the most meaningful review of detention on an ongoing basis.<sup>14</sup> As stated in paragraph 27 of its revised deliberation No. 5 on deprivation of liberty of migrants:

There may be instances when the obstacle for identifying or removal of persons in an irregular situation from the territory is not attributable to them – including non-cooperation of the consular representation of the country of origin, the principle of non-refoulement or the unavailability of means of transportation – thus rendering

<sup>7</sup> Ibid., annex, para. 47 (a).

<sup>8</sup> Ibid., annex, para. 47 (b).

<sup>9</sup> See opinions No. 20/2018, para. 61, No. 50/2018, para. 77, No. 74/2018, para. 112, No. 1/2019, para. 80, and No. 2/2019, para. 95.

<sup>10</sup> Ibid.

<sup>11</sup> *C. v. Australia; Baban et al. v. Australia* (CCPR/C/78/D/1014/2001), *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

<sup>12</sup> Revised deliberation No. 5 on deprivation of liberty of migrants (A/HRC/39/45, annex), para. 18, and opinions No. 42/2017, No. 28/2017 and No. 7/2019. See also A/HRC/13/30, para. 63.

<sup>13</sup> Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61, and opinion No. 7/2019.

<sup>14</sup> See opinions No. 1/2019 and No. 7/2019.

expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.

70. Therefore, the de facto indefinite detention of Mr. Jaffarie is contrary to the obligations Australia has undertaken under international law and article 9 of the Covenant in particular. The Working Group therefore concludes that Mr. Jaffarie has been denied the right to challenge the continued legality of his detention, in breach of article 9 of the Covenant, and that his detention is therefore arbitrary, falling under category IV.

71. Furthermore, the Working Group notes the argument presented by the source that Mr. Jaffarie, 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 the cited case, the High Court held that provisions of the Migration Act requiring the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

72. The Working Group is not convinced by the explanation provided by the Government in relation to the High Court's decision and notes that it is exactly the same explanation that the Government has repeatedly presented to the Working Group and that the Working Group has rejected on numerous occasions.<sup>15</sup> The explanation only confirms that the High Court affirmed the legality of detaining non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future.

73. However, the Working Group has repeatedly noted that the Government fails to explain how non-citizens can effectively challenge their continued detention given the decision of the High Court, which is what the Government must do in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the jurisprudence of the Human Rights Committee, which has examined the implications of the High Court's judgment in *Al-Kateb v. Godwin* and has concluded that the effect of that judgment is such that there is no effective remedy to challenge the legality of continued administrative detention.<sup>16</sup>

74. The Working Group has concurred with the views of the Human Rights Committee on this matter in the past<sup>17</sup> and continues to do so in the present case. The Working Group underscores that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Jaffarie is arbitrary, falling under category V.

#### *Migration Act 1958*

75. The Working Group observes that the present case is the latest in a number of cases that have come before the Working Group since 2017, all on the same issue, namely the mandatory immigration detention in Australia in application of the Migration Act 1958.<sup>18</sup> Under the Act, unlawful non-citizens must be detained and kept in immigration detention until they are removed from Australia or granted a visa. In addition, section 196 (3) of the Act provides that "to avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa)

<sup>15</sup> See opinions No. 21/2018, para. 79, No. 50/2018, para. 81, No. 74/2018, para. 117, No. 1/2019, para. 88, and 2/2019, para. 98.

<sup>16</sup> See *C. v. Australia; Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013) and *F.J. et al. v. Australia*, para. 9.3.

<sup>17</sup> 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 and No. 2/2019.

<sup>18</sup> *Ibid.*

or (b)) unless the non-citizen has been granted a visa". As such, providing there is some sort of process relating to the granting of a visa, or removal (even if the removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

76. The Working Group 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 and the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.<sup>19</sup> The Working Group notes that these instruments constitute international legal obligations undertaken by Australia and stresses the undoubtedly legally binding nature of the 1951 Convention and its 1967 Protocol in relation to Australia.

77. The Working Group must once again underscore that deprivation of liberty in the immigration context must be a measure of last resort and that alternatives to detention must be sought in order to meet the requirement of proportionality.<sup>20</sup> Moreover, as the Human Rights Committee has argued in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

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.

78. The provisions of the Migration Act appear to be contrary to these requirements of international law since its sections 189 (1) and 189 (3) provide for the de facto mandatory detention of all unlawful non-citizens unless they are removed from the country or granted a visa. Furthermore, the Working Group observes that the Act does not reflect the principle of exceptionality of detention in the context of migration as recognized in international law; nor does it provide for alternatives to detention to meet the requirement of proportionality.<sup>21</sup>

79. The Working Group notes the rising number of cases emanating from Australia concerning the implementation of the Migration Act that are being brought to its attention. The Working Group is concerned that in all these cases the Government has argued that the detention is lawful because it follows the stipulations of the Act. The Working Group outlines that such an argument can never be accepted as legitimate in international law. The fact that a State is following its own domestic legislation does not in itself mean that the legislation conforms with the obligations that the State has undertaken under international law. In other words, no State can legitimately avoid its obligations arising from international law by hiding behind its domestic laws and regulations.

80. The Working Group stresses that it is the duty of the Government to bring its national legislation, including the Migration Act, into line with its obligations under international law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,<sup>22</sup> the Committee on Economic, Social and Cultural Rights,<sup>23</sup> the Committee on the Elimination of All Forms of Discrimination against Women,<sup>24</sup> the Committee on the Elimination of All Forms of Racial Discrimination,<sup>25</sup> the Special Rapporteur on the human rights of migrants<sup>26</sup> and the Working Group.<sup>27</sup> The Working Group is concerned that the unison voice of these independent, international human rights

<sup>19</sup> See opinions No. 28/2017, No. 42/2017 and No. 50/2018. See also revised deliberation No. 5, para. 9.

<sup>20</sup> A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

<sup>21</sup> Ibid.

<sup>22</sup> CCPR/C/AUS/CO/6, paras. 33–38.

<sup>23</sup> E/C.12/AUS/CO/5, paras. 17–18.

<sup>24</sup> CEDAW/C/AUS/CO/8, para. 53.

<sup>25</sup> CERD/C/AUS/CO/18-20, paras. 29–33.

<sup>26</sup> A/HRC/35/25/Add.3.

<sup>27</sup> See opinions No. 50/2018, paras. 86–89, No. 74/2018, paras. 99–103, No. 1/2019, paras. 92–97 and No. 2/2019, paras. 115–117.

mechanisms would be disregarded and calls upon the Government to urgently review its legislation in the light of its obligations under international law without delay.

81. The Working Group welcomes the invitation made on 27 March 2019 by the Government for the Working Group to conduct a visit to Australia in 2020. The Working Group looks forward to this opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

### **Disposition**

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

The deprivation of liberty of Sayed Akbar Jaffarie, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories IV and V.

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

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

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

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

87. 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.

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

### **Follow-up procedure**

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

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

90. 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.

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

92. 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.<sup>28</sup>

*[Adopted on 21 November 2019]*

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<sup>28</sup> Human Rights Council resolution 42/22, paras. 3 and 7.