WGAD Submission

1. The present submission is made on behalf of the United Nations Working Group on Arbitrary Detention in response to the [call](https://www.ohchr.org/en/calls-for-input/calls-input/report-older-persons-deprived-their-liberty) by the Independent Expert on the enjoyment of all human rights by older persons for inputs to thematic report by the Independent Expert on older persons deprived of their liberty.
2. The Working Group welcomes and strongly supports the focus of the Independent Expert on older persons deprived of their liberty as through its jurisprudence it has observed numerous instances of the violations of the rights of older persons in detention.
3. From the perspective of Working Group’s mandate, the central question in relation to older persons deprived of their liberty is the meaning of the term ‘detention’. Through its mandate, the Working Group has observed that detention can take place and indeed does take place in many different contexts. Thus, for example, older persons can be deprived of their liberty in the criminal justice context (for example, in prisons, pre-trial detention facilities and police stations) as well as during the course of migration proceedings or indeed in health and social care contexts.
4. The challenge arises in some States which adopt a narrow interpretation of the term ‘detention’ which has lead the Working Group to argue that each instance of alleged deprivation of liberty must be examined in the light of the individual circumstances of that case.[[1]](#footnote-1) Consequently, deprivation of liberty is not only a question of legal definition, but also of fact and if an individual is not at liberty to leave a place or facility, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected.[[2]](#footnote-2)
5. To determine if a particular situation amounts to derivation of liberty, the Working Group has stated:

“when presented with a dispute of whether a deprivation of liberty has occurred, it [WGAD] must examine the specific situation as a whole and account must be taken of a wide range of factors including the type, duration, effects and manner of implementation of the measures imposed and not just of the way the national legislation describes it. Therefore when making this determination the Working Group considers, inter alia, whether the person has freely consented to the confinement measures, what are the limitations on the person’s physical movements, on receiving visits and having various other means of communication with the outside world, the modalities of the imposed daily regime and the level of security around the place.”[[3]](#footnote-3)

1. Turning to the question of free consent of the person to the confinement measure, the Working Group examined has warned against abuses of this element arguing that any claim that an individual is at a certain place at his or her own free will must indeed be the case for the situation not to amount to deprivation of liberty.[[4]](#footnote-4) In its Opinion 22/2020, when addressing the submission of the Government of Hungary that asylum seekers who are held in the transit zone facilities on Serbian-Hungarian border are there at their free will and therefore not detained as they are free to leave, towards Serbia, at any time, the Working Group concluded that it “cannot accept that an individual who must either agree to remain in the transit zones or lose the possibility of lodging an asylum application could be described as freely consenting to stay in the transit zones”.[[5]](#footnote-5)
2. Further, in the same Opinion, when assessing whether migrants held in so-called transit zones on the Serbian-Hungarian border are in fact detained, the Working Group recalled its actual visit to the facility during the 2018 country visit to Hungary[[6]](#footnote-6) and highlighted the highly restrictive regime, with large numbers of guards, preventing individuals from moving freely within the facility or receiving visitors from outside as well as the physical structures of the facilities themselves and their ‘carceral’ character. These factors lead the Working Group to conclude that the transit zones were indeed places of detention.[[7]](#footnote-7)
3. In contrast, during its 2019 visit to Bhutan the Working Group noted the following:

“The Working Group also visited the Gangzhay Kepiling Centre in Limukha, a facility run by the Zhung Dratshang (Central Monastic Body), which provides residence for monks who have retired from active service. The Working Group appreciated being able to visit the facility and to speak with both those in charge and the residents, which allowed the Working Group to conclude that it was not a detention facility.”[[8]](#footnote-8)

1. The essential factor therefore in the view of the Working Group is the ability to arrive at an independent assessment of whether a particular place is one of deprivation of liberty since “[S]uch an assessment cannot rest solely upon the assessment of the local authorities as to whether the place is one of deprivation of liberty”.[[9]](#footnote-9)
2. Consequently during its country visits the Working Group always seeks to visit places where older persons are or may be deprived of their liberty in the wide variety of contexts to assess whether these situations amount to detention. It is paramount that all situations of deprivation of liberty are subjected to effective safeguards against arbitrary deprivation of liberty.
1. The Working Group on Arbitrary Detention. Deliberation No. 1 on House Arrest, E/CN.4/1993/24, 12 January 1993. [↑](#footnote-ref-1)
2. See A/HRC/36/37, para. 56. See also A/HRC/WGAD/2020/22 at para 62. [↑](#footnote-ref-2)
3. A/HRC/WGAD/2020/22 at para 65. [↑](#footnote-ref-3)
4. A/HRC/36/37 at para 51. [↑](#footnote-ref-4)
5. A/HRC/WGAD/2020/22 at para 69. [↑](#footnote-ref-5)
6. A/HRC/42/39 at paras 53-58. [↑](#footnote-ref-6)
7. A/HRC/WGAD/2020/22 at paras 67-70. [↑](#footnote-ref-7)
8. A/HRC/42/39/Add.1 at para 3. [↑](#footnote-ref-8)
9. A/HRC/42/39 at para 54. [↑](#footnote-ref-9)