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# Advance Edited Version

Distr.: General  
12 February 2021

Original: English

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

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

### **Opinion No. 72/2020 concerning Said Mohamed Elmahdy Agueib Attia Farag (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 21 May 2020 the Working Group transmitted to the Government of Australia a communication concerning Said Mohamed Elmahdy Agueib Attia Farag. The Government replied to the communication on 18 August 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,

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

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

### **Submissions**

#### *Communication from the source*

4. Said Mohamed Elmahdy Agueib Attia Farag, born in 1967, is a national of Egypt and holds an Egyptian passport. Prior to his arrest, Mr. Farag was working as a seaman.

a. Arrest and detention

5. The source submits that Mr. Farag was detained on 13 October 2014 at the port of Newcastle in Australia after he disembarked a cargo ship on which he was working. The source assumes that a notice of detention from the Australian Department of Home Affairs was shown to Mr. Farag, but no copy is available. He was detained under section 189 (1) of the Migration Act 1958 and taken to a police station.

6. According to the source, Mr. Farag was transferred to Villawood Immigration Detention Centre on 13 November 2014. He has since been transferred to other onshore detention centres in Australia and continued to be detained at the time of submission, given that his immigration status remained undetermined.

7. The source reports that on 5 December 2014, Mr. Farag lodged an application for a permanent protection visa (class XA, subclass 866). On 14 April 2015, he was notified that his application was invalid under section 46A (1) of the Migration Act. This section provides that, other than at the discretion of the Minister, an application for a visa is not valid if made by an unauthorized maritime arrival who is in Australia and is an unlawful non-citizen. The term “unauthorised maritime arrival” is defined under section 5AA of the Act to mean a person who entered Australia by sea at an “excised offshore place”.

8. According to the source, on 22 October 2016, the Department of Home Affairs notified Mr. Farag that his case had been identified for inclusion in a ministerial submission for consideration under section 195A of the Migration Act, which provides that if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Act. To date, there has been no progress in respect of the ministerial intervention.

9. The source submits that the Department has not presented any particular reason specific to Mr. Farag, such as an individualized likelihood of absconding, committing a crime or committing an act against national security, which would justify his initial or continued detention.

10. The source further states that Mr. Farag has applied for and been granted an injunction in the High Court of Australia that provides for 72 hours’ notice prior to any removal from Australia.

11. The source reports that the Commonwealth Ombudsman has assessed Mr. Farag’s detention under section 486O of the Migration Act. The Department has not progressed Mr. Farag’s case, despite the Ombudsman’s strong recommendations to lift the requirement regarding validity under section 46A of the Act and to prioritize the resolution of Mr. Farag’s immigration status.

b. Legal analysis

12. According to the source, Mr. Farag exercised his right to seek asylum from persecution under article 14 of the Universal Declaration of Human Rights following repeated threats from his family due to what is deemed a “dishonourable” marriage in his home country. Separately and in addition to this, he converted from Islam to Christianity and sought asylum owing to fears of the Muslim Brotherhood in Egypt, allegedly known for its repeated persecution of Muslims converted to Christianity. Reportedly, sending Mr. Farag back to Egypt would put his life in danger, owing to his own conversion and to the fact that he converted another detainee to Christianity, which is punishable by death under Islamic law. Furthermore, the source notes that in February 2014, the then Department of

Immigration and Border Protection (now under the Department of Home Affairs) released details of Mr. Farag on the Internet, when it inadvertently made public the identity of almost 10,000 asylum seekers.

13. The source submits that Mr. Farag applied for a temporary maritime crew visa (subclass 988), and the application was deemed invalid on 23 October 2014. He was under the impression that he had arrived in Australia legally. In addition to his other protection claims, Mr. Farag left the ship upon arriving in Australia owing to fears of his superior, who was a close friend of Mr. Farag's family.

14. While the basis for Mr. Farag's deprivation of liberty is authorized by sections 189 (1), 196 (1) and 196 (3) of the Migration Act, the source refers to the Human Rights Committee, which has argued in its general comment No. 36 (2018) that arbitrariness is not defined as merely being against the law, but also as including elements of inappropriateness, injustice and lack of predictability.

15. According to the source, Mr. Farag's prolonged detention has impaired both his physical and his mental health. He has received treatment for a wrist fracture, chest pain and an abdominal lipoma, and continues to receive treatment for multiple mental health concerns. He has claimed to feel restricted and suffocated, and he has refused food and fluid on two occasions as a form of protest. The source adds that the deterioration of Mr. Farag's mental health is positively correlated with the length of his detention in the detention centre, which, according to the source, amounts to cruel, inhumane or degrading treatment, in breach of the obligations of Australia under articles 7 and 10 (1) of the Covenant.

16. The source further argues that during Mr. Farag's nearly six years of detention, no judicial body has been involved in the assessment of the lawfulness of his detention, noting that such consideration by a judicial body should involve assessment of the legitimacy and proportionality of detention.

#### *Response from the Government*

17. On 21 May 2020, the Working Group transmitted the allegations made by the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 20 July 2020, detailed information about Mr. Farag's current situation 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 of Australia to ensure Mr. Farag's physical and mental integrity.

18. On 28 May 2020, the Government requested an extension, which was granted with a new deadline of 20 August 2020. In its reply of 18 August 2020, the Government explained that Mr. Farag remained in immigration detention because he was an unlawful non-citizen, which is a non-citizen who does not hold a visa and therefore does not have permission to remain in Australia. At the time of the Government's response Mr. Farag was detained at Villawood Immigration Detention Centre.

19. The Government notes that on 13 October 2014, before his arrival in Australia, Mr. Farag lodged an application for a maritime crew visa (subclass 988). On 22 October 2014, he arrived at Newcastle port aboard the vessel *Wadi Safaga*, without a valid visa for entry to Australia. He was refused immigration clearance, detained under the Migration Act and placed in immigration detention on board the vessel.

20. On 23 October 2014, Mr. Farag's application for a maritime crew visa (subclass 988) was refused. After being refused immigration clearance, he reportedly attempted to leave the vessel without permission, but was detained again on the wharf by an officer from the then Department of Immigration and Border Protection. On the same day, Mr. Farag was transferred to Villawood Immigration Detention Centre. He reportedly indicated that he was willing to return to Egypt and signed a request for voluntary removal from Australia, and planning for his removal commenced.

21. On 24 October 2014, Mr. Farag was notified that he was scheduled to be voluntarily removed from Australia on 26 October 2014. On 26 October 2014, Mr. Farag withdrew his

request for voluntary removal and expressed his intention to seek the protection of Australia, and his removal was cancelled.

22. According to the Government, Mr. Farag's Status Resolution Service officer met with him on 27 October 2014 to advise him that he was liable for transfer to a regional processing country. The Government adds that Mr. Farag satisfies the definition of unauthorized maritime arrival under section 5AA of the Migration Act, having entered Australia by sea and having been classified as an unlawful non-citizen because of that entry. He is accordingly subject to the regional processing provisions of the Act, whereby he has the opportunity for his protection claims to be assessed by a regional processing country. Mr. Farag has acknowledged this information.

23. On 13 November 2014, Mr. Farag was transferred to Wickham Point Alternative Place of Detention in the Northern Territory.

24. On 8 December 2014, Mr. Farag lodged an application for a protection visa (subclass 866). On 14 February 2015, his application was found to be invalid under section 46A of the Migration Act, which relates to visa applications made by unauthorized maritime arrivals.

25. In May 2015, the Department considered Mr. Farag's transfer to a regional processing country, noting that there were no plans to transfer him at that point.

26. On 16 June 2016, Mr. Farag was transferred from Wickham Point Alternative Place of Detention to Melbourne Immigration Transit Accommodation.

27. On 9 August 2016, Mr. Farag's case was referred for assessment against the guidelines under section 195A of the Migration Act. Under the Act, Mr. Farag is required to remain in detention unless the Minister intervenes to grant him a visa or make a residence determination, pursuant to sections 195A and 197AB of the Act respectively. Following advice that Australian Border Force was pursuing removal action, the Department ceased processing the referral for assessment against the guidelines under section 195A.

28. On 13 December 2016, Mr. Farag applied to the High Court for an injunction to prevent the Department from taking any steps towards removing him from Australia. The Government adds that the litigation is pending. The ongoing litigation remains a practical impediment to effecting Mr. Farag's removal from Australia, including his transfer to a regional processing country.

29. On 28 February 2018, Mr. Farag's case was again referred for assessment against the guidelines under section 195A of the Migration Act. On 17 May 2018, Mr. Farag's case was assessed as meeting the guidelines under section 195A for referral to the Minister. On 25 June 2018, the then Minister for Immigration and Border Protection declined to consider intervening.

30. On 31 October 2018, Mr. Farag's case was referred to the then Minister for Immigration, Citizenship and Multicultural Affairs for possible consideration under section 197AB of the Act. On 14 February 2019, the Minister declined to consider intervening.

31. On 13 June 2019, the Department initiated another assessment against the guidelines for ministerial intervention under sections 195A and 197AB of the Migration Act in relation to Mr. Farag. On 17 September 2019, his case was assessed as meeting the guidelines for referral to the Minister.

32. On 3 September 2019, meanwhile, Mr. Farag was transferred to Villawood Immigration Detention Centre, where he was being held at the time of the Government's response.

33. On 3 December 2019, Mr. Farag's case was referred to the Assistant Minister for Customs, Community Safety and Multicultural Affairs for possible consideration under sections 195A and 197AB of the Act. On 20 December 2019, the submission was returned to the Department for redrafting and was resubmitted to the Assistant Minister's office on 24 December 2019.

34. On 5 March 2020, the Assistant Minister declined to intervene under section 197AB of the Act, and he reportedly indicated that he would consider intervening under section 195A of the Act to grant Mr. Farag a final departure bridging E visa (subclass 050) for a period of

12 months. On 16 March 2020, the case was referred to the Assistant Minister for consideration of a ministerial intervention under section 195A of the Act. The Government notes that the case was still with the Assistant Minister for consideration at the time of its response.

35. The Government adds that Mr. Farag's health is regularly reviewed by a general practitioner of the International Health and Medical Services for his current physical health issues, including type 2 diabetes, high blood pressure, high cholesterol and vitamin D deficiency. Mr. Farag has been prescribed daily medications for his health conditions, and has varying compliance in taking his medications. He has been educated and encouraged by staff of the International Health and Medical Services in regard to medication compliance.

36. The Government also adds that Mr. Farag has a pending specialist referral for a consultation with a cardiologist to review his history of chest pain. He has also recently approached staff of the International Health and Medical Services for assistance with quitting smoking cigarettes. He has been prescribed nicotine replacement therapy and engaged with staff for consultations aimed at supporting him during this process. On 8 June 2020, during a consultation with a primary health nurse, Mr. Farag reported that he was still smoking cigarettes owing to frustration and stress. He requested that he should not be scheduled for the appointments and declined referral to the mental health team. He reported that he wished to continue with nicotine replacement therapy.

37. According to the Government, Mr. Farag is regularly reviewed, in accordance with his mental health-care plan, by a qualified and experienced counsellor of the International Health and Medical Services. He reportedly has a history of insomnia and depression.

38. The Government notes that Mr. Farag has presented to the International Health and Medical Services team reports of frustration relating to his prolonged detention and other stressors. He has been prescribed antidepressant medication. On 18 May 2020, during a consultation with a counsellor, Mr. Farag's mood was noted to be largely euthymic (normal/tranquil), although there were periods of sadness and frustration noted in regard to his detention status. Mr. Farag was agreeable to ongoing mental health appointments. No acute risk issues were identified.

39. The Government also notes that Mr. Farag has been able to seek health care at any time by lodging a medical request form. He suffered a left wrist fracture in 2014, following a fall. He was reviewed at the Royal Darwin Hospital for this fracture, and there have been no recent reports in relation to his left wrist.

40. The Government adds that Mr. Farag has a history of recurrent episodic chest pain. Previous investigations have not shown any cardiac ischaemia (reduced blood flow to the heart). On 13 February 2017, he underwent an exercise cardiac stress test, to show the heart's response during physical activity, which showed normal findings. Owing to cardiac risk factors, including cigarette smoking, elevated body mass index, high cholesterol levels, type 2 diabetes and high blood pressure, Mr. Farag has been referred to Liverpool Hospital for a consultation with a cardiologist. At the time of the Government's response, the hospital had yet to provide an appointment date.

41. The Government also adds that Mr. Farag has a history of an abdominal lump, which has been previously suggested to be a lipoma. He was previously referred, in October 2015, for surgical removal of the lump at his request. However, he was transferred to an alternative detention centre before the lump could be removed. Mr. Farag has reportedly not raised further concerns in regard to this issue.

42. According to the Government, the universal visa system in Australia requires all non-citizens to hold a valid visa to enter and/or remain in the country. Regarding the legislative framework on immigration detention, the Migration Act provides that an officer must detain an individual if the officer knows or reasonably suspects that the individual is an unlawful non-citizen (section 189 of the Act). Unlawful non-citizens must be kept in immigration detention, as defined in section 5 (1) of the Act, until they are removed from Australia or they are granted a visa (section 196 of the Act).

43. The Government remains committed to its strong border protection policies. People who enter Australia by boat unlawfully are safely returned to their country of origin, or

transferred to a regional processing country, where their protection claims are assessed. Individuals under regional processing arrangements are provided with appropriate support and have their protection claims assessed by a regional processing country in accordance with international law and with respect for human rights.

44. Under section 46A (1) of the Migration Act, an application for a visa is not considered valid if it is made by an unauthorized maritime arrival who is in Australia and is an unlawful non-citizen. Under section 46A (2) of the Act, if the Minister considers it in the public interest to do so, the Minister may, by written notice given to an unauthorized maritime arrival, determine that section 46A (1) of the Act does not apply to an application by the unauthorized maritime arrival for a visa of a class specified in the determination.

45. Under section 195A of the Migration Act, if the Minister considers it in the public interest to do so, the Minister may grant a visa to a person in immigration detention. In addition, section 197AB of the Act provides that, if the Minister considers it in the public interest to do so, the Minister may 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.

46. It is for the Minister to decide what is in the public interest. 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 referred for ministerial consideration only if they are assessed as meeting the guidelines.

47. The Government clarifies that the Minister's powers under sections 195A and 197AB of the Migration Act are discretionary and non-compellable, meaning that the Minister is under no obligation to exercise or to consider exercising them. These powers are non-delegable, and, accordingly, may only be exercised by the Minister personally.

48. It is the position of the Government that the immigration detention of an individual on the basis that they are an unlawful non-citizen is not arbitrary per se under international law. However, 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.

49. The Government adds that immigration detention is administrative in nature and not used for punitive purposes. The Government is committed to ensuring that all individuals in immigration detention are treated in a manner consistent with the international legal obligations of Australia. The reason for Mr. Farag's immigration detention is that he is an unlawful non-citizen – as he does not hold a valid visa – and the grounds for his detention remain justified.

50. As an unauthorized maritime arrival, Mr. Farag is subject to the regional processing provisions in the Migration Act. Mr. Farag's ongoing High Court litigation remains a practical impediment to effecting his transfer to a regional processing country. The Department continues to regularly review his case and refer him for consideration under the Minister's personal intervention powers as appropriate, including a referral before the Assistant Minister at the time of the Government's response.

51. The Department is required, under section 486N of the Migration Act, to provide the Commonwealth Ombudsman with reports detailing the circumstances of detention of individuals who have been detained under section 189 of the Act for a cumulative period of two years and every six months thereafter. Upon receipt of the Department's report under section 486N, the Commonwealth Ombudsman, under section 486O of the Act, prepares an independent assessment of the individual's detention arrangements and provides the Minister with a report. The Commonwealth Ombudsman may make recommendations regarding the circumstances of these individuals' detention, including their detention placement. The Department has reported on the circumstances of Mr. Farag's detention on eight occasions, with the most recent report having been sent to the Commonwealth Ombudsman on 8 May 2020. The Commonwealth Ombudsman has provided the Minister with four assessments under section 486O of the Act, with the most recent assessment having been provided on 10 October 2019. The Commonwealth Ombudsman made two recommendations in the

assessment. The de-identified version of the assessment and Minister's response to the recommendations were tabled in Parliament on 27 November 2019.

52. The Department's national detention placement model entails a risk-based approach to the placement of detainees. Decisions in relation to detainee placements are taken after careful consideration of a number of factors, including the individual's needs. Medical needs are given priority, and family and community links are considered. Decisions on the placement of individuals also take account of the safety and good order of the immigration detention network, operational capacity of each facility and the need to ensure the safety and security of all detainees in immigration detention.

53. A person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court of Australia or the High Court of Australia. Paragraph 75 (v) of the Constitution provides that the High Court has original jurisdiction in relation to all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under section 39B (1) of the Judiciary Act 1903, the Federal Court of Australia has the same jurisdiction as the High Court under paragraph 75 (v) of the Constitution. It is these provisions that constitute the legal mechanism through which a non-citizen may challenge the lawfulness of their detention, that is, the legal application of section 189 of the Migration Act.

54. The Government notes that the object of the Migration Act is to "regulate, in the national interest, the coming into, and presence in, Australia of non-citizens" (section 4 (1)). In that sense, the purpose of the Act is to differentiate on the basis of nationality between non-citizens and citizens. This legitimate differential treatment is consistent with the international legal obligations of Australia. The Government refers to the Human Rights Committee, which, in its general comment No. 15 (1986) on the position of aliens under the Covenant, has recognized the following:

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment.

55. The Government submits that, consistent with its obligations under international law, it is for the State to determine 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 a non-citizen who does not hold a visa be subject to immigration detention.

56. The Government thus respectfully submits that Mr. Farag's detention is lawful under section 189 (1) of the Migration Act and that his continued detention is justified. Mr. Farag's ongoing High Court litigation remains a practical impediment to effecting his transfer to a regional processing country, where his protection claims would be assessed, or to otherwise effecting his removal from Australia. The Department continues to regularly review the appropriateness of his detention and assess his case against the guidelines for referral under the Minister's personal intervention powers.

*Additional comments from the source*

57. The response of the Government was sent to the source for further comments on 23 September 2020. On 24 September 2020, the Working Group was informed that Mr. Farag had been released on 27 August 2020 on a final departure visa for a period of 13 months.

58. In its further comments of 15 October 2020, the source notes the Government's assertion that Mr. Farag's ongoing proceedings at the High Court of Australia are a "practical impediment" to effecting his transfer to a regional processing country, and therefore to assessing his protection claims. This assertion implies that there is nothing that the Department of Home Affairs can do to release Mr. Farag from detention. The source states that this implication is incorrect, as has been borne out by his release on 27 August 2020. As noted in the Government's response, the Minister has the power under section 46A (2) of the

Migration Act to permit Mr. Farag to lodge an application for a protection visa. The Minister also has powers under sections 195A and 197AB of the Act to permit Mr. Farag to enter the Australian community, which were exercised.

59. The source also disputes the statement by the Government that detention in an immigration detention centre is a last resort for the management of unlawful non-citizens. According to the source, detention is the first resort for unlawful non-citizens. Under section 189 of the Migration Act, unlawful non-citizens must be detained.

60. The source further states that review mechanisms operate in Australia within the legal framework that permits arbitrary detention. In addition, the source notes that the Commonwealth Ombudsman has no power to compel the Department to release a person from immigration detention. The source argues that the Department has indeed consistently failed to act on recommendations of the Ombudsman to release individual asylum seekers and refugees from detention.

61. The source notes the Working Group's response in, for example, its opinion No. 2/2019 with regard to the approach taken by Australia to the Covenant in the context of admitting refugees.

62. Additionally, the source refers to the Government's response that the purpose of the Migration Act is to differentiate on the basis of nationality between non-citizens and citizens, and that this legitimate differential treatment is consistent with the international legal obligations of Australia (see para. 54 above). The response then goes on to cite a general comment of the Human Rights Committee that implies that the detention of aliens is permitted.

63. According to the source, this is a misrepresentation of the obligations owed to non-citizens under international law. The source refers to the Working Group's position expressed in its revised deliberation No. 5, whereby any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort (A/HRC/39/45, annex, para. 12). The source submits that the Minister had numerous opportunities to release Mr. Farag from detention and did not do so for six years. The Minister has also not provided any reasons as to why Mr. Farag's visa applications were rejected. The source states that the Government's attempts to assert that the regime of immigration detention is compliant with international law are misleading.

## **Discussion**

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

65. In determining whether Mr. Farag's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of 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).

66. As a preliminary matter, the Working Group observes that Mr. Farag was released on 27 August 2020 for a period of 13 months and that he is therefore currently no longer in detention. However, the Working Group observes that, prior to this release, Mr. Farag was detained for nearly six years, and that his current release is not final. On the basis of paragraph 17 (a) of its methods of work, therefore, the Working Group shall proceed to consider the communication and render its opinion.

67. The Working Group notes that although there is a slight discrepancy about the exact dates, both the source and the Government agree that Mr. Farag was detained in Australia in October 2014 and that he remained in detention until his release on 27 August 2020. The Working Group observes that, according to the Government, Mr. Farag was initially detained for having the wrong visa and he agreed at first to be removed from Australia. However, on 26 October 2014, Mr. Farag requested to stay in Australia, and from that point in time it was clear to the Australian authorities that he was seeking asylum. Since that time, however, Mr.



Farag was continuously detained, as he applied for a visa, until his current release for a period of 13 months.

68. The Working Group notes that the detention of Mr. Farag was only a few days short of six years, which is a very long period. 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 (A/HRC/39/45, annex, para. 12).

69. This position echoes the following views of the Human Rights Committee:

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.<sup>1</sup>

70. In the present case, Mr. Farag was detained upon arrival and remained detained for nearly six years. Throughout this time, the Government did not engage in the assessment of the need to detain Mr. Farag and there was no attempt to ascertain whether a less restrictive measure would be suited to his individual circumstances, as required by international law. The Working Group cannot accept that detention for nearly six years could be described as a "brief initial period". Furthermore, the Government has not presented any particular reason specific to Mr. Farag, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security, that could have justified his detention.

71. These two failures by the Government lead the Working Group to conclude that there was no other reason for detaining Mr. Farag than the fact that he was an asylum seeker and therefore subjected to the automatic immigration detention policy of Australia under the Migration Act. The Working Group therefore concludes that Mr. Farag was detained for the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights.

72. Furthermore, while noting the Government's reference to general comment No. 15 (1986) of the Human Rights Committee on the position of aliens under the Covenant (see para. 54 above), the Working Group wishes to highlight that the Committee makes clear in the same general comment 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>2</sup>

73. Mr. Farag is thus entitled to the right to liberty and security of person, as guaranteed in article 9 of the Covenant, and Australia must guarantee these rights to him without distinction of any kind, as required by article 2 of the Covenant. In the present case, Mr. Farag was 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.

74. The Working Group notes that Mr. Farag's release does not alter the characterization of his detention as indefinite, as throughout his nearly six years of detention, there was never a clear indication as to how long the detention would last or when he could expect to have a resolution. However, as the Working Group has clearly stated, indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.<sup>3</sup> The Working Group has therefore required that a maximum period for detention in the course of migration proceedings be set by legislation, and that such detention be permissible only for the shortest period of time.<sup>4</sup>

<sup>1</sup> General comment No. 35 (2014), para. 18.

<sup>2</sup> General comment No. 15 (1986), paras. 2 and 7.

<sup>3</sup> Revised deliberation No. 5 (A/HRC/39/45, annex), para. 26. See also A/HRC/13/30, para. 63, and opinions No. 28/2017 and No. 42/2017.

<sup>4</sup> Revised deliberation No. 5, para. 25. See also opinions No. 5/2009 and No. 42/2017; E/CN.4/1999/63/Add.3, para. 35; and A/HRC/33/50/Add.1, paras. 49–50.

75. Consequently, noting that Mr. Farag was detained for the legitimate exercise of his rights under article 14 of the Universal Declaration of Human Rights and under articles 2 and 9 of the Covenant, the Working Group finds his detention arbitrary, falling under category II. In making this finding, the Working Group notes the submission of the Government that Mr. Farag 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 undertaken by Australia under international law, a point which the Working Group will revisit later in the present opinion (see paras. 88–90 below). The Working Group refers the present case to the Special Rapporteur on the human rights of migrants, for appropriate action.

76. The source has further argued that Mr. Farag was subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Government of Australia denies these allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court of Australia or the High Court of Australia and that the case of Mr. Farag has been reviewed by the Commonwealth Ombudsman.

77. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.<sup>5</sup> This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,<sup>6</sup> and to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including migration detention.<sup>7</sup>

78. The Working Group notes that throughout his nearly six years of detention, Mr. Farag was able to apply for a visa and to take other procedural steps in an attempt to legalize his migratory status in Australia. However, the Working Group observes that no proceedings ever took place to consider the very need to detain Mr. Farag. While the Government has argued that Mr. Farag's detention was periodically reviewed by the Commonwealth Ombudsman, it has failed to explain how such review satisfies the requirement of article 9 (4) of the Covenant for review of the lawfulness of detention by a judicial body. 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.

79. The Government has also argued that the Minister reviewed Mr. Farag's detention. However, once again, the Working Group notes that this is a review by the executive, which thus does not satisfy the criteria of article 9 (4) of the Covenant.

80. The Working Group therefore concludes that during Mr. Farag's nearly six years of detention, no judicial body was ever involved in the assessment of the lawfulness of his detention, noting that such consideration by a judicial body would necessarily involve assessment of the legitimacy, necessity and proportionality of detention.<sup>8</sup>

81. In this connection, the Working Group must once again address the argument that has been 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>9</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>10</sup> which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings must

<sup>5</sup> A/HRC/30/37, paras. 2–3.

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

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

<sup>8</sup> Revised deliberation No. 5, paras. 12–13.

<sup>9</sup> Opinions No. 74/2019, paras. 69–70, and No. 35/2020, paras. 91–92.

<sup>10</sup> Revised deliberation No. 5, 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.

be set by legislation and that upon expiry of the period for detention set by law, the detained person must be automatically released.<sup>11</sup>

82. The Working Group therefore rejects the Government's submission that the length of detention in itself is not a determining factor and that as long as reasons justifying detention are present, the detention may legally continue. To follow this logic would entail accepting that individuals could be caught up in an endless cycle of periodic reviews of their detention without any prospect of actual release. This situation is akin to indefinite detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.<sup>12</sup> As the Working Group has 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.

83. Moreover, as the Working Group has noted, in order to ensure that detention in migration settings is used as an exceptional measure, alternatives to detention must be sought.<sup>13</sup> In the case of Mr. Farag, the Working Group has already established that since his initial detention in 2014, no alternatives to detention have been considered.

84. Despite the claims of the Government to the contrary, the Working Group is of the view that the detention of Mr. Farag was in fact punitive in nature. As the Working Group has noted, this should never be the case.<sup>14</sup> Mr. Farag was detained for nearly six years, without being charged or tried, in what clearly was a punitive and indefinite detention in breach of article 9 of the Covenant.

85. Consequently, the Working Group finds that Mr. Farag was subjected to de facto indefinite detention owing to his migratory status, without the possibility of challenging the legality of his detention before a judicial body, as was his right under article 9 (4) of the Covenant. Mr. Farag's detention 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>15</sup>

86. Furthermore, the Working Group notes the unchallenged argument presented by the source that Mr. Farag, 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 of Australia in *Al-Kateb v. Godwin*, in which the High Court upheld the view that the mandatory detention of non-citizens was constitutionally permissible.<sup>16</sup> According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot.

87. The Working Group reiterates the jurisprudence of the Human Rights Committee, which has examined the implications of the High Court's judgment in *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy

<sup>11</sup> Revised deliberation No. 5, para. 17. See also A/HRC/13/30, para. 61, and opinion No. 7/2019.

<sup>12</sup> See opinions No. 1/2019 and No. 7/2019.

<sup>13</sup> Revised deliberation No. 5, para. 16. See also opinions No. 72/2017 and No. 21/2018.

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

<sup>15</sup> *Mr. 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 and 1288/2004), *Bakhtiyari et al. 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>16</sup> High Court of Australia, *Al-Kateb v. Godwin*, case No. A253/2003, Order, 6 August 2004.

to challenge the legality of continued administrative detention.<sup>17</sup> In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,<sup>18</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. Farag is arbitrary, falling under category V.

#### *Migration Act 1958*

88. The Working Group observes that the present case is the latest in a number of cases from Australia that have come before the Working Group since 2017, all on the same issue, namely mandatory immigration detention in Australia under the Migration Act 1958.<sup>19</sup> The Working Group reiterates its views on this Act as expressed most recently in its opinion 35/2020 (paras. 98–103).

89. 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 this 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 mean that the legislation is in accordance 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.

90. 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>20</sup> the Committee on Economic, Social and Cultural Rights,<sup>21</sup> the Committee on the Elimination of Discrimination against Women,<sup>22</sup> the Committee on the Elimination of Racial Discrimination,<sup>23</sup> the Special Rapporteur on the human rights of migrants<sup>24</sup> and the Working Group.<sup>25</sup> The Working Group once again reiterates the unison voices of these independent international human rights mechanisms and calls upon the Government to urgently review this legislation in the light of its obligations under international human rights law without delay.

91. 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 owing to the global coronavirus disease (COVID-19) pandemic, the Working Group looks forward to carrying out the visit as soon as is practically possible. 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.

<sup>17</sup> *Mr. C. v. Australia; Baban and Baban v. Australia; Shafiq v. Australia; Shams et al. v. Australia; Bakhtiyari et al. v. Australia; D and E and their two children v. Australia; Nasir v. Australia; and F.J. et al. v. Australia*, para. 9.3.

<sup>18</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. 71/2020.

<sup>19</sup> *Ibid.*

<sup>20</sup> CCPR/C/AUS/CO/6, paras. 33–38.

<sup>21</sup> E/C.12/AUS/CO/5, paras. 17–18.

<sup>22</sup> CEDAW/C/AUS/CO/8, para. 53.

<sup>23</sup> CERD/C/AUS/CO/18-20, paras. 29–33.

<sup>24</sup> A/HRC/35/25/Add.3.

<sup>25</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. 75–80; and No. 35/2020, paras. 98–103.

### Disposition

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

The deprivation of liberty of Said Mohamed Elmahdy Agueib Attia Farag, 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 II, IV and V.

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

94. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Farag unconditionally and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate unconditional release of Mr. Farag.

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

96. 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.

97. 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.

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

### Follow-up procedure

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

100. 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.

101. 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.

102. 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>26</sup>

*[Adopted on 24 November 2020]*

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<sup>26</sup> Human Rights Council resolution 42/22, paras. 3 and 7.