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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022

Opinion No. 32/2022 concerning Ahmed Sayahi (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,[1] on 15 December 2021 the Working Group transmitted to the Government of Australia a communication concerning Ahmed Sayahi. The Government replied to the communication on 16 March 2022. 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.

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Ahmed Sayahi is an Iranian national, born in 1979 and currently detained at the North West Point Immigration Detention Centre, Christmas Island, Australia.

5. According to the source, Mr. Sayahi came to Australia seeking asylum from persecution in the Islamic Republic of Iran. Mr. Sayahi sought recognition of his refugee status due to his ethnic group and fears of being seriously harmed or killed by Iranian authorities because of his anti-government activities.

6. The source notes that Mr. Sayahi is from Ahvaz, Khuzestan, Islamic Republic of Iran, and is of Arab ethnicity. Reportedly, Mr. Sayahi's culture has been suppressed by the Government of the Islamic Republic of Iran.

7. The source explains that Mr. Sayahi was a satellite installer in private homes and installed equipment to receive unauthorized access to channels. In 2007, during demonstrations, the Government of the Islamic Republic of Iran reportedly attempted to block transmissions by some local and foreign media organizations. Mr. Sayahi was able to find ways of getting around this block. Allegedly, he also cooperated with foreign media organizations and installed channels not approved by the Government. In doing so, Mr. Sayahi believed that he would be helping his suppressed community by allowing them to express their culture and access unrestricted news.

8. According to the source, Mr. Sayahi was arrested by Iranian authorities because of this work. Reportedly, he was held in a small room for a week and tortured, including being beaten and abused, and interrogated. The source explains that he was released after his father provided a security bond and surety on their house. Thereafter, Mr. Sayahi was ordered to appear before a court but, fearing for his safety, he fled the Islamic Republic of Iran legally through Turkey, then Europe, to the United Kingdom of Great Britain and Northern Ireland, where he applied for asylum. The source reports that Mr. Sayahi was refused asylum there, as he had first entered Europe through Italy. After being deported back to Italy, Mr. Sayahi reportedly returned to the Islamic Republic of Iran, where he ran his satellite business again. However, the source notes that his activities were discovered and Mr. Sayahi was again threatened by the Iranian authorities. He allegedly received another court summons and, fearing for his safety, fled the country on 4 July 2012.

a. Arrest and detention

9. The source reports that Mr. Sayahi arrived on Christmas Island by boat in July 2012. Reportedly, he was immediately detained there by the Department of Immigration and Citizenship (subsequently subsumed into the Department of Home Affairs, and hereinafter referred to as "the Department"). The source states that it is likely that a warrant or decision by a public authority was shown to Mr. Sayahi, but no copy is currently available. On 24 August, Mr. Sayahi was transferred to the Curtin Immigration Detention Centre and was invited, on 31 October, to apply for a protection visa (class XA), following a ministerial intervention request and a lift on the bar on visas. An application for a bridging visa E was reportedly commenced on 14 November and granted on 22 November. The source notes that, on the same day, Mr. Sayahi was released into the community.

10. Reportedly, on 1 May 2013, a new ministerial intervention request was commenced after Mr. Sayahi's bridging visa E had expired. On 6 May, Mr. Sayahi was reportedly detained and released after a new bridging visa E was granted the same day. The source reports that, on 24 October, Mr. Sayahi attended a protection (class XA) visa interview with the Department, which denied him a protection visa on 17 February 2014. On 19 February, Mr. Sayahi reportedly filed an appeal to the Refugee Review Tribunal, which, on 7 January 2016, upheld the Department's decision.

11. According to the source, on 2 July 2014, Mr. Sayahi's bridging visa E was cancelled by the Department. He was reportedly provided with written documentation that stated that his visa had been cancelled on the grounds that he was charged with an offence. He was detained at the Parklea Correctional Centre. The source notes that, on 23 August 2016, the

Office of the Commonwealth Director of Public Prosecutions decided not to proceed with charges against Mr. Sayahi. His case was dismissed and he was released from criminal detention. The Department reportedly transferred Mr. Sayahi from the Parklea Correctional Centre and immediately placed him in administrative detention at the Villawood Immigration Detention Centre. On 5 September 2017, he was reportedly transferred to the immigration detention centre on Christmas Island.

12. According to the source, on 16 November 2017, Mr. Sayahi applied for a new bridging visa E and received notification that his application was invalid due to his previous bridging visa E being cancelled. On 4 December, a complaint was lodged with the Australian Human Rights Commission regarding Mr. Sayahi's ongoing detention. Reportedly, the complaint was transferred to the legal section of the Commission for reporting by its president. The source adds that, in late 2017, the Department generated an internal ministerial intervention request for a residence determination, which was rejected on the basis that Mr. Sayahi did not meet the guidelines for a submission to the Minister under section 195A of the Migration Act 1958.

13. The source notes that Mr. Sayahi has no further charges or other matters pending against him and has not been convicted of any offence. Yet, according to the source, Mr. Sayahi has been held in administrative detention since his case was dismissed and the charges against him were withdrawn.

14. The source reports that Mr. Sayahi was arrested under the Migration Act 1958, which specifically provides in sections 189 (1), 196 (1) and 196 (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. In particular, section 196 (3) provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

15. The source recalls that, under section 501 of the Migration Act 1958, the Minister may cancel a person's visa if he or she believes that the person does not meet the character requirements set out in that section. The source notes that the charges against Mr. Sayahi were dismissed on 23 August 2016. Despite this, the Minister deemed that those charges prevented Mr. Sayahi from meeting the character requirements and rejected his application of 16 November 2017 for a bridging visa E. According to the source, the Federal Circuit Court of Australia held that it is lawful to cancel a bridging visa E and refuse a right to apply to the Minister for a new bridging visa for a person who has been charged with a criminal offence, even if that person was found not guilty. The source adds that Mr. Sayahi is not eligible to apply for any other type of visa.

b. Legal analysis

16. The source submits that Mr. Sayahi's detention is arbitrary under categories I, II, III, IV and V of the Working Group.

i. Category I

17. The source contends that Australian law provides that a non-citizen can only be released from administrative detention if he or she is removed from Australia or granted a visa. The source recalls that the Department and the Minister refused to grant Mr. Sayahi a visa.

18. Mr. Sayahi's bridging visa E was reportedly cancelled by the Department due to character concerns, namely, that he was charged with an offence, even though all charges against Mr. Sayahi were dismissed on 23 August 2016.

19. The source notes that section 196 (3) of the Act specifically provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa. Furthermore, the source recalls the decision of the Federal Circuit Court of Australia that it is lawful to cancel a bridging visa E and refuse a right to apply to the Minister for a new bridging visa, where the applicant has been charged with a criminal offence, even if that person is found not guilty. The source also points to the decision of the High Court of

Australia that the mandatory detention of non-citizens is not contrary to the Australian Constitution.[2]

20. The source submits that Mr. Sayahi is not eligible to apply for any type of visa other than the bridging visa E. Due to the above-mentioned national laws and jurisprudence, the source argues that Mr. Sayahi lacks any chance of his detention being subject to real judicial review. In this regard, the source also recalls that the Human Rights Committee has held that there is no effective remedy for people subject to mandatory detention in Australia.[3]

21. For these reasons, the source contends that Mr. Sayahi's detention is arbitrary under category I.

ii. Category II

22. The source argues that Mr. Sayahi was deprived of liberty as a result of the exercise of his rights guaranteed under article 14 of the Universal Declaration of Human Rights.

23. Furthermore, the source contends that Mr. Sayahi was deprived of liberty in violation of article 26 of the International Covenant on Civil and Political Rights. Allegedly, as a non-citizen of Australia, Mr. Sayahi is subject to administrative detention, while Australian citizens who have had their charges dismissed, as did Mr. Sayahi, are no longer subject to administrative detention once such dismissal occurs.

24. For these reasons, the source submits that Mr. Sayahi's detention is arbitrary under category II.

iii. Category III

25. The source recalls the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, according to which detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.

26. In this regard, the source notes that Mr. Sayahi's application on 16 November 2017 for a bridging visa E was deemed invalid by the Minister for Immigration and Border Protection due to the previous charges against him. The source also notes that a ministerial intervention request was generated at the end of 2017 and was found not to meet guidelines.

27. The source affirms that Mr. Sayahi cannot return to the Islamic Republic of Iran and, as such, faces indefinite detention. The source further submits that there is no evidence that the Department has reassessed Mr. Sayahi's detention in any meaningful manner as it extends in time.

28. For these reasons, the source submits that Mr. Sayahi's detention is arbitrary under category III.

iv. Category IV

29. The source argues that Mr. Sayahi is an asylum seeker who is subject to prolonged administrative custody and has not been guaranteed the possibility of administrative or judicial review or remedy.

30. In this regard, the source recalls that sections 189 (1), 196 (1) and 196 (3) of the Migration Act 1958 provide that unlawful non-citizens must be detained and kept in detention until they are either removed or deported from Australia or granted a visa.

31. According to the source, given that Mr. Sayahi's application for a bridging visa E was deemed invalid and a recent ministerial intervention request was found not to meet the guidelines, it is unlikely that he would be granted either a bridging visa or community detention placement to enable him to reside in the community. The source reiterates that

[2] High Court of Australia, *Al-Kateb v. Godwin*, (2004) 219 CLR 562, Order, 6 August 2004.
[3] See Human Rights Committee, *C. v. Australia* (CCPR/C/76/D/900/1999).

section 196 (3) of the Migration Act 1958 specifically provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

32. Considering the High Court's holding that the mandatory detention of non-citizens is constitutional and the Human Rights Committee's finding that persons subject to mandatory detention in Australia lack any effective remedy, the source concludes that Mr. Sayahi lacks any chance of his detention being subject to real administrative or judicial review or remedy.

33. For these reasons, the source submits that Mr. Sayahi's detention is arbitrary under category IV.

v. Category V

34. The source contends that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. In this regard, the source recalls the decision of the High Court of Australia in *Al-Kateb v. Godwin* to the effect that detention of non-citizens pursuant to section 189 of the Migration Act 1958, inter alia, does not contravene the Constitution. According to the source, the effective result of this holding is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

35. For these reasons, the source submits that Mr. Sayahi's detention is arbitrary under category V.

Response from the Government

36. On 15 December 2021 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 14 February 2022, detailed information about the current situation of Mr. Sayahi and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Australia under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure his physical and mental integrity.

37. On 22 December 2021, the Government requested an extension in accordance with paragraph 16 of the Working Group's methods of work, which was granted with a new deadline of 16 March 2022. On 16 March, the Government submitted its reply, in which it explains that Mr. Sayahi is an Iranian national who entered Australia by sea without a visa on 26 July 2012, and thereby became an unauthorized maritime arrival as defined in section 5AA of the Migration Act 1958. He was detained under section 189 of the Act and transferred to the immigration detention centre on Christmas Island.

38. According to the Government, Mr. Sayahi is currently held in immigration detention at the Yongah Hill Immigration Detention Centre based on an assessment of the risk he poses to the Australian community (due to criminal behaviour, which resulted in the cancellation of his bridging visa). He requires ministerial intervention to be granted a bridging visa E (subclass 050).

39. The Government explains that, as an unauthorized maritime arrival, Mr. Sayahi is prevented by section 46A of the Migration Act 1958 from making a valid visa application unless the Minister decides to intervene by exercising public interest powers under the Act. In accordance with government policy, as an unauthorized maritime arrival, Mr. Sayahi will not be settled permanently in Australia.

40. Reportedly, the Department of Home Affairs has found Mr. Sayahi not to engage the protection obligations of Australia under the Migration Act 1958. The Administrative Appeals Tribunal (formerly the Refugee Review Tribunal), a body independent of the Department, reportedly affirmed this decision.

41. According to the Government, Mr. Sayahi has no ongoing matters before the Department and is on a removal pathway. He does not have valid travel documents and is unwilling to voluntarily return to the Islamic Republic of Iran. The Government notes that Iranian authorities generally do not facilitate the involuntary removal of Iranian nationals. Therefore, the Department is unable to action his involuntary removal at this time.

42. The Government reports that, on 24 August 2012, Mr. Sayahi was transferred from the immigration detention centre on Christmas Island to the Curtin Immigration Detention Centre.

43. The Government explains that, on 22 November 2012, the Minister intervened under section 46A of the Migration Act 1958 to allow Mr. Sayahi to make a valid application for a protection visa (subclass 866). The same day, the Minister intervened under section 195A of the Act and granted Mr. Sayahi a bridging visa E. On 3 January 2013, Mr. Sayahi reportedly lodged a valid application for a protection visa.

44. On 6 May 2013, the Minister intervened under section 195A of the Migration Act 1958 and granted Mr. Sayahi a bridging visa E. However, on 2 July 2014, a representative of the Minister cancelled Mr. Sayahi's bridging visa E under paragraph 116 (1) (g) of the Act, due to criminal charges brought against Mr. Sayahi.

45. Reportedly, on 17 February 2014, Mr. Sayahi was found not to engage the protection obligations of Australia and his application for a protection visa was denied. On 19 February, Mr. Sayahi requested that the refusal be reviewed by the Refugee Review Tribunal. The Government notes that, on 15 December 2014, Mr. Sayahi's protection visa application was deemed to be an application for a temporary protection visa (subclass 785) by operation of law.

46. On 2 July 2014, Mr. Sayahi was allegedly charged with four counts of aggravated sexual assault under section 61J (1) of the New South Wales Crimes Act 1900, three counts of aggravated indecent assault under section 61M (1) of the same Act and one count of assault with an act of indecency, also under the Act.

47. According to the Government, on 8 January 2016, the Administrative Appeals Tribunal affirmed the refusal decision on Mr. Sayahi's application for a temporary protection visa.

48. The Government notes that, on 14 July 2016, Mr. Sayahi was issued with an interim apprehended violence order under the New South Wales Crimes (Domestic and Personal Violence) Act 2007, which included three mandatory and three additional orders.

49. Reportedly, on 23 August 2016, the New South Wales Director of Public Prosecutions decided not to pursue the charges against Mr. Sayahi, who was released from criminal custody. On the same day, Mr. Sayahi was detained under subsection 189 (1) of the Migration Act 1958 and transferred to the Villawood Immigration Detention Centre.

50. According to the Government, on 21 March 2017, Mr. Sayahi was issued a final apprehended personal violence order under the New South Wales Crimes (Domestic and Personal Violence) Act 2007, which included orders regarding behaviour, contact and limitations as to where Mr. Sayahi could go.

51. The Government notes that, on 12 April 2017, the Department received advice in relation to the decision of the New South Wales Director of Public Prosecutions not to pursue the charges against Mr. Sayahi. While there was enough evidence for a conviction, the Director of Public Prosecutions decided the victim would suffer further mental trauma and stress from giving such evidence in court if the charges were pursued.

52. On 4 December 2017, the Department reportedly received correspondence from the Australian Human Rights Commission stating that Mr. Sayahi had filed a complaint with the Commission, claiming a breach of human rights under the Covenant. Mr. Sayahi stated that he was being held in immigration detention on Christmas Island following the cancellation of his visa due to criminal charges being brought against him. However, on 2 October 2018, the Commission advised the Department that, considering all relevant circumstances, it had decided not to pursue the complaint with no further investigation warranted.

53. According to the Government, on 16 November 2017 and 6 June 2019, Mr. Sayahi applied for a bridging visa E. These applications were deemed invalid under item 1305 (3) (g) of schedule 1 of the Migration Regulations 1994, which requires an applicant not to have previously held a visa that was cancelled.

54. On 19 January 2018, an apprehended personal violence order was served on Mr. Sayahi, preventing him from any form of contact with the victim whom he had been initially charged with assaulting on 2 July 2014.

55. On 21 February 2018, 15 November 2018, 30 December 2019 and most recently on 24 June 2021, the Department reportedly assessed that Mr. Sayahi did not meet the guidelines for referral to the Minister for ministerial intervention under sections 195A and 197AB of the Migration Act 1958.

56. The Government reports that, on 17 October 2018, the Department designated Mr. Sayahi for involuntary removal action.

57. On 21 October 2019, in accordance with section 486N of the Migration Act 1958, the Department reportedly gave a report to the Commonwealth Ombudsman relating to the circumstances of Mr. Sayahi's detention.

58. The Government notes that, on 31 August 2020, the Department received a complaint from the Australian Human Rights Commission on behalf of Mr. Sayahi, in which the latter alleged a breach of his human rights. The Department responded on 22 October.

59. Reportedly, on 2 March 2021, Mr. Sayahi brought proceedings against the Commonwealth in the Federal Court of Australia, claiming that he had been unlawfully detained, and seeking damages and an order that he be released from immigration detention. The matter was part of a cohort of matters affected by the decision of 2021 of the High Court of Australia in *Commonwealth v. AJL20.*[4] Following the decision, both parties reportedly agreed to discontinue the matter.

60. According to the Government, Mr. Sayahi does not have valid travel documents and is unwilling to voluntarily return to the Islamic Republic of Iran. Iranian authorities generally do not facilitate the involuntary removal of Iranian nationals and the Department is therefore unable to action his involuntary removal at this time. The Government notes that advice is being sought on whether the Department of Foreign Affairs and Trade could issue a certificate of identity to facilitate Mr. Sayahi's international travel and entry into the Islamic Republic of Iran upon arrival. The matter is reportedly ongoing.

61. The Government explains that, unless the Minister decides to intervene by exercising public interest powers under the Migration Act 1958, sections 46A and 48A of the Act prevent Mr. Sayahi from making a valid visa application or a subsequent protection visa application in Australia. The Government notes that it is open to Mr. Sayahi to request removal from Australia, as he does not engage the protection obligations of Australia and has no immigration pathway options available to him onshore.

62. Turning to the issue of Mr. Sayahi's health, the Government explains that the Department continues to prioritize the health and safety of all persons in immigration detention. Health examinations are reportedly routinely conducted by the contracted health services provider of the Department, namely, International Health and Medical Services, to monitor detainees' health and welfare. Psychological consultations are also undertaken as necessary to establish and monitor the mental health of detainees. The Government adds that detainees have access to external scrutiny bodies, mandated to oversee the operations of immigration detention facilities.

63. Allegedly, International Health and Medical Services advised that Mr. Sayahi attend a review with a psychiatrist in August 2019 and the latter noted that Mr. Sayahi suffered from detention fatigue/stress. According to the Government, Mr. Sayahi continues to decline medication or counselling and has no health conditions that cannot be cared for in the detention environment.

64. The Government reports that Mr. Sayahi has been diagnosed with an intradermal nevus (classic mole) and has a history of suffering torture and trauma and anxiety. Reportedly, Mr. Sayahi did not present to International Health and Medical Services any concerns regarding these health issues in the six months prior to 9 September 2021.

[4] [2021] HCA 21, Order, 23 June 2021.

65. Turning to the applicable legal framework, the Government explains that the universal visa system of Australia requires all non-citizens to hold a valid visa to enter and/or remain in Australia. Under section 189 of the Migration Act 1958, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Section 196 of the Act provides that an unlawful non-citizen must be kept in immigration detention until he or she is either removed from Australia or granted a visa.

66. 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, under section 197AB of the Act, the Minister has the power to make a residence determination in respect of a person in immigration detention, allowing him or her to reside in the community at a specified place and under specified conditions, if the Minister considers it in the public interest. The Government notes that what is in the public interest is a matter for the Minister to decide and that these powers are non-delegable and non-compellable. Accordingly, the Minister is under no obligation to exercise or to consider exercising these powers in a case.

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

68. Persons in Australia who make a valid application for a protection visa will have their claims assessed by the Government of Australia. The Government alleges that, through the State's domestic legislation, namely the Migration Act 1958, and its policies and practices, it implements the non-refoulement obligations of Australia under the Convention relating to the Status of Refugees and the 1967 Protocol thereto; the Covenant and the Second Optional Protocol thereto, aiming at the abolition of the death penalty; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

69. The Government's position is that the immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary under international law if it is reasonable, necessary and proportionate in the light of the particular circumstances of the individual. 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. Under the Migration Act 1958, detention is not limited by a set time frame but is dependent on a number of factors based on an individual's circumstances, including identity determination, developments in country information, health, character or security matters. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. According to the Government, Mr. Sayahi remains in immigration detention, in accordance with Australian law, because he is an unlawful non-citizen, as he does not hold a valid visa and based on his individual circumstances. As a result, immigration detention is reportedly considered to be the most appropriate form of detention.

70. The Government argues that immigration detention is administrative in nature and not for punitive purposes, and that it is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the legal obligations of Australia. According to the Government, the ongoing detention of Mr. Sayahi is justifiable and not arbitrary, and is consistent with the Covenant, as the Department continues to engage with the Iranian authorities in relation to progressing involuntary removals.

71. In relation to the available review mechanisms, the Government notes that the Secretary of 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 Department's section 486N reports, the Commonwealth Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Commonwealth Ombudsman may make recommendations to the Minister or the Department regarding the circumstances of the individual's detention, including his or her detention

placement. The Government submits that the Department has reported to the Commonwealth Ombudsman regarding Mr. Sayahi on eight occasions, most recently on 5 November 2021.

72. The Government explains that national laws enable a person in immigration detention to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court. Paragraph 75 (v) of the Australian 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. Similarly, subsection 39B (1) of the Judiciary Act 1903 grants the Federal Court the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution.

73. The Government challenges the source's interpretation of the effect of the decision of the High Court in *Al-Kateb v. Godwin*. The Government explains that the High Court held that provisions of the Migration Act 1958 requiring the detention of non-citizens until they were removed or granted a visa, even if removal was not reasonably practicable in the foreseeable future, were lawful. The Government therefore submits that the High Court's decision does not alter a non-citizen's ability to challenge the lawfulness of his or her detention under Australian law and adds that non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus.

74. Furthermore, the Government submits that Mr. Sayahi 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. In this regard, the Government notes that the Universal Declaration of Human Rights does not create legally binding obligations. The Government also specifies that neither seeking asylum nor entering Australia unlawfully constitutes a criminal offence under Australian domestic law. Reportedly, Mr. Sayahi's claims for protection were assessed against the protection visa criteria in the Act, and the Department, as well as the Administrative Appeals Tribunal, found that Mr. Sayahi did not engage the protection obligations of Australia.

75. The Government recalls that article 26 of the Covenant provides that all people are entitled to equal protection under the law without any discrimination. The Government notes that the object of the Migration Act 1958 is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In that sense, the purpose of the Act is to differentiate, on the basis of nationality, between non-citizens and citizens. The Government underlines that the Human Rights Committee has noted the following:

> 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 treatments and respect for family life arise. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment.[5]

76. Accordingly, the Government submits that it is a matter for it 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.

77. The Government submits that, to the extent that there is differential treatment of citizens and non-citizens in that Australian citizens are not subject to immigration detention, this differential treatment is not discriminatory and is consistent with article 26 of the Covenant because it is aimed at achieving a purpose that is legitimate, based on reasonable and objective criteria, and that is proportionate to the aim to be achieved.

78. The Government further submits that the differential treatment in the Migration Act 1958 of Australian citizens and non-citizens is for the legitimate aim of ensuring the integrity of the migration programme of Australia, assessing the security, identity and health of unlawful non-citizens and protecting the Australian community. The Government argues that

[5] Human Rights Committee, general comment No. 15 (1986), para. 5.

this is consistent with articles 12 and 13 of the Covenant. Furthermore, the differentiation is allegedly reasonable because it is consistent with those aims and no more restrictive than required. The Government therefore submits that any differential treatment of citizens and non-citizens is based on reasonable and objective criteria for a legitimate purpose and does not amount to prohibited discrimination under the Covenant.

79. The Government contends that, as a party to the core international human rights treaties, Australia takes steps to respect, protect, promote and fulfil the right to non-discrimination. However, equality and non-discrimination should not be understood simplistically as requiring identical treatment of all persons in all circumstances. Furthermore, under international human rights law, not all differences in treatment constitute discrimination. The Government therefore submits that the treatment of Mr. Sayahi amounts to permissible legitimate differential treatment, consistent with the obligations of Australia under the Covenant.

Further comments from the source

80. On 16 March 2022, the Government's reply was sent to the source for further comments, which the source submitted on 24 March. In its comments, the source dismisses the reply of the Government and reiterates the original submission that Mr. Sayahi's detention is arbitrary under international law.

Discussion

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

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

Category I

83. The Working Group observes that the present case is the latest in the long line of cases that it has been asked to consider in recent years in relation to Australia. This case, which follows the same pattern as those that preceded it, is the nineteenth case since 2017 concerning the same issue, namely mandatory immigration detention in Australia in accordance with the Migration Act 1958.[7] The Working Group once again reiterates its views on the Act.[8]

84. As in each of those previous instances, the Working Group reiterates its alarm at the rising number of cases emanating from Australia concerning the implementation of the Migration Act 1958 that are being brought to its attention. The Working Group is equally alarmed that in all these cases the Government has argued that the detention is lawful purely because it follows the stipulations of the Act.

85. The Working Group once again wishes to emphasize that such arguments can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that the State has undertaken. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations. To accept otherwise would be to make a mockery of international human rights law.

86. The Working Group wishes to emphasize that it is the duty of the Government of Australia to bring its national legislation, including the Migration Act 1958, into line with its

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

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

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

obligations under international human rights law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies, including the Human Rights Committee,[9] the Committee on Economic, Social and Cultural Rights, [10] the Committee on the Elimination of Discrimination against Women, [11] the Committee on the Elimination of Racial Discrimination, [12] the Special Rapporteur on the human rights of migrants[13] and the Working Group.[14] The Working Group is concerned that the unison voice of so many independent, international human rights mechanisms should be disregarded, and it calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law, without delay.

87. 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 to its obligations under international human rights law that the Migration Act 1958 poses, and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. Sayahi under the said legislation is arbitrary under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it, as it violates article 9 (1) of the Covenant. Domestic law that violates international human rights law and that has been brought to the attention of the Government on so many occasions by international human rights mechanisms cannot be accepted as a valid legal basis for detention, especially noting the findings of the Working Group under categories II and V below.

Category II

88. First, the Working Group observes that the present case involves an individual who arrived on Christmas Island, Australia, in July 2012 and was detained. He was, however, released into the community in November 2012. The Working Group notes two brief periods of detention, as Mr. Sayahi's visa was cancelled and then reissued in 2013 and 2014. In 2016, following an alleged criminal offence for which he was detained, Mr. Sayahi was once again returned to immigration detention as, despite the decision not to prosecute, an adverse character assessment was made in relation to his migratory status. Mr. Sayahi was detained because of this and has remained thus detained since August 2016.

89. The Working Group has consistently maintained 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 in the Convention relating to the Status of Refugees and the 1967 Protocol thereto. The Working Group notes that these instruments constitute international legal obligations that Australia has undertaken.[15]

90. The source has argued that the detention of Mr. Sayahi falls under category II, as he is detained because of the peaceful exercise of his right to seek asylum. This in fact is not effectively rebutted by the Government, which admits that Mr. Sayahi was detained in accordance with the stipulations of the Migration Act 1958. Although Mr. Sayahi was released in November 2012, some four months after his initial detention, it is clear to the Working Group that the sole reason for this detention was the fact that he was seeking asylum. This is further confirmed by the two instances in 2013 and 2014 where, as soon as his visa had expired or been cancelled, Mr. Sayahi would be detained until a new visa would be granted. Although this appears to have happened relatively swiftly, the Working Group notes that this nevertheless was detention, a fact not contested by the Government. It is clear to the Working Group that all these instances of detention occurred solely because he exercised his right to seek asylum.

[9] CCPR/C/AUS/CO/6, paras. 33–38.
[10] E/C.12/AUS/CO/5, paras. 17–18.
[11] CEDAW/C/AUS/CO/8, para. 53.
[12] CERD/C/AUS/CO/18-20, paras. 29–33.
[13] See A/HRC/35/25/Add.3.
[14] For example, opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 112–117; No. 74/2019, paras. 75–80; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.
[15] See, for example, opinions No. 28/2017, No. 42/2017 and No. 35/2020.

91. Thereafter, in 2016, Mr. Sayahi was detained in the criminal justice context. It was following this detention that, despite the fact that a decision not to prosecute had been taken, an adverse character assessment was made in the context of Mr. Sayahi's immigration status and he was detained and remains detained to date, some six years later.

92. Notwithstanding the Working Group's views and findings regarding the Migration Act 1958 and its compatibility with the obligations of Australia under international human rights law (see above), the Working Group observes that it is not disputed that Mr. Sayahi remains detained today based on that same Act. The source argues that Mr. Sayahi is detained under the Act purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights. The Government does not contest that this detention is due to the migratory status of Mr. Sayahi but argues that such detention is strictly in accordance with the Act.

93. Indeed, Mr. Sayahi's immigration detention in Australia, and especially since August 2016, is characterized by numerous unsuccessful applications for various visas and the appeals of such rejections. Mr. Sayahi has been detained for some six years and has become unwell, apparently due to his prolonged detention. The Working Group notes in particular that the Government has made no indication as to when Mr. Sayahi's detention would cease.

94. As the Working Group has explained in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.[16]

95. This echoes the views of the Human Rights Committee, which, in paragraph 18 of its general comment No. 35 (2014), argued the following:

> 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.

96. In the present case, Mr. Sayahi was initially detained, later released, and again detained on two occasions when his visa expired or was cancelled, and then again immediately after a decision not to prosecute was made in relation to an alleged criminal offence in 2016 that had prompted an adverse character assessment. It is therefore clear to the Working Group that, if it were not for Mr. Sayahi's migratory status, he would not have been detained, especially not following the alleged criminal offence for which, the Working Group wishes to emphasize, the decision was taken by the authorities not to prosecute, and all charges against Mr. Sayahi were withdrawn, a point not contested by the Government.

97. Furthermore, it is clear to the Working Group that, when Mr. Sayahi was detained on all those various occasions, the Government did not assess the need to detain him, and there was no attempt to ascertain if a less restrictive measure would be suited to his individual circumstances, as required by international law. He has thus remained detained for some six years, which the Working Group cannot accept as a "brief initial period", to use the language of the Human Rights Committee (see para. 95 above). Furthermore, the Government has not presented any particular reason specific to Mr. Sayahi, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would have justified his initial or subsequent detention.

98. These failures by the Government lead the Working Group to conclude that there was no reason for detaining Mr. Sayahi other than the fact that he was seeking asylum. The Working Group therefore concludes that Mr. Sayahi was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

99. Furthermore, while the Working Group agrees with the argument presented by the Government in its reply in relation to article 26 of the Covenant, it must nevertheless

[16] A/HRC/39/45, annex, para. 12.

highlight that the Human Rights Committee, in the same general comment as cited by the Government, also makes it clear that aliens are to receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof, and that aliens have the full right to liberty and security of the person.[17]

100. This means that Mr. Sayahi is entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and that Australia must ensure that he is guaranteed such right without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Sayahi is subjected to de facto indefinite detention due to his migratory status, in clear breach of article 2, in conjunction with article 9, of the Covenant.

101. Consequently, noting that Mr. Sayahi 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 under category II. In making this finding, the Working Group notes the Government's submission that Mr. Sayahi has always been treated in accordance with the stipulations of the Migration Act 1958. Be that as it may, such treatment is not compatible with the obligations that Australia has undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

Category IV

102. The source has further argued that Mr. Sayahi has been subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government of Australia 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. Sayahi has been reviewed by the Commonwealth Ombudsman eight times.

103. 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.[18] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[19] and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to migration detention.[20]

104. The facts of Mr. Sayahi's case since his detention in August 2016, as presented to the Working Group, are characterized by various visa applications, their rejections and challenges to these rejections. However, as already observed by the Working Group, none of these has concerned the necessity to detain Mr. Sayahi or indeed the proportionality of such detention to his individual circumstances. Rather, these actions assessed the claims of Mr. Sayahi against the legal framework set out by the Migration Act 1958. As is evident by the Working Group's examination above, the Act is incompatible with the obligations of Australia under international law, and the assessments carried out in accordance with the Act are therefore equally incompatible with the requirements of international human rights law.

105. The Government has argued that the case of Mr. Sayahi is being periodically reviewed by the Commonwealth Ombudsman. However, in doing so, the Government has not explained how such review satisfies the requirement of article 9 (4) of the Covenant for a review of legality of detention by a judicial body.[21] The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department to release a person from immigration detention, as clearly stipulated by the Government itself.

[17] Human Rights Committee, general comment No. 15 (1986), paras. 2 and 7.
[18] A/HRC/30/37, annex, paras. 2–3.
[19] Ibid., para. 11.
[20] Ibid., para. 47 (a).
[21] Opinion No. 69/2021, para. 126.

106. Lastly, the Government has also argued that the Minister has reviewed the detention of Mr. Sayahi. Once again, noting that this is a review by an executive body, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

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

108. In this connection, the Working Group must once again reiterate that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[23] and it rejects the repeated argument by the Government to the contrary.

109. International human rights law and the Working Group have required that a maximum period for detention in the course of migration proceedings be set by legislation and, upon the expiry of the period for detention set by law, the detained person be automatically released.[24] There cannot be a situation whereby individuals are caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite detention that cannot be remedied even by the most meaningful review of detention on an ongoing basis.[25] As the Working Group has 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 principle of non-refoulement,[26] or the unavailability of means of transportation – thus rendering expulsion impossible. In such cases, the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary.[27]

110. The Working Group also recalls the Human Rights Committee's numerous findings that the application of mandatory immigration detention in Australia and the impossibility of challenging such detention violate article 9 (1) of the Covenant.[28] Moreover, as the Working Group has noted 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.[29] In the case of Mr. Sayahi, the Working Group has already established that, since his detention in August 2016, no alternatives to his detention have been considered.

111. Moreover, despite the Government's claims to the contrary, the Working Group puts forward that the detention of Mr. Sayahi is in fact punitive in nature, which, as highlighted by the Working Group in its revised deliberation No. 5, should never be the case.[30] Mr. Sayahi has been detained for some six years, without a charge or a trial in what clearly was a punitive detention in breach of article 9 of the Covenant.

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[22] Revised deliberation No. 5, paras. 12–13.

[23] Ibid., 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.

[24] Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61; and opinion No. 7/2019.

[25] See opinions No. 1/2019 and No. 7/2019.

[26] Convention against Torture, art. 3; and Convention relating to the Status of Refugees, art. 33.

[27] A/HRC/39/45, annex, para. 27. See also A/HRC/7/4, para. 48; A/HRC/10/21, para. 82; A/HRC/13/30, para. 63; and opinion No. 45/2006.

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

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

[30] Revised deliberation No. 5, paras. 9 and 14. See also opinion No. 49/2020, para. 87.

112. Mr. Sayahi has now been detained for six years and the Government has not been able to identify how long such detention would last, which means that his detention is de facto indefinite.

113. Consequently, the Working Group finds that Mr. Sayahi is subjected to de facto indefinite detention due to his migratory status without the possibility of challenging the legality of such detention before a judicial body, as guaranteed under article 9 (4) of the Covenant. It is therefore arbitrary under category IV.

Category V

114. Furthermore, the Working Group notes the source's argument that the High Court's decision in *Al-Kateb v. Godwin* effectively places non-citizens such as Mr. Sayahi in a different situation than Australian citizens in relation to the ability to effectively challenge the legality of detention before domestic courts and tribunals. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. In its reply, the Government denies those allegations, arguing that in the cited case the High Court upheld the provisions of the Migration Act 1958 requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

115. The Working Group remains perplexed by the explanation provided repeatedly by the Government in relation to the High Court's decision in that case,[31] as it only confirms the legality of 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. As the Working Group has repeatedly noted, the Government fails to explain how such 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 Human Rights Committee's consistent jurisprudence in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[32]

116. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[33] and this remains the position of the Working Group in the present case.

117. The Working Group underlines that this situation is discriminatory and contrary to article 26 of the Covenant. It therefore concludes that the detention of Mr. Sayahi is arbitrary, falling under category V. In making this finding, the Working Group also notes that the key reason for which Mr. Sayahi was returned to immigration detention in August 2016 was the adverse character assessment that was made in relation to him following the allegations of criminal activity. This led to the cancellation of his visa, which in turn led to his immigration detention since then. The Working Group considers that this further reflects the discriminatory attitude of the Government.

Concluding remarks

118. The Working Group wishes to place on record its serious concern over the state of Mr. Sayahi's mental and physical health, which has severely deteriorated during the six years of detention, which the Working Group has established to be indefinite arbitrary detention.

[31] 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, para. 95; No. 70/2020, para. 113; and No. 17/2021, para. 121.

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

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

119. The Working Group reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty be treated with respect for their human dignity and that this also applies to those held in the context of migration. As the Working Group has explained in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity, and 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. 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.

120. The Working Group also wishes to highlight that, in the light of the outbreak of the coronavirus disease (COVID-19), it has called upon States to note the underlying conditions of detention as especially conducive to the spread of the infection. As highlighted in 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 be satisfied in the context of a pandemic or other public health emergency,[34] and the Working Group calls upon the Government to release Mr. Sayahi in the prevailing circumstances and especially noting the trauma that he has suffered as a result of the years of detention to which he has already been subjected.

121. The Working Group welcomes the Government's invitation of 27 March 2019 for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed due 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, including regarding its offshore detention facilities, and to offer the Working Group's assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

> The deprivation of liberty of Ahmed Sayahi, 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.

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

124. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Sayahi immediately and 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 to take urgent action to ensure the immediate unconditional release of Mr. Sayahi.

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

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

127. 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

[34] Deliberation No. 11 (A/HRC/45/16, annex II), para. 23.

Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

129. 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. Sayahi has been released and, if so, on what date;

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

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

130. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

131. 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.

132. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[35]

[*Adopted on 6 April 2022*]

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