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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-ninth session (23–27 November 2020)

#### Opinion No. 71/2020 concerning Mohammad Qais Niazy (Australia)\*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 16 April 2020 the Working Group transmitted to the Government of Australia a communication concerning Mohammad Qais Niazy. The Government replied to the communication on 14 July 2020. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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

## Submissions

### *Communication from the source*

4. Mohammad Qais Niazy, born in 1991, is a national of Afghanistan. His family fled to Pakistan after the Taliban came to power, living in a refugee camp before settling in Peshawar. At the age of 8, Mr. Niazy was reportedly kidnapped and held captive for three years. Mr. Niazy's parents, believing him dead, applied for global humanitarian visas to Australia in 2001, which were granted in 2002. Two weeks after their settlement in Australia in April 2002, they were informed that their son had been found alive. On 22 June 2005, Mr. Niazy arrived in Australia on a child migrant visa.

5. In 2008 and 2009, Mr. Niazy was reportedly convicted of two offences and sentenced to a control of two years by the Children's Court in Parramatta, New South Wales. The sentences ran consecutively for one year, and expired in October 2011. In March 2009, Mr. Niazy was transferred to Wyong Mental Health Unit for more intensive treatment, because he was violently self-harming. He was placed on medication for post-traumatic stress disorder. On 20 May 2010, Mr. Niazy was transferred from Cobham Youth Justice Centre to the Bronte Adolescent Unit at the Forensic Hospital Long Bay for mental health treatment. He was transferred back to Cobham Youth Justice Centre on 12 October 2010.

6. On 16 March 2011, Mr. Niazy was provided with a Notice of Intention to Consider Cancellation under section 501 (2) of the Migration Act 1958. On 7 September 2011, a delegate of the Minister of Home Affairs concluded that Mr. Niazy did not satisfy the character test. However, he decided not to exercise the discretion to cancel Mr. Niazy's visa, instead issuing a warning about his conduct.

7. In April 2012, Mr. Niazy was reportedly arrested and charged with the possession of a firearm at a dwelling with disregard to safety. On 24 April 2014, he was deemed unfit to plead, under the Mental Health (Forensic Provisions) Act 1990 of New South Wales.

8. The source adds that on 4 December 2014, Mr. Niazy was arrested for the possession of a firearm. On 1 April 2015, he was given a third Notice of Intention to Consider Cancellation and on 28 April 2015, he received further information regarding possible visa cancellation. On 30 May 2015, he was found to be unfit to be tried on other charges and subjected to a limiting term of two years and three months under the Mental Health (Forensic Provisions) Act.

9. On 28 September 2015, Mr. Niazy was reportedly arrested under section 198 (3) of the Migration Act and charged with several firearm offences. He received further information regarding possible visa cancellation in October and November 2015.

10. On 24 November 2015, while Mr. Niazy was serving a custodial sentence for the firearm offences, the Minister cancelled his visa because he had failed the character test under section 501 of the Migration Act for having been sentenced to a period of imprisonment of more than 12 months.

11. On 28 March 2017, Mr. Niazy lodged an application for a subclass 866 protection visa.

12. On 2 June 2017, Mr. Niazy was charged with the possession of an unregistered firearm and sentenced to imprisonment of four years and seven months, commencing with a non-parole period of two years and nine months.

13. On 26 June 2018, Mr. Niazy was reportedly released from criminal custody and immediately transferred to Maribyrnong Immigration Detention Centre in Melbourne, where he was detained under section 189 (1) of the Migration Act. He was subsequently moved to Brisbane Immigration Transit Accommodation Centre.

14. The source reports that Mr. Niazy's application for a protection visa was refused on 2 October 2018 under section 65 of the Migration Act, because the Minister was not satisfied that Mr. Niazy had met the character requirements for the visa. Mr. Niazy appealed this decision to the Administrative Appeals Tribunal.

15. On 22 February 2019, the Tribunal found Mr. Niazy to be a refugee within the meaning of section 5H (1) of the Migration Act. The Tribunal found that Mr. Niazy was owed protection for his membership in a particular social group, namely a person suffering from severe mental health issues. Mr. Niazy's matter was thus remitted by the Tribunal for reconsideration to the Department of Home Affairs on the same date.

16. According to the source, Mr. Niazy's child visa was cancelled in May 2019. He subsequently appealed to the Federal Court. On 11 December 2019, just before the hearing, the Department of Home Affairs reportedly instructed its legal representatives to concede the matter. At 11.08 a.m., the Department's representative sent the agreed consent orders to the judge's associate, and they were signed by the judge in chambers at 12.03 p.m. The source adds that by doing so, the Federal Court entered orders in favour of Mr. Niazy, whose visa was thus automatically reissued. However, two hours later on that same day, the Minister cancelled Mr. Niazy's visa under section 501 (3) of the Migration Act.

17. On 20 December 2019, Mr. Niazy was transferred by the Department of Home Affairs to the Silverwater Correctional Complex, because the Minister had determined that there was a risk to Mr. Niazy's life in all detention centres. According to the source, Mr. Niazy is held in segregation for 23 hours a day as an unlawful non-citizen. The source argues that Mr. Niazy's case is part of a new development, in which Australia has started holding refugees subject to administrative detention in maximum security prisons.

18. On 14 January 2020, the Department of Home Affairs reportedly refused Mr. Niazy's application for a protection visa under section 36 (1C) of the Migration Act. This refusal was appealed, and a hearing was scheduled for 10 June 2020. However, the source submits that owing to the coronavirus disease (COVID-19) pandemic, almost all court and tribunal sessions were cancelled. As a result, the source submits that Mr. Niazy faces a long delay in bringing his case to a conclusion.

19. The source notes that Mr. Niazy has been diagnosed with chronic and severe post-traumatic stress disorder and schizophrenia, and he requires close psychiatric and psychological monitoring. As a result of the current detention arrangements, his mental health has severely deteriorated. Mr. Niazy is allegedly not receiving ongoing professional help from a psychologist and does not have access to rehabilitation courses. In addition, his medication is not being reviewed on a regular basis.

#### Analysis of violations

20. According to the source, 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 either granted a visa, or removed or deported from Australia. In Mr. Niazy's case, such removal would constitute refoulement, as he has been recognized as being owed protection obligations. 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. The source adds that section 197 C of the Act states that the non-refoulement obligations of Australia are irrelevant to removal of unlawful non-citizens under section 198.

21. The source adds that the High Court has upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution.<sup>1</sup> Mr. Niazy thus lacks any chance of his detention being the subject of a real judicial review. The source recalls that the Human Rights Committee held that there was no effective remedy for people subject to mandatory detention in Australia.<sup>2</sup> The source argues that the continued detention of such people is, in practice, at the discretion of the Minister.

22. The source further submits that citizens and non-citizens are not equal before the courts and tribunals. The High Court of Australia, in *Al-Kateb v. Godwin*, upheld that the detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act does not contravene the Constitution. The effective result is that while citizens can challenge administrative detention, non-citizens cannot.

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

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

23. The source notes that Mr. Niazy requires close psychiatric and psychological monitoring and that his mental health has severely deteriorated owing to the current detention arrangement. The Department of Home Affairs has been informed that Mr. Niazy cannot be transferred to an administrative detention centre owing to threats to his life. Mr. Niazy has been held since 26 June 2018, first in immigration detention, and since 20 December 2019, in a correction facility. His requests to be transferred back from the prison to the detention centre have all been denied.

24. The source adds that ministerial powers under section 195A of the Migration Act are non-compellable and non-reviewable. There is reportedly no correspondence or other feedback that outlines the reasons for keeping Mr. Niazy in the prison against the advice and recommendations of medical and legal professionals, which are supported by several reports of mental health professionals who have treated and/or assessed Mr. Niazy.

25. The source further submits that Mr. Niazy has been deprived of liberty because of the exercise of his rights guaranteed by article 14 of the Universal Declaration of Human Rights. He has also been deprived of liberty in contravention of article 26 of the International Covenant on Civil and Political Rights. Mr. Niazy, as a non-citizen of Australia, is subject to administrative detention, and the source argues that Mr. Niazy's detention is not appropriate, considering his circumstances.

#### *Response from the Government*

26. On 16 April 2020, 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 15 June 2020, detailed information about the current situation of Mr. Niazy 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 Mr. Niazy's physical and mental integrity.

27. On 20 April 2020, the Government requested an extension, which was granted with the new deadline of 15 July 2020.

28. In its response of 14 July 2020, the Government submits that Mr. Niazy remains in immigration detention because he is an unlawful non-citizen. He is currently being held in an alternative place of detention and is accommodated at the Metropolitan Remand and Reception Centre within Corrective Services New South Wales.

29. On 11 December 2019, following the cancellation of his child visa under section 501 (3) (b) of the Migration Act, Mr. Niazy was detained under section 189 (1) of the Act, as an unlawful non-citizen, at the Brisbane Immigration Transit Accommodation Centre.

30. The Government notes that on 12 December 2019, police raised concerns for Mr. Niazy's safety through the Immigration Status Service of the Department of Home Affairs. Mr. Niazy was thus transferred to an alternative place of detention.

31. On 13 December 2019, Mr. Niazy was returned to the Brisbane Immigration Transit Accommodation Centre owing to further concerns for his safety. The Department of Home Affairs sought placement for Mr. Niazy in a correctional facility, and on 20 December 2019, he was transferred to the Metropolitan Remand and Reception Centre, where he is still located.

32. On 14 January 2020, Mr. Niazy's application for a protection visa was refused as he did not satisfy the criterion in section 36 (1C) (b) of the Migration Act. The Government notes that all visa applicants must meet the character and health requirements, as well as the relevant criteria of the visa for which they have applied.

33. On 3 April 2020, Mr. Niazy's migration agent requested consideration for ministerial intervention under sections 195A and 197AB of the Migration Act on Mr. Niazy's behalf. Section 195A of the Act enables the Minister to grant a visa to a person in immigration detention if the Minister considers it to be in the public interest to do so. Section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing them to reside in the community at a specified

place and under specified conditions, if the Minister considers it is in the public interest. The Minister's powers are discretionary, non-compellable and non-delegable.

34. The Government adds that the Minister has established guidelines that set out the types of cases that should or should not be referred for consideration under these intervention powers. If Mr. Niazy's case is found to meet these guidelines, it will be referred to the Minister for consideration. Generally, persons whose visas have been refused or cancelled under section 501 of the Migration Act would only meet the guidelines for referral in exceptional circumstances.

35. According to the Government, as a person whose visa was cancelled under section 501 of the Migration Act, Mr. Niazy is statutorily barred from lodging a visa application, other than for a protection visa and a bridging visa R (class WR). As Mr. Niazy has been refused a protection visa, he is barred by section 48A of the Act from lodging a further protection visa application. He can only be granted a visa, placed into the community or permitted to make a further protection visa application by a Minister exercising personal intervention powers.

36. On 15 January 2020, Mr. Niazy lodged an appeal in the Federal Court of Australia in relation to the cancellation of his child visa by the Minister under section 501 (3) (b) of the Migration Act. On 28 May 2020, with agreement from Mr. Niazy and his lawyers, the Department of Home Affairs withdrew from the Federal Court proceedings, the effect of which was that Mr. Niazy's child visa was reinstated and he became a lawful non-citizen. The Department immediately took steps to release Mr. Niazy. Shortly thereafter, and prior to his release being effected, advice was received that the Minister had made a further decision to cancel Mr. Niazy's child visa. He was detained at the Metropolitan Remand and Reception Centre, an alternative place of detention, pursuant to section 189 (1) of the Act.

37. On 20 January 2020, the Administrative Appeals Tribunal commenced a review of the decision to refuse Mr. Niazy's application for a protection visa. At the time of the submission of the Government's response, the review was ongoing and a teleconference had been scheduled on 7 August 2020.

38. According to the Government, Mr. Niazy arrived in Australia on 22 June 2005, as the holder of a child visa. His family arrived in Australia on 15 April 2002 as the holders of Global Special Humanitarian visas. They had provided evidence that he had been kidnapped while residing in Pakistan. On 25 March 2008, Mr. Niazy applied for conferral of Australian citizenship.

39. Between June and November 2008, Mr. Niazy was convicted of a series of minor driving offences. In November 2008, Mr. Niazy was sentenced as a minor to several control orders, including a two-year control order following conviction of an offence involving kidnapping.

40. On 10 June 2009, Mr. Niazy's application for conferral of citizenship was refused because he was not eligible to become an Australian citizen under section 24 (6) (g) of the Citizenship Act 2007.

41. From November 2009 to June 2017, Mr. Niazy was reportedly convicted of serious offences, including firearm-related crimes. He was sentenced to a two-year control order in November 2009. In May 2015, he was found to be unfit to be tried on other charges and subjected to a limiting term of two years and three months under the Mental Health (Forensic Provisions) Act. In September 2015, he was arrested and charged with a number of further firearm offences. In March 2016, he was convicted of intimidating a police officer in the execution of his duty, for which he was fined 660 Australian dollars. In June 2017, he was convicted of the use of an unauthorized firearm. He was sentenced to imprisonment of four years and seven months, commencing with a non-parole period of two years and nine months.

42. On 22 October 2010, Mr. Niazy was referred to the National Character Consideration Centre of the Department of Home Affairs for consideration of cancellation of his child visa under section 501 of the Migration Act. On 15 March 2011, a Notice of Intention to Consider Cancellation was issued to Mr. Niazy. On 6 September 2011, the Department closed the referral and did not cancel his child visa.

43. On 25 June 2014, Mr. Niazy was referred for consideration of cancellation of his child visa under section 501 of the Migration Act. On 1 April 2015, a Notice of Intention to Consider Cancellation was issued to Mr. Niazy for comment, which was provided on 21 July 2015. The Minister considered this response in making the decision to cancel his child visa.

44. On 24 November 2015, while serving a custodial sentence for firearm offences, Mr. Niazy's child visa was cancelled, owing to his substantial criminal record.

45. On 28 March 2017, Mr. Niazy lodged a protection visa application. The application was determined to be valid and an application for a bridging visa E was made on 5 April 2017. The application for a bridging visa E was assessed as being invalid on 24 May 2018, since Mr. Niazy was barred from applying for a visa, other than a protection visa and a bridging visa R (class WR), under the Migration Act.

46. On 26 June 2018, Mr. Niazy was released from criminal custody and immediately detained under section 189 (1) of the Migration Act, because he was an unlawful non-citizen, and he was transferred to the Maribyrnong Immigration Detention Centre.

47. On 2 October 2018, it was found that Mr. Niazy was not a refugee and did not meet complementary protection criteria. In that connection, a decision was made to refuse his application for a protection visa. On 9 October 2018, Mr. Niazy sought a merits review of the decision to refuse his application through the Administrative Appeals Tribunal. On 26 February 2019, the Tribunal remitted the matter to the Department of Home Affairs for reconsideration and directed that Mr. Niazy was a refugee within the meaning of section 5H (1) of the Migration Act.

48. On 16 July 2019, Mr. Niazy sought judicial review of the decision to cancel his visa through the Federal Court. The Federal Court set aside the decision to cancel his visa and he was released from detention on 11 December 2019. On the same day, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled Mr. Niazy's visa under section 501 (3) (b) of the Act.

49. On 14 January 2020, Mr. Niazy's application for a protection visa – which had been remitted from the Administrative Appeals Tribunal on 26 February 2019 for reconsideration by the Department of Home Affairs – was refused because he did not satisfy the criterion in section 36 (1C) (b) of the Migration Act. Section 36 (1C) (b) of the Act provides that one criterion for a protection visa is that the applicant is not a person who the Minister considers to be a danger to the community, despite their having been convicted by a final judgment of a particularly serious crime. The Tribunal's review of this decision remains ongoing. The Government adds that the Tribunal had listed the matter for teleconference on 7 August 2020.

50. On 15 January 2020, Mr. Niazy sought a judicial review of the Minister's decision to cancel his visa through the Federal Court. On 28 May 2020, with agreement from Mr. Niazy, the Department of Home Affairs withdrew from the Federal Court proceedings, the effect of which was that Mr. Niazy's visa was reinstated and he became a lawful non-citizen. The Department immediately took steps to release Mr. Niazy from immigration detention. Shortly thereafter, and prior to his release being effected, advice was received that the Minister had made a further decision to cancel Mr. Niazy's visa. He was detained at the Metropolitan Remand and Reception Centre, an alternative place of detention, pursuant to section 189 (1) of the Migration Act.

51. In regards to mental health, the Government notes that Mr. Niazy's diagnosed mental illness has been a causal factor in his criminal offending. He has been diagnosed with post-traumatic stress disorder, schizophrenia and substance use disorder, and his health and welfare is continually monitored by the Justice Health and Forensic Mental Health Network of New South Wales.

52. On 15 May 2020, Mr. Niazy saw a nurse. He reported experiencing hallucinations. However, they were reportedly not consistent with his presentation on the day, nor with his reported behaviour by Corrective Services or primary health-care nurses. Mr. Niazy is reported to have good compliance with treatment and also good efficacy, which is in contrast to his reported symptomology.

53. During the consultation on 15 May 2020, Mr. Niazy emphasized his poor mental health care in custody, compared with the superior care in immigration detention. He also expressed his desire to return to immigration detention. He declined to see a psychiatrist at the Justice Health and Forensic Mental Health Network. The nurse's clinical opinion is that he was attempting to exacerbate his symptoms in order to secure a transfer to an immigration detention facility. He has been reported as being settled and appropriate in behaviour by both Corrective Services New South Wales and the main clinic staff.

54. Turning to legal and policy frameworks, the Government submits that the universal visa system of Australia requires all non-citizens to hold a valid visa to enter and/or remain in Australia. The immigration detention legislative framework provides that under section 189 of the Migration Act, an individual must be detained where an officer knows or reasonably suspects that the individual is an unlawful non-citizen. In addition, section 196 of the Act specifies that an unlawful non-citizen must be kept in immigration detention until they are either removed or granted a visa.

55. Section 195A of the Act 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. Section 197AB of the Act provides the Minister with the power to make a residence determination in respect of a person in immigration detention, allowing them to reside in the community at a specified place and under specified conditions, if the Minister considers that it is in the public interest to do so.

56. The Government adds that what is in the public interest is a matter for the Minister to decide. The Minister has established intervention guidelines that set out the types of cases that should or should not be referred for consideration under these intervention powers. Cases are only referred for ministerial consideration if they are assessed as meeting these guidelines. Generally, persons whose visas have been refused or cancelled under section 501 of the Act would only meet the guidelines for referral in exceptional circumstances.

57. The powers of the Minister under sections 195A and 197AB of the Migration Act are discretionary and non-compellable. The Minister is under no obligation to exercise or to consider exercising these powers in a case.

58. Persons who make a valid application for a protection visa will have their claims assessed by the Government. The Government asserts that domestic legislation, policy and practice implement the non-refoulement obligations of Australia under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol thereto; the International Covenant on Civil and Political Rights and its Second Optional Protocol; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

59. Persons engaging the protection obligations of Australia may be refused a protection visa if they cannot also meet other visa criteria. For example, section 36 (1C) of the Migration Act provides that an applicant for a protection visa cannot be a person that the Minister considers, on reasonable grounds, to be a danger to the security of Australia or the community. This criterion reflects the exception to non-refoulement in article 33 (2) of the Convention relating to the Status of Refugees. However, a person will not be removed in breach of the non-refoulement obligations of Australia, including those obligations under the International Covenant on Civil and Political Rights and the Convention against Torture, even in circumstances where the person has been refused a protection visa.

60. Section 501 of the Migration Act allows the Minister to refuse to grant a visa to a non-citizen if the non-citizen does not satisfy the Minister that they pass the character test. In addition, the same section permits the Minister to cancel a visa if the Minister reasonably suspects that the person does not pass the character test and the person is not able to satisfy the Minister that they do. A person may not pass the character test on a number of grounds, including if the person has a substantial criminal record.

61. When the Minister or delegate is considering making a decision to refuse to grant a visa, or to cancel a visa, under section 501 of the Migration Act, all relevant information and circumstances relating to the case, including the impact on the individual, are taken into account. However, public safety remains a primary consideration and a decision to refuse to grant a visa, or to cancel a visa, may be made because a non-citizen represents a danger to

the community, even where there are countervailing factors. Cases under character consideration are allocated to a decision maker according to the seriousness and nature of the adverse conduct.

62. The Government submits that immigration detention of an individual on the basis of their status as an unlawful non-citizen is not arbitrary under international law. Continuing detention may become arbitrary if it continues without proper justification. In instances of continuing detention, the determining factor is not the length of the detention, but whether the grounds for the detention are justifiable. Detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Mr. Niazy remains in detention because he is an unlawful non-citizen. He has been assessed as being a danger to the community owing to his substantial criminal record, such that alternative options, including residence determinations or bridging visas, are deemed inappropriate. Mr. Niazy is currently detained in an alternative place of detention owing to concerns for his safety.

63. According to the Government, immigration detention is administrative in nature and not for punitive purposes. It notes its commitment to ensuring that all individuals in immigration detention are treated in a manner consistent with the country's international legal obligations. According to section 5 of the Migration Act, the definition of "immigration detention" includes being held by, or on behalf of, an officer in a prison or remand centre of a State or territory.

64. The Department of Home Affairs is required under section 486N of the Migration Act 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 Ombudsman prepares independent assessments of the individual's circumstances and provides the Minister with a report under section 486O of the Act. The Ombudsman may make recommendations to the Minister and the Department regarding the circumstances of the individual's detention, including their detention placement. On 7 July 2020, the Department provided the Ombudsman with a section 486N report covering a 24-month period for Mr. Niazy. No assessments under section 486O have been completed by the Ombudsman.

65. The Government adds that in 2018, the Ombudsman's Office was made the national preventive mechanism with responsibility for inspecting places of detention under the control of the Commonwealth, in line with the Optional Protocol to the Convention against Torture, which Australia ratified in 2017. The Office is also the coordinator of the national preventive mechanism. In this capacity, the Ombudsman has decided to commence regularly publishing information about the Office's work in overseeing immigration detention.

66. The Department of Home Affairs works on a regular basis with the Queensland Police and Corrective Services to review the ongoing threat to Mr. Niazy's safety and his placement.

67. A person in immigration detention is reportedly able to seek judicial review of the lawfulness of the detention before the Federal Court or the High Court. Paragraph 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. Section 476 of the Migration Act grants the Federal Circuit Court the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution in relation to most migration decisions. It is these provisions that constitute the legal mechanisms through which a non-citizen may challenge the lawfulness of their detention, that is, to challenge the legal application of section 189 of the Act.

68. The Government rebuts the source's arguments in relation to *Al-Kateb v. Godwin*. The High Court held that provisions of the Migration Act requiring the detention of non-citizens until they are either removed or granted a visa, even if removal is not reasonably practicable in the foreseeable future, are lawful. The right to seek a remedy against an officer of the Commonwealth under the Constitution is still available to non-citizens. The decision in *Al-Kateb v. Godwin* does not alter a non-citizen's ability to challenge the lawfulness of their detention under Australian law. Furthermore, non-citizens are also able to challenge the lawfulness of their detention through actions such as habeas corpus.

69. The universal visa system of Australia involves a binary system of lawful and unlawful non-citizens. In order to be a lawful non-citizen, a non-citizen must hold a visa that is in effect. A non-citizen who does not hold a visa that is in effect is an unlawful non-citizen (sects. 13 and 14 of the Migration Act). Section 189 (1) of the Act obliges officers to detain a person they know or reasonably suspect to be an unlawful non-citizen.

70. Nothing in the Act, including section 196 (3), prevents the Court from determining and enforcing the limitation in section 189 (1). It is open to immigration detainees to approach the Court to challenge their detention on the basis that the requisite knowledge or reasonable suspicion does not exist. One such example would be when they in fact hold a visa that is in effect and are lawful non-citizens, or are citizens and not non-citizens at all. If the Court agrees, it can order that a person be released from immigration detention. Section 196 (3) does not prevent such an occurrence because the person in question is necessarily either a lawful non-citizen, or not a non-citizen at all.

71. A person may challenge their detention under section 75 of the Constitution. The section similarly guarantees judicial review rights in relation to all visa decisions under the Migration Act. Contrary to the source's submissions, Mr. Niazy is guaranteed the possibility of judicial review.

72. The Government submits that Mr. Niazy is able to seek merits and judicial reviews of the migration decisions made in respect of him, and that he has done so. Most recently, on 20 January 2020, Mr. Niazy applied again to have the Administrative Appeals Tribunal review the protection visa refusal decision. This matter remains ongoing, and the Tribunal listed the matter for a telephone conference on 7 August 2020. In addition, on 11 December 2019, the Federal Court set aside the Minister's decision to cancel Mr. Niazy's child visa. Mr. Niazy had also sought judicial review of a subsequent decision to cancel his child visa.

73. The Government notes that although it has been adopted by the General Assembly, the Universal Declaration of Human Rights does not create binding legal obligations. Notwithstanding this, Mr. Niazy is detained as required by section 189 of the Migration Act because he is an unlawful non-citizen – as a result of his child visa having been cancelled, and his subsequent protection visa application being refused owing to his substantial criminal record – and is a danger to the community. Mr. Niazy is detained as a consequence of the operation of the country's domestic laws, not as a consequence of seeking protection.

74. As indicated in section 4 of the Migration Act, the aim of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. In that sense, the purpose of the Act is to differentiate on the basis of nationality between non-citizens and citizens. The Government recalls that the Human Rights Committee has recognized in the context of the Covenant that it 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.<sup>3</sup>

75. Articles 12 and 13 of the International Covenant on Civil and Political Rights imply that States parties have the right, under international law, to control the residence, entry and expulsion of aliens. The Government submits that it is a matter for it to determine, consistently 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 when a visa is not held, a non-citizen is subject to immigration detention.

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

77. The differential treatment of citizens and non-citizens set out in the Migration Act is for the legitimate aims of: preventing unlawful non-citizens from travelling to Australia by

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<sup>3</sup> Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 5.

irregular means; ensuring the integrity of the country's migration programme; assessing the identity and security risk of unlawful non-citizens; and protecting the community. This is consistent with articles 12 and 13 of the Covenant. The differentiation is reasonable because it is consistent with those aims. Therefore, any differential treatment between 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.

78. The Government concludes that Mr. Niazy is lawfully detained under section 189 (1) of the Act and that his detention is appropriate in his circumstances.

*Further comments from the source*

79. The response of the Government was transmitted to the source for further comments on 20 July 2020. In its response of 22 July 2020, the source submits that despite the known danger to Mr. Niazy and his poor mental health, the relevant ministers have not deemed his case of sufficient gravity to make a decision on the request for ministerial intervention under sections 195A and 197AB with any sense of urgency.

80. According to the source, it is also misleading to imply that some action is taking place in the processing of Mr. Niazy's ministerial intervention request. There is no evidence that the request is even before any relevant portfolio Minister. Instead, it is reportedly much more likely that it remains with the Department of Home Affairs for assessment against guidelines to potentially send to ministers for consideration.

81. The source also adds that it is unlikely that, after cancelling Mr. Niazy's child visa multiple times and refusing him a protection visa, the Department of Home Affairs will now somehow assess Mr. Niazy as meeting the guidelines for referral to the ministers, and that the ministers will then decide to grant him a visa or a residence determination. Instead, according to the source, this appears to be a tactic used by the Department to give the impression that it remains engaged with Mr. Niazy's matter, instead of admitting that it is pursuing a constructive refoulement approach by ensuring that he remains in detention so that he "agrees" to return to Afghanistan.

82. The source further adds that, owing to the timing of the Minister's cancellation of Mr. Niazy's child visa on 28 May 2020, immediately after the same visa had been reinstated, it is clear that this cancellation was planned prior to the reinstatement. This implies that the Department of Home Affairs was seeking to avoid the Federal Court proceedings – which were to be held on the same day – and thus the scrutiny of the Court. The source notes that this is the second time the Minister cancelled Mr. Niazy's visa on the same day that it was reinstated.

83. According to the source, it is irrelevant if Mr. Niazy sought to exacerbate his symptoms to secure a transfer to an immigration detention facility. For the purposes of administrative detention, Mr. Niazy is being held in a prison. Even if he had excellent mental health, he should be held in an immigration detention facility as opposed to a prison. The source adds that this raises serious questions regarding the constitutional separation of powers between the executive and the judiciary.

84. Similarly, the source notes that merely stating that immigration detention is administrative in nature and not for punitive purposes does not make it so. The fact is that Mr. Niazy has been and continues to be held in a prison. In the criminal justice system, one of the purposes of imprisonment is punitive in nature. It follows that the conditions of imprisonment are also punitive, reflecting this purpose.

85. The source adds that the Government acknowledges in its response that Mr. Niazy's mental health is a causal factor in his criminal offending. As a result, instead of taking steps to promote the improvement of his condition, the Government is effectively punishing Mr. Niazy for being mentally ill by holding him in prison.

86. According to the source, it is not correct to state that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. Detention is the first resort for unlawful non-citizens. Under section 189 of the Migration Act, unlawful non-citizens must be detained.

87. The source notes that the Government refers in its response to detention review mechanisms. The source adds that these operate within the country's legal framework, which permits arbitrary detention. Furthermore, the source notes that the Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention. Indeed, it is reported that the Department has consistently failed to act on recommendations of the Ombudsman to release individual asylum seekers and refugees from detention.

88. In its response, the Government discusses the *Al-Kateb v. Godwin* case. In this respect, the source notes that the case reinforces the position of Mr. Niazy – that is, that his arbitrary, open-ended detention is authorized by Australian law (both legislation and case law).

89. According to the source, judicial review mechanisms available to Mr. Niazy operate within the country's legal system, in particular the Migration Act. The Migration Act prima facie authorises the detention of Mr. Niazy. Furthermore, although he has an impending hearing with the Administrative Appeals Tribunal, the Tribunal cannot grant him a protection visa or order him to be released from detention.

90. The source submits that the Government response misconstrues Australian law. If Mr. Niazy had not come to Australia to seek asylum – on a Government-sponsored programme – he would not be an unlawful non-citizen and would not be liable for detention.

91. According to the source, the Government also discusses the Covenant in its response. In this respect, the source notes the response by the Working Group on Arbitrary Detention to the approach of Australia to the Covenant in the context of the admission of refugees.<sup>4</sup>

92. With reference to paragraph 77 above, the source argues that this is a general statement of the Government's deterrent policy, in which asylum seekers are detained for indefinite periods of time to deter others from seeking asylum. The source adds that there is nothing in this statement that applies to the specific circumstances of Mr. Niazy.

## Discussion

93. The Working Group thanks the source and the Government for their timely and detailed submissions.

94. In determining whether the deprivation of liberty of Mr. Niazy is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international requirements 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 (A/HRC/19/57, para. 68).

95. At the outset, the Working Group observes that the present case involves an individual who has spent a considerable part of his life in various detention settings in Australia. Mr. Niazy has been subjected to detention owing to his mental health condition and to detention in the criminal justice context, because he has been arrested, charged and sentenced for various criminal offences. The subject of the present communication to the Working Group, however, is his detention in the migration context. The Working Group thus notes that Mr. Niazy concluded serving his sentence on 26 June 2018 following his criminal conviction, but that he was immediately detained owing to his migratory status because his visa had been cancelled under section 189 (1) of the Migration Act. Notwithstanding the serious reservations the Working Group has in relation to this Act, as discussed below, the Working Group observes that it is not disputed that Mr. Niazy remains detained today based on that same Act.

96. Turning to the submission from the source, in which it was stated that Mr. Niazy had been detained purely for the exercise of his rights under article 14 of the Universal Declaration of Human Rights, the Working Group observes that the Government does not contest that this detention is due to the migratory status of Mr. Niazy. However, the Government argues that such detention is strictly in accordance with the Migration Act.

<sup>4</sup> See, for example, opinion No. 2/2019.

97. The Working Group has always 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.<sup>5</sup>

98. Indeed, Mr. Niazy had been living legally in Australia since 2005, when he arrived there as a child on a visa. His identity was well known to the authorities and his claim in relation to refugee status was confirmed by the Administrative Appeals Tribunal on 22 February 2019. Although the Government concedes that the decision of the Tribunal directed the Department of Home Affairs on 26 February 2019 that Mr. Niazy was a refugee, he remained in detention until a very brief release on 11 December 2019, when he was released and re-detained on the same day, owing to his visa having been cancelled. This visa was then reinstated and Mr. Niazy was about to be released on 28 May 2020 when another decision to cancel his visa was taken, thereby preventing his release.

99. The Working Group cannot help but observe that in both December 2019 and May 2020, Mr. Niazy undertook proceedings before the Federal Court. In December 2019, the Court effectively ordered his release, while in May 2020, the Government decided to reinstate his visa, leading to his release, in order to withdraw from further proceedings before the Federal Court. It is evident to the Working Group that the Government has employed a kind of revolving-door policy in relation to the detention of Mr. Niazy, given that his visa has been reinstated twice only to be cancelled the very next day in a manner that appears to be a tactic aimed at avoiding the proceedings before the Federal Court. In making this finding, the Working Group observes that the Government has failed to present any explanation of the timings of visa reinstatements and cancellations on these two occasions.

100. However, the Working Group is mindful that the Government has argued that Mr. Niazy has been assessed as being a danger to the Australian community owing to his substantial criminal record, such that alternative options, including residence determinations or bridging visas, were deemed inappropriate. Indeed, the Working Group has already noted the extensive history of Mr. Niazy's encounters with the criminal justice system of Australia. Nevertheless, to follow the Government's argument, Mr. Niazy could be detained indefinitely owing to his criminal record despite being recognized as a refugee in Australia. In fact, the Government has not presented any clear plan that would lead to Mr. Niazy's release; to the contrary, as already noted by the Working Group, the Government has subjected Mr. Niazy to a revolving-door policy by reinstating his visa and cancelling it the following day on two occasions in a period of about six months.

101. In this connection, the Working Group must once again address the argument being repeatedly presented by the Government that the continuing detention in the context of migration is lawful under international law as long as the grounds for detention are justifiable, and that the length of detention is not a determining factor.<sup>6</sup> In the view of the Working Group, this is a misinterpretation of the applicable international human rights law. The Working Group reiterates that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary,<sup>7</sup> which is why it has required that a maximum period for detention in the course of migration proceedings be set by law, and that upon the expiry of the period of detention set by law, the detained person must be automatically released.<sup>8</sup>

102. The Working Group rejects the Government's submission that the length of detention in itself is not a determining factor and that as long as reasons justifying detention are present, the detention may legally continue. To follow this logic of the Government would mean to accept that individuals could be caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This is a situation akin to indefinite

<sup>5</sup> See, e.g., opinions No. 28/2017, 42/2017 and 35/2020.

<sup>6</sup> See opinions No. 74/2019, paras. 69–70; and No. 35/2020, paras. 90–91.

<sup>7</sup> See the Working Group's revised deliberation No. 5 (A/HRC/39/45, annex), para. 18, and opinions No. 28/2017, No. 42/2017, No. 7/2019 and No. 35/2020. See also A/HRC/13/30, para. 63.

<sup>8</sup> Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61; and opinion No. 7/2019.

detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.<sup>9</sup>

103. Furthermore, the Working Group observes that the Government has argued that Mr. Niazy is being held in what it describes as an “alternative place of detention” (para. 62 above) owing to concerns for his safety. However, this place is in fact Silverwater Correctional Complex, a maximum-security prison, in which the source has alleged, and the Government has not contested, that Mr. Niazy has been held in solitary confinement for 23 hours a day since 20 December 2019.

104. The Working Group can under no circumstances agree that those detained in the context of migration proceedings could be held in facilities other than those which are suitable for such purpose and which respect the non-convicted status of such individuals.<sup>10</sup> Moreover, despite the claims of the Government to the contrary, the Working Group is of the view that the detention of Mr. Niazy is in fact punitive in nature. As the Working Group notes in its revised deliberation No. 5, this should never be the case.<sup>11</sup> Mr. Niazy has been detained for some two years, without a charge or a trial, in what was clearly a punitive detention in breach of article 9 of the Covenant.

105. Furthermore, while detained, Mr. Niazy has been effectively denied the right to challenge the continued legality of his detention. The Working Group has already addressed the two instances in which the Government circumvented the proceedings that Mr. Niazy brought before the Federal Court (see paras. 99 and 100 above). In this regard, the Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>12</sup> That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>13</sup> not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including migration detention.<sup>14</sup> Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.<sup>15</sup>

106. Moreover, the Working Group is mindful that the proceedings before the Federal Court were initiated by Mr. Niazy. In other words, his detention was not subject to an automatic, periodic review to ensure that it was compatible with article 9 of the Covenant,<sup>16</sup> and the Working Group recalls the obligation of the States to ensure such an automatic, periodic review at set time limits.<sup>17</sup> In the present case, the absence of such a review is an additional serious breach of article 9 of the Covenant.

107. The Working Group takes note of the argument presented by the Government that the detention of Mr. Niazy has been submitted for review to the Commonwealth Ombudsman in July 2020. However, the Government has not presented any explanation as to how such a review would satisfy the requirements for the review of the legality of detention to be carried out by a judicial body as stipulated by article 9 (4) of the Covenant. The Working Group is

<sup>9</sup> Revised deliberation No. 5, para. 27. See also opinions No. 1/2019 and No. 7/2019.

<sup>10</sup> Revised deliberation No. 5, para. 36. See also opinion No. 7/2019.

<sup>11</sup> Revised deliberation No. 5, paras. 9 and 14. See also opinion No. 49/2020, para. 87.

<sup>12</sup> A/HRC/30/37, paras. 2–3.

<sup>13</sup> *Ibid.*, para. 11.

<sup>14</sup> A/HRC/30/37, annex, para. 47 (a).

<sup>15</sup> *Ibid.*, annex, para. 47 (b).

<sup>16</sup> Opinion No. 72/2017, para. 60. See also principle 21 of the Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court; A/HRC/13/30, para. 61; principle 11.3 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; E/CN.4/2003/4, para. 86; E/CN.4/2003/8/Add.2, para. 64; A/HRC/13/30/Add.2, para.79 (g); and A/HRC/16/47/Add.2, para. 120.

<sup>17</sup> A/HRC/36/37/Add.2, para. 92.

particularly mindful that the Commonwealth Ombudsman has no power to compel the Department of Home Affairs to release a person from immigration detention.

108. The Government has also argued that the Minister has reviewed the detention of Mr. Niazy but once again, noting that this is a review by an executive, the Working Group observes that it does not satisfy the criteria of article 9 (4) of the Covenant.

109. While the Working Group agrees with the argument presented by the Government in relation to article 26 of the Covenant (see paras. 74–76 above), it is also compelled to highlight that in the same general comment No. 15 that is quoted by the Government, the Human Rights Committee 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.<sup>18</sup>

110. This means that Mr. Niazy is entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant and that when guaranteeing these rights to him, Australia must ensure that this is done without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Niazy is subjected to de facto indefinite detention owing to his immigration status, in clear breach of article 2 in conjunction with article 9 of the Covenant.

111. Consequently, the Working Group finds that Mr. Niazy is subjected to de facto indefinite detention owing to his migratory status, without the possibility to challenge the legality of such detention before a judicial body, the right encapsulated in article 9 (4) of the Covenant. The detention of Mr. Niazy is therefore arbitrary, falling under category IV. In making this finding, the Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 of the Covenant.<sup>19</sup>

112. Furthermore, the Working Group notes the argument presented by the source that Mr. Niazy, 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. The Government denies those allegations, arguing that in the cited case, the High Court held that provisions of the Migration Act 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, were valid.

113. The Working Group notes that the same explanation was submitted by the Government in relation to the High Court's decision on numerous previous occasions and that it has been rejected by the Working Group.<sup>20</sup> This explanation only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future.

114. However, the Working Group has repeatedly noted that the Government is failing to explain how such non-citizens can effectively challenge their continued detention after this decision by 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 jurisprudence of the Human Rights Committee in which it examined

<sup>18</sup> Human Rights Committee, general comment No. 15, paras. 2 and 7.

<sup>19</sup> *C. v. Australia; Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

<sup>20</sup> 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; and No. 35/2020, paras. 95–96.

the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.<sup>21</sup>

115. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,<sup>22</sup> 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. Niazy is arbitrary, falling under category V.

#### Migration Act 1958

116. The Working Group observes that the present case is the latest in the number of cases from Australia that have come before it since 2017 that have all concerned the same issue, namely the mandatory immigration detention in Australia as per the Migration Act 1958.<sup>23</sup> The Working Group reiterates its views on the Migration Act as expressed most recently in its opinion No. 35/2020.<sup>24</sup>

117. The Working Group is concerned about the rising number of cases from Australia concerning the implementation of the Migration Act that are being brought to its attention. The Working Group is equally concerned that in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Migration Act. The Working Group wishes to clarify that such an argument 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 approve that legislation as conforming with the obligations that the State has undertaken under international human rights law. A State cannot legitimately avoid its obligations arising from international human rights law by evoking its domestic laws and regulations.

118. 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, into line 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,<sup>25</sup> the Committee on Economic, Social and Cultural Rights,<sup>26</sup> the Committee on the Elimination of Discrimination against Women,<sup>27</sup> the Committee on the Elimination of Racial Discrimination,<sup>28</sup> the Special Rapporteur on the human rights of migrants<sup>29</sup> and the Working Group.<sup>30</sup> The Working Group reiterates this unison voice of independent, international human rights mechanisms and calls upon the Government to urgently review its legislation in the light of its obligations under international human rights law without delay.

119. The Working Group welcomes the invitation of 27 March 2019 from the Government 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

<sup>21</sup> *C. v. Australia; Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 9.3.

<sup>22</sup> 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 and No. 35/2020.

<sup>23</sup> See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018, No. 1/2019, No. 2/2019, No. 74/2019, No. 35/2020, No. 70/2020 and No. 72/2020.

<sup>24</sup> Opinion No. 35/2020, paras. 98–103.

<sup>25</sup> CCPR/C/AUS/CO/6, paras. 33–38.

<sup>26</sup> E/C.12/AUS/CO/5, paras. 17–18.

<sup>27</sup> CEDAW/C/AUS/CO/8, para. 53.

<sup>28</sup> CERD/C/AUS/CO/18-20, paras. 29–33.

<sup>29</sup> A/HRC/35/25/Add.3.

<sup>30</sup> Opinions No. 50/2018, paras. 86–89; No. 74/2018, paras. 99–103; No. 1/2019, paras. 92–97; No. 2/2019, paras. 115–117; No. 74/2019, paras. 37–42; and No. 35/2020, paras. 98–103.

the Government constructively and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

### **Disposition**

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

The deprivation of liberty of Mohammad Qais Niazy, 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 IV and V.

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

122. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Niazy immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (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 release of Mr. Niazy.

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

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

125. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

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

### **Follow-up procedure**

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

128. 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.

129. 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.

130. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>31</sup>

*[Adopted on 24 November 2020]*

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<sup>31</sup> Human Rights Council resolution 42/22, paras. 3 and 7.