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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninety-sixth session, 27 March–5 April 2023

Opinion No. 14/2023 concerning Gus Kuster (Australia)

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

2. In accordance with its methods of work,[1] on 9 November 2022 the Working Group transmitted to the Government of Australia a communication concerning Gus Kuster. The Government replied to the communication on 8 February 2023. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

[1] A/HRC/36/38.

Submissions

Communication from the source

4. Gus Kuster is a stateless person of Torres Strait Islander descent, born in Lorengau, Papua New Guinea, on 31 October 1978. The Government of Papua New Guinea, however, has no record of his birth there and does not recognize Mr. Kuster as a citizen.

5. The source explains that Mr. Kuster's grandmother was born in the Torres Strait Islands and moved to Papua New Guinea for marriage. There are, however, no written records of Mr. Kuster's maternal family in the Torres Strait Islands. This is in keeping with the deep oral traditions of family lore and the fact that no written records were kept in remote communities. Mr. Kuster and his family identify themselves as Torres Strait Islanders. The paternal side of Mr. Kuster's family is European Australian.

6. Mr. Kuster arrived in Australia on 9 September 1983 at the age of 4 with his family and was granted a permanent entry permit upon arrival. On 1 September 1994, a legal determination was made that he was the holder of a transitional (permanent) BF-C visa. Mr. Kuster understood that, like his siblings, he was an Australian citizen. Mr. Kuster has never left Australia.

7. Mr. Kuster has criminal convictions for various offences, for which he has received fines, been subject to numerous court orders and been sentenced to terms of imprisonment ranging from seven days to two years. On 20 December 2017, Mr. Kuster was convicted of contravening a domestic violence order (aggravated offence) and sentenced to 12 months' imprisonment. On 21 December 2017, Mr. Kuster's visa was mandatorily cancelled by a delegate of the Minister for Home Affairs under section 501 (3A) of the Migration Act 1958, due to his having a substantial criminal record, as defined by the Act. At that time, Mr. Kuster was serving a custodial sentence at the Woodford Correctional Centre. A notice of visa cancellation was sent to Mr. Kuster. It was at this time that Mr. Kuster realized that he was not an Australian citizen.

8. On 18 January 2018, Mr. Kuster made a request for revocation of the mandatory visa cancellation under section 501 (3A) of the Migration Act. On 24 January 2018, the Minister received the request and, on 29 January 2018, informed Mr. Kuster that the request was invalid.

9. On 14 March 2018, Mr. Kuster lodged an application for a review of the determination of the Department of Home Affairs that he had not made a valid request for revocation to the Administrative Appeals Tribunal. On 13 April 2018, the Tribunal found that it had no jurisdiction to review Mr. Kuster's visa cancellation, as Mr. Kuster had not sought review within the relevant time frame.

10. On 23 July 2018, Mr. Kuster was released from the correctional institution and, on the same day, was detained by officials from the Department of Home Affairs under section 189 of the Migration Act. The source explains, that upon cancellation of Mr. Kuster's Class BF transitional (permanent) visa under section 501 (3A) of the Migration Act, Mr. Kuster became an unlawful non-citizen. As required by section 189, an officer must detain an unlawful non-citizen.

11. The Migration Act 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 removed or deported from Australia, or 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. In addition, section 501 (3A) of the Migration Act provides that the Minister must cancel a person's visa if the Minister is satisfied that the person does not pass the character test because they have a substantial criminal record and are serving a sentence of imprisonment on a full-time basis at a custodial institution for an offence against an Australian law.

12. On 31 July 2018, Mr. Kuster was referred for removal. It appears that, in the time period between 31 July 2018 and 16 April 2019, steps were taken towards removing Mr. Kuster, although his citizenship status was never finalized, and the matter was addressed only

on 20 May 2020. On 13 February 2019, Mr. Kuster's representatives wrote to the Minister requesting a review of his case owing to the exceptional circumstances.

13. On 20 February 2019, the High Commission of Papua New Guinea wrote to a departmental officer at the Australian Border Force, copying the Department of Foreign Affairs and Trade, stating that Papua New Guinea had no records showing that Mr. Kuster was a citizen of that country. The Commission reaffirmed that Mr. Kuster was not a citizen of Papua New Guinea and therefore could not be deported to that country.

14. On 4 March 2019, the departmental officer noted that Mr. Kuster's request for a review of his case due to exceptional circumstances raised claims about his Australian citizenship, which, based upon a cursory view of the file, did not appear to have been assessed.

15. On 16 April 2019, the Australian Border Force notified Mr. Kuster of the acceptance of the revocation request and, on 23 May 2019, Mr. Kuster's case was allocated to a revocation officer. On 6 June 2019, Mr. Kuster provided the Force with a personal circumstances form and a statement in relation to the revocation request.

16. On 20 June 2019, Mr. Kuster requested voluntary removal from Australia. The source recalls that the departmental officers noted the citizenship concerns regarding Papua New Guinea and requested further information relevant to the decision under section 501 (3A) of the Migration Act on whether to revoke the original decision to cancel his visa. The source further recalls that this request was made more than two months after the department had accepted the revocation request as valid and related to information dating to 2018 and to a departmental file note regarding Mr. Kuster's son, created the day before the request for further information was made. Mr. Kuster received an extension of the deadline, to 15 August 2019, to reply.

17. On 20 August 2019, a departmental officer decided not to wait for further submissions from Mr. Kuster and to move to finalize the submission of the request for voluntary removal. Departmental officers started preparing the submission and a draft statement of the reasons for a decision.

18. On 21 August 2019, Mr. Kuster attempted voluntary departure to Papua New Guinea and was denied entry, as the Immigration and Citizenship Authority of Papua New Guinea was not satisfied that he was a citizen of the country. Mr. Kuster was returned to detention in Australia pending the decision on his request for revocation of the mandatory cancellation of his visa, which he had lodged on 18 January 2018. Subsequent review of Mr. Kuster's case, in November 2020, five months after the voluntary deportation attempt to Papua New Guinea, determined that Mr. Kuster was stateless.

19. The source highlights the fact that considerable delay occurred in the consideration of the revocation request such that Mr. Kuster sought judicial review of the unreasonable delay. The case was scheduled for a hearing on 16 April 2021. On 12 April 2021, the Minister decided not to revoke the cancellation of Mr. Kuster's visa. Mr. Kuster sought review of the decision in the Federal Court.[2] On 23 November 2021, the Federal Court found for the Minister, and Mr. Kuster's appeal based on unreasonable delay in the consideration of the visa revocation request was dismissed.

20. In February 2022, Mr. Kuster applied for Australian citizenship. On 31 May 2022, the Department of Home Affairs invited Mr. Kuster to provide further comments in relation to his application for Australian citizenship, specifically with regard to his criminal history and citizenship status (i.e. statelessness), in a letter entitled "Invitation to comment on adverse information: application for Australian citizenship by descent". On 27 June 2022, Mr. Kuster responded to the invitation to comment.

21. The source submits that Mr. Kuster's mental health has increasingly deteriorated during his period in immigration detention. He suffers from depression, anxiety and suicidal ideation, for which he is being medicated. He is also taking medication for depression and

[2] Federal Court of Australia, *Kuster v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, File No. NSD 457of 2021, Judgment, 23 November 2021.

has requested mental health support while in immigration detention. For example, on 30 August 2019, a delegate of the Minister for Home Affairs in the Character and Cancellations Branch of the Department of Home Affairs referred Mr. Kuster's case for escalation to the Assistant Secretary of the Branch, citing concerns about Mr. Kuster's significant mental and physical health issues. The delegate also confirmed that Mr. Kuster was taking medication for depression, anxiety, panic attacks, skin rashes, depigmentation, asthma and headaches.

22. Mr. Kuster's open-ended and continued lengthy detention and complex series of appeals and the uncertainty of his visa situation have both caused and exacerbated his mental health issues. On 25 July 2022, Mr Kuster was diagnosed with coronavirus disease (COVID-19) and was transferred to a quarantine hotel. He remains in detention.

23. The source submits that Mr. Kuster's detention as an unlawful non-citizen under section 189 (1) of the Migration Act is arbitrary because there is no consideration of the unique circumstances of this individual and the ways in which those circumstances affect the appropriateness of his immigration detention. It is noted that once a person becomes an unlawful non-citizen, there is no assessment of whether the person's detention is reasonable, necessary and proportionate in the light of the circumstances, nor is it appropriately reassessed by an independent body as it extends in time. The Minister for Home Affairs has the power, under section 195 A of the Migration Act, to release Mr. Kuster from detention. However, the source notes that that power is non-compellable and non-reviewable.

24. The source also submits that Mr. Kuster has been deprived of liberty and of his rights guaranteed under article 7 of the Universal Declaration of Human Rights, which provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. The source recalls that Mr. Kuster has been detained since 23 July 2018, following his release from prison.

25. According to the source, Mr. Kuster has also been deprived of his rights in contravention of article 26 of the International Covenant on Civil and Political Rights, in which it is stated that all people are entitled without any discrimination to the equal protection of the law. Both article 7 of the Universal Declaration and article 26 of the Covenant have been violated because, as a non-citizen, Mr. Kuster is unable to effectively challenge his detention. The source states that Australian citizens are not subject to the Migration Act and, as such, are not subject to indefinite or open-ended immigration detention.

26. The source recalls that the Minister, in the statement of reasons for cancellation of the visa dated 12 April 2021, accepted that it was not reasonably practicable to remove Mr. Kuster from Australia to Papua New Guinea or to remove him to another country, and found the possibility of indefinite detention for Mr. Kuster to weigh in favour of revocation of the cancellation of his visa. The Minister also noted that it was unclear whether and when Mr. Kuster's removal from Australia would become reasonably practicable.

27. The source notes that immigration detention is described by the Department of Home Affairs as a last resort and reserved for a very small proportion of those whose citizenship status requires resolution, sometimes through protracted legal proceedings. This is not the case for Mr. Kuster, who has been clear from the outset that he is stateless and not a citizen of Papua New Guinea.

28. The source recalls that the Human Rights Committee, in its general comment No. 35 (2014) on liberty and security of person, required that detention be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extended in time. In this context, it is submitted that Mr. Kuster has been held in administrative detention for over four years. There is no mechanism under Australian law to challenge such detention because it is authorized by the Migration Act and by case law.

29. The source argues that Mr. Kuster has no effective right to appeal his detention under Australian law. It notes that the High Court of Australia, in *Al-Kateb v. Godwin*,[3] upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution of

[3] High Court of Australia, Case No. A253/2003, Order, 6 August 2004.

Australia. It further notes that the Human Rights Committee, in *Mr. C. v. Australia*,[4] held that there was no effective remedy for people subject to mandatory detention in Australia.

30. Finally, the source submits that Mr. Kuster was deprived of his liberty for reasons of discrimination. It states that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The decision of the High Court of Australia in *Al-Kateb v. Godwin* stands for the proposition that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution. The effective result of this is that while Australian citizens can challenge administrative detention, non-citizens cannot.

31. The source concludes by stating that Mr. Kuster has taken all the necessary steps to seek his release from arbitrary detention in Australia and to use the appeal avenues available to him by law. He has also made a complaint regarding his detention to the Australian Human Rights Commission. The Commission, however, does not have the power to order Mr. Kuster's release from detention. Furthermore, while the Commonwealth Ombudsman reviews places of detention and the department of Home Affairs is required to provide a report to the Ombudsman on the detention of people detained for more than two years, the Ombudsman has no power to order the release of a person from detention. Finally, the department has an internal detention review committee, which reviews the legality of a person's detention on a monthly basis. This committee, however, is not independent nor is it a judicial or administrative body to which submissions can be made.

Response from the Government

32. On 9 November 2022, 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 9 January 2023, detailed information about the current situation of Mr. Kuster and to clarify the legal provisions justifying his continued detention and its compatibility with the country's obligations 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. Kuster's physical and mental integrity.

33. On 10 November 2022, the Government requested an extension of the time limit, in accordance with paragraph 16 of the Working Group's methods of work, and was granted a new deadline of 9 February 2023.

34. In its reply, dated 8 February 2023, the Government stated that Mr. Kuster had been born in Papua New Guinea, that he was of Torres Strait Islander descent and had arrived in Australia on 9 September 1983 at the age of 4 as a dependant. He was granted a permanent entry permit on arrival, which subsequently became a transitional (permanent) BF-C visa, on 1 September 1994.

35. On 21 December 2017, Mr. Kuster's visa was mandatorily cancelled by a delegate of the Minister under section 501 (3A) of the Migration Act due to his substantial criminal record and the fact he was serving a sentence of imprisonment, on a full-time basis in a custodian institution, for an offence against a law of the Commonwealth, a state or a territory. The Government submits that Mr. Kuster's extensive criminal history dates from 1993 and includes convictions for drug possession, weapons possession, breach of bail, breach of probation, dangerous driving, assault and property- and domestic violence-related offences.

36. Mr. Kuster is currently being held at the Brisbane Immigration Transit Accommodation Centre in Pinkenba, as he is an unlawful non-citizen who does not hold a visa that is currently in effect (see sections 13 and 14 of the Migration Act).

37. Mr. Kuster was denied entry to Papua New Guinea on 21 August 2019 while attempting voluntary departure. Upon his arrival in Port Moresby, Mr. Kuster was held on the plane and flown back to Australia, as the Immigration and Citizenship Authority of Papua New Guinea was not satisfied that Mr. Kuster was a citizen of the country.

[4] CCPR/C/76/D/900/1999.

38. The Immigration and Citizenship Authority maintains that Mr. Kuster, despite having been born in Papua New Guinea, does not hold Papua New Guinean citizenship and that, under current legislation, he is ineligible for citizenship by descent under section 66 (3) of the Constitution, as he was born after Papua New Guinea Independence Day. In order for him to apply for Papua New Guinean citizenship, he would need to have resided in the country during the three preceding years and meet character requirements. He is currently unable to satisfy either requirement. As such, he cannot presently be removed to Papua New Guinea.

39. However, as a result of information provided to the Department of Home Affairs by the High Commission of Papua New Guinea, notwithstanding the views of the Immigration and Citizenship Authority dating to 21 August 2019, the department continues to make enquiries with the authorities of Papua New Guinea into Mr. Kuster's citizenship status. These enquiries remain open.

40. According to the Government, Mr. Kuster is currently being detained for the purpose of removal to another country. However, removal is not possible while the status of his Papua New Guinean citizenship remains contested. He is also being detained for the purpose of allowing the Minister for Home Affairs to determine whether the visa cancellation should be revoked. A submission will be referred to the Minister for consideration, once Mr. Kuster's Papua New Guinean citizenship status has been clarified.

41. The Government further explained that Mr. Kuster first entered Australia with his family at the age of 4 on 9 September 1983 and had been granted a permanent entry permit upon arrival. On 1 September 1994, he was deemed to hold a transitional (permanent) BF-C visa by operation of law. In July 2011 and August 2014, consideration was given to cancelling Mr. Kuster's transitional (permanent) visa on character grounds, but on both occasions, Mr Kuster's visa was not cancelled and he was issued a warning.

42. On 28 November 2017, Mr. Kuster was convicted of the contravention of a domestic violence order (aggravated offence), for which he was sentenced to a 12-month suspended term of imprisonment. On 4 December 2017, his parole was suspended and he was returned to prison to serve the remainder of his sentence. As a result, on 21 December 2017, Mr. Kuster's visa was mandatorily cancelled under section 501 (3A) of the Migration Act on the basis of his full-time imprisonment and his substantial criminal record.

43. On 24 January 2018, the Minister's office received Mr. Kuster's request for the revocation of his visa cancellation. The revocation request was initially deemed invalid on the basis of having been lodged outside the required time frame, but it was later accepted as having been made in the prescribed manner and within the prescribed time frame.

44. On 20 June 2019, Mr. Kuster requested voluntary removal from Australia. On 21 August 2019, he left Australia under escort on a commercial flight to Papua New Guinea. Despite appropriate travel documentation having been obtained through the High Commission of Papua New Guinea, Mr. Kuster was refused entry upon his arrival, resulting in his subsequent return, under escort, to Australia. The authorities of Papua New Guinea believed that Mr. Kuster was not a Papua New Guinean citizen, contrary to the understanding of the Department of Home Affairs, especially following its engagement with the High Commission prior to Mr. Kuster's removal. Mr. Kuster's request for revocation remained open during this time.

45. On 3 February 2022, Mr. Kuster lodged a valid application for Australian citizenship by descent on the basis of having been born outside of Australia to a father who was an Australian citizen at the time of Mr. Kuster's birth.

46. On 6 July 2022, the Australian Border Force attended a meeting with the High Commission of Papua New Guinea in Canberra in order to confirm Mr Kuster's citizenship status for the purposes of removal to Papua New Guinea. On 12 July 2022, the Australian Border Force consulted the First Secretary at the Australian High Commission in Papua New Guinea, in Port Moresby, requesting assistance with approaching the authorities in Papua New Guinea to seek clarification on Mr. Kuster's citizenship. These enquiries remain open.

47. On 15 December 2022, Mr. Kuster's application for Australian citizenship by descent was refused under the Australian Citizenship Act 2007 on the grounds that he did not meet

the character requirements. On the day of the refusal, Mr. Kuster applied to the Administrative Appeals Tribunal for a review of this decision. The Tribunal review proceedings remain ongoing.

48. On 4 January 2023, the Department commenced a ministerial intervention process to assess Mr. Kuster's case under the ministerial guidelines set out in sections 195 A and 197 AB of the Migration Act. The department's assessment remains ongoing.

49. The Government also provided a detailed record of Mr. Kuster's state of health. In particular, it was submitted that he had a history of substance abuse that predated his immigration detention, in particular a history of alcohol, cannabis and amphetamine use. The Government also maintained that Mr. Kuster had a long history of mental health issues, in addition to some physical health issues, and that all his health issues had been addressed.

50. Referring to the relevant provisions in domestic legislation, the Government submits that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Kuster remains in immigration detention, in accordance with Australian law, because he is an unlawful non-citizen and thus lawfully detained under subsection 189 (1) of the Migration Act, consistent with the international obligations of Australia.

51. Under section 189 of the Migration Act, an individual must be detained if an officer knows or reasonably suspects that the individual is an unlawful non-citizen. Under section 196 of the Migration Act, unlawful non-citizens must be kept in immigration detention until they are removed from Australia or granted a visa.

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

53. The department has been issued ministerial intervention guidelines to assess whether a case should be referred to the Minister for consideration of the exercise of the Minister's personal intervention powers. Cases are referred for ministerial consideration only if they are assessed as meeting those guidelines.

54. The Minister's public interest powers under sections 195 A and 197 AB of the Migration Act are non-compellable, that is, the Minister is under no obligation to exercise or to consider exercising those powers. Furthermore, what is in the public interest is a matter for the Minister to determine.

55. If a person holds a visa that is subsequently cancelled, that person can seek to have the legality of the cancellation decision reviewed through the domestic judicial processes of Australia. Furthermore, the Government is obliged, in all proceedings before courts, to act as a model litigant. The model litigant obligation requires the Commonwealth to act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency. The obligation includes a duty not to take advantage of a claimant who lacks the resources to litigate a legitimate claim. The obligation also includes a duty to adhere to the highest professional standards, including by assisting the court to arrive at the proper and just result.

56. The Government submits that the Department has reported to the Commonwealth Ombudsman regarding Mr. Kuster on eight occasions, most recently in August 2022.

57. The position of the Government is that the detention of an individual on the basis of their being 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, detention is not limited by a set time frame, but rather is dependent upon a number of factors based on an individual's circumstances,

including identity determination, developments in country information, health, character and security matters.

58. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Kuster remains in immigration detention in accordance with Australian law because he is an unlawful non-citizen, as he does not hold a visa that is in effect, and because, on the basis of his individual circumstances, immigration detention is considered to be the most appropriate form of detention. The Government attempted to voluntarily remove Mr. Kuster to Papua New Guinea. However, upon his arrival, he was not recognized as a Papua New Guinean citizen and was immediately returned to Australia.

59. In the most recent report of the Ombudsman, it was noted that Mr. Kuster was precluded from lodging a valid bridging visa E application, in accordance with section 501 E of the Migration Act. He requires ministerial intervention to be granted such a visa or to be placed in the community.

60. Immigration detention is administrative in nature and not for punitive purposes. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the legal obligations of Australia. The ongoing detention of Mr. Kuster is justifiable and not arbitrary and is consistent with the Covenant.

Further comments from the source

61. On 9 February 2023, the reply of the Government was sent to the source for further comments, which the source provided on 23 February 2023. The source suggests that the response of the Government relating to the reasons that Mr. Kuster's citizenship application was refused is misleading and insists that Mr. Kuster's citizenship application was refused: (a) because the Department of Home Affairs did not accept that Mr. Kuster was stateless; and (b) owing to character considerations. Had the department accepted that Mr. Kuster was stateless, he would have been eligible, under Australian law, for citizenship, which should have been granted.

62. The claim by the Government that detention in an immigration detention centre is used as a last resort in the management of unlawful non-citizens is misleading. Section 189 of the Migration Act provides that if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person. There is no discretion. This section creates a positive duty for Commonwealth officers to detain any person that they believe is an unlawful non-citizen. The government response fails to explain how statutorily based mandatory detention is a last resort.

63. The source recalls that the Working Group has delivered more than 20 opinions in relation to the breach of international human rights standards by Australia through its mandatory immigration detention regime. It reiterates that Mr. Kuster's detention is arbitrary as it is required as a first resort under the Migration Act. Furthermore, the Working Group has previously held that the detention of refugees and stateless people by Australia is inconsistent with the Covenant. The Government cannot therefore claim that its actions are consistent with the Covenant.

Discussion

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

65. In determining whether the deprivation of liberty of Mr. Kuster is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.[5]

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

Category I

66. The Working Group refers to its line of jurisprudence in relation to Australia. Since 2017, the Working Group has considered 20 cases, all of which concern the same issue, namely mandatory immigration detention in Australia in accordance with the Migration Act 1958.[6] The Working Group reiterates its views on the Migration Act.[7]

67. The Working Group furthermore reiterates its alarm that, in all these cases, the Government has argued that the detention is lawful purely because it follows the stipulations of the Migration Act. The Working Group once again wishes to clarify that such arguments can never be accepted as legitimate in international human rights law. The fact that a State is following its own domestic legislation does not in itself prove that the legislation conforms with the obligations that the State has undertaken under international human rights law. No State can legitimately avoid its obligations under international human rights law by citing its domestic laws and regulations.

68. The Working Group again emphasizes that it is the duty of the Government to bring its national legislation, including the Migration Act, into alignment with its 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,[8] the Committee on Economic, Social and Cultural Rights,[9] the Committee on the Elimination of Discrimination against Women,[10] the Committee on the Elimination of Racial Discrimination,[11] the Special Rapporteur on the human rights of migrants[12] and the Working Group.[13] The Working Group calls upon the Government to urgently review the Migration Act in the light of its obligations under international human rights law.

69. Noting this and the numerous occasions on which the Working Group and other United Nations human rights bodies and mechanisms have alerted the Government of Australia to the affront to its obligations under international human rights law posed by the Migration Act, and noting the failure of the Government to take any action, the Working Group concludes that the detention of Mr. Kuster under the said legislation is arbitrary under category I as it violates article 9 (1) of the Covenant. Domestic law that violates international human rights law, and which has been brought to the attention of the Government on so many occasions, cannot be accepted as a valid legal basis for detention, especially in the light of the findings below.

Category II

70. The Working Group observes that Mr. Kuster arrived in Australia on 9 September 1983, aged 4, with his family, was granted a permanent entry permit upon arrival, which was subsequently replaced with a permanent visa, and since that time, was free to live in the community. He served terms of imprisonment in the criminal justice context in 2017 and was then moved to immigration detention due to the mandatory cancellation of his visa as a result of his imprisonment. Following an unsuccessful attempt to enter Papua New Guinea, he remains in immigration detention for the purpose of removal to another country. The Government, however, admits that his removal is not possible while the status of his Papua New Guinean citizenship is still contested. He is also detained for the purpose of allowing

[6] Opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 69/2021, No. 28/2022, No. 32/2022 and No. 42/2022.

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

[8] CCPR/C/AUS/CO/6, paras. 33–38.

[9] E/C.12/AUS/CO/5, paras. 17 and 18.

[10] CEDAW/C/AUS/CO/8, paras. 53 and 54.

[11] CERD/C/AUS/CO/18-20, paras. 29–33.

[12] See A/HRC/35/25/Add.3.

[13] See, 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. 115–117; No. 35/2020, paras. 98–103; and No. 17/2021, paras. 125–128.

the Minister for Home Affairs to determine, once Mr. Kuster's Papua New Guinean citizenship status has been clarified, whether the visa cancellation should be revoked.

71. Notwithstanding the views and findings of the Working Group regarding the Migration Act and its compatibility with the obligations of Australia under international human rights law, the Working Group observes that it is not disputed that Mr. Kuster remains detained today on the basis of that Act. The source argues that Mr. Kuster is detained in violation of article 26 of the Covenant and article 7 of the Universal Declaration of Human Rights.

72. The Working Group notes that the Government has given no indication as to when Mr. Kuster's detention could end. Noting that he has already been detained for about four years, the Working Group is bound to conclude that his detention appears to be indefinite.

73. As the Working Group has explained in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.[14] This echoes the views of the Human Rights Committee, which stated, in paragraph 18 of its general comment No. 35 (2014), that asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity, if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

74. The Working Group cannot accept that detention for over four years could be described as a brief initial period, to use the language of the Human Rights Committee. The Government has not presented any particular reason specific to Mr. Kuster, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that would justify his detention. The Working Group also notes Mr. Kuster's health problems as a significant factor in favour of his release. The Working Group concludes that there was no reason for detaining Mr. Kuster other than his migration status. As his visa was mandatorily cancelled due to his criminal conviction, as required by the Migration Act, he has been subjected to the automatic immigration detention policy. The Working Group concludes that Mr. Kuster was detained due to the exercise of his legitimate rights under article 14 of the Universal Declaration of Human Rights.

75. Furthermore, while the Working Group agrees with the argument presented again by the Government in relation to article 26 of the Covenant, it must nevertheless emphasize that the Human Rights Committee, in its general comment No. 15 (1986), quoted by the Government, also makes it clear that "aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof" and that "aliens have the full right to liberty and security of the person".[15]

76. Mr. Kuster is therefore entitled to the right to liberty and security of person, as guaranteed in article 9 of the Covenant, and, when guaranteeing these rights to him, Australia must ensure that it is done without distinction of any kind, as required by article 2 of the Covenant. Mr. Kuster has been subjected to de facto indefinite detention due to his immigration status, in clear breach of articles 2 and 9 of the Covenant.

77. Noting that Mr. Kuster has been detained due to the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and articles 2 and 9 of the Covenant, the Working Group finds his detention to be arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Mr. Kuster has always been treated in accordance with the stipulations of the Migration Act. Be that as it may, such treatment is not compatible with the obligations that Australia has undertaken under international law. The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

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

[15] Paras. 2 and 7.

Category IV

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

79. 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.[16] This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty[17] and to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also migration detention.[18]

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

81. The Government has argued that the case of Mr. Kuster is periodically reviewed by the Commonwealth Ombudsman. However, the Government has not explained how such a review satisfies the requirement of article 9 (4) of the Covenant for a review of legality of detention by a judicial body, a point that the Working Group has already explained to the Government in earlier jurisprudence.[19] The Working Group is particularly mindful that the Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention, as clearly stipulated by the Government itself.

82. The Government has also argued that the Minister has reviewed the detention of Mr. Kuster. Noting that this is a review by an executive body, the Working Group observes, as it has on previous occasions,[20] that it does not satisfy the criteria of article 9 (4) of the Covenant.

83. The Working Group therefore concludes that, during his more than four years of detention, no judicial body has been involved in the assessment of the legality of Mr. Kuster's detention and notes that international human rights law requires that such consideration by a judicial body necessarily involves an assessment of the legitimacy, necessity and proportionality of detention.[21]

84. The Working Group must therefore reiterate that the indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,[22] which is why the Working Group has required that a maximum period for detention in the course of migration proceedings must be set by legislation and, upon the expiry of the period for detention set by law, the detained person must automatically be released.[23] There cannot be a situation whereby individuals are caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite detention, which cannot be remedied, even by the most meaningful review of detention on

[16] A/HRC/30/37, paras. 2 and 3.
[17] Ibid., para. 11.
[18] Ibid., para. 47 (a).
[19] Opinion No. 69/2021, para. 126.
[20] See, for example, opinion No. 32/2022.
[21] A/HRC/39/45, annex, paras. 12 and 13.
[22] Ibid., para. 26. See also opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020; and A/HRC/13/30, para. 63.
[23] A/HRC/39/45, annex, para. 25. See also A/HRC/13/30, para. 61; and opinion No. 7/2019.

an ongoing basis.[24] As the Working Group stated in paragraph 27 of 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 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.

85. The Working Group recalls the numerous findings by the Human Rights Committee that the application of mandatory immigration detention in Australia and the impossibility of challenging such detention is in breach of article 9 (1) of the Covenant.[25] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in migration settings must be exceptional and, in order to ensure this, alternatives to detention must be sought.[26] In the case of Mr. Kuster, the Working Group has already established that no alternatives to detention have been considered.

86. Moreover, despite the claims of the Government to the contrary, the Working Group considers that the detention of Mr. Kuster is, in fact, punitive in nature, which, as it highlighted in its revised deliberation No. 5, should never be the case[27] and is in breach of article 9 of the Covenant. Presently, Mr. Kuster has been detained for over four years and the Government has not been able to identify how long his detention will last, which means that it is de facto indefinite.

87. Consequently, the Working Group finds that Mr. Kuster has been subjected to de facto indefinite detention due to his migratory status without the possibility of challenging the legality of such detention before a judicial body, which is the right encapsulated in article 9 (4) of the Covenant. This is therefore arbitrary, falling under category IV. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee in which the application of mandatory immigration detention in Australia and the impossibility of challenging such detention have been found to be in breach of article 9 of the Covenant.[28]

Category V

88. The Working Group notes the source's argument that Mr. Kuster, as a non-citizen, appears to be in a different situation from Australian citizens in relation to his ability to effectively challenge the legality of his detention before the domestic courts and tribunals, owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. In its reply, the Government denies those allegations, arguing that, in that case, the High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they were removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid. The decision in *Al-Kateb v. Godwin* does not alter the ability of non-citizens to challenge the lawfulness of their detention under Australian law.

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

[25] *C. v. Australia* (CCPR/C/76/D/900/1999); *Baban and Baban v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&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).

[26] 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.

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

[28] *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*.

89. The Working Group remains perplexed by the repeated explanation submitted by the Government,[29] since this confirms only that the High Court has affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal is not reasonably practicable in the foreseeable future.

90. However, as the Working Group has repeatedly noted, the Government is failing to explain how such non-citizens can effectively challenge their continued detention after that decision of the High Court, which is what the Government must show in order to comply with articles 9 and 26 of the Covenant. To this end, the Working Group once again specifically recalls the consistent jurisprudence of the Human Rights Committee, in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that its effects were such that there was no effective remedy to challenge the legality of continued administrative detention.[30]

91. As in the past, the Working Group cannot but again concur with the views of the Human Rights Committee on this matter,[31] and this remains the position of the Working Group in the present case. 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. Kuster is arbitrary, falling under category V.

Concluding remarks

92. The Working Group makes its determination without prejudice to other criminal proceedings to which Mr. Kuster is subjected. Moreover, it wishes to place on record its very serious concern regarding the state of Mr. Kuster's mental and physical health. Although the Working Group acknowledges submissions by the Government concerning the health-care provision for Mr. Kuster, it nevertheless reminds the Government that article 10 of the Covenant requires that all persons deprived of their liberty are to be treated with respect for their human dignity, and that this also applies to those held in the context of migration.[32] As the Working Group has explained in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.[33] 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.

93. The Working Group welcomes the Government's invitation of 27 March 2019 for the Working Group to conduct a visit to Australia in 2020. Although the visit had to be postponed owing to the worldwide coronavirus disease (COVID-19) pandemic, the Working Group looks forward to carrying out the visit as soon as practicable. It views the visit as an opportunity to engage with the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

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

The deprivation of liberty of Gus Kuster, being in contravention of articles 2, 3, 7–9 and 14 of the Universal Declaration of Human Rights and articles 2, 9 and 26 of the

[29] Opinions No. 21/2018, para. 79; No. 50/2018, para. 81; No. 74/2018, para. 117; No. 1/2019, para. 88; No. 2/2019, para. 98; No. 74/2019, para. 72; No. 35/2020, paras. 95 and 96; No. 70/2020, paras. 71–73; No. 17/2021, paras. 120–123; and No. 32/2022, paras. 72 and 73.

[30] *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.

[31] See also opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020, No. 71/2020, No. 72/2020, No. 17/2021, No. 68/2021, No. 28/2022, No. 32/2022 and No. 33/2022.

[32] See also deliberation No. 12 (A/HRC/48/55, annex).

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

International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, IV and V.

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

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

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

98. 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.

99. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

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

Follow-up procedure

101. 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. Kuster has been released and, if so, on what date;

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

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

102. 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.

103. 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.

104. 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.[34]

[*Adopted on 29 March 2023*]

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