

OPINION No. 25/2007 (Australia)

Communication addressed to the Government on 2 April 2007.

Concerning Mr. Konstantinos Georgiou.

The State is a Party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 15/2007.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, but has not received any comments on it.
5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto.
6. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Konstantinos Georgiou, 39 years old, of Australian nationality, a mechanic, was reportedly convicted in 2000 for a triple murder committed in 1997. He was sentenced to life imprisonment. He will be eligible for release on 2 February 2031.

7. Mr. Georgiou has been detained for more than nine years at various maximum security prisons in New South Wales. In July 2003, the said detainee was transferred without written notice from Lithgow to the High Risk Management Unit (HRMU) of the New South Wales prison system, a maximum security unit inside the prison designated to admit high risk convicts, where he continues to remain. The HRMU is considered by the source to be a prison within the prison. Convicts cannot participate in the usual rehabilitation programs.
8. According to the source, rules at the HRMU change on a daily basis: Prisoners complain that one day they could do something they have been doing for several months, and without warning from the officers they may be charged and punished. Correctional staff can withdraw what little privileges prisoners have been given without even being charged with any offence or any other formal disciplinary action taken against them.
9. Mr. Georgiou has been placed by the Commissioner of Corrective Services in solitary confinement in an isolated and unclean HRMU cell, without fresh air or ventilation and with only negligible natural light. HRMU cells have no windows to the outside world.
10. Mr. Georgiou was considered by the Commissioner of Corrective Services to be a high risk prisoner. According to the source, the Commissioner of Corrective Services has absolute discretion to designate a prisoner as high risk and place that prisoner into the HRMU.
11. Mr. Georgiou is subjected to the harsh standard conditions within the HRMU, in addition to his confinement in an individual cell for up to 23 hours per day. Prisoners at the HRMU complain about freezing temperatures, stale air, and claustrophobia exacerbated by daily 23-hour lockdowns. Access to external areas is at the whim of prison guards.
12. Mr. Georgiou had no right to challenge the Commissioner's decision on his placement before a higher or a judicial authority. However, during an appeal against the severity of his 33 years custodial sentence, he raised the issue of his segregation in the HRMU as a mitigating factor. The New South Wales Court of Criminal Appeal had affirmed the principle that more onerous conditions of confinement justify some moderation in sentence. During the sentencing proceedings, the Court is thus required to make some prediction about the nature of the custody that will be endured by the prisoner. However, Mr. Georgiou was transferred to the HRMU post-sentence. He was designated a high security prisoner on 16 February 2003, five years into his sentence.
13. Mr. Georgiou was explained that three reasons were set forth for his transfer to this unit. Those reasons were: the suspected possession of three mobile phones; a suspected attempt to conduct a business at the interior of the prison; and a level of desperation on the detainee's part about being in prison. However, no evidence was ever tendered to support these allegations and no official charges were laid against Mr. Georgiou for possession of mobile phones within correctional centres. The authorities could not verify that Mr. Georgiou had cellular phones in his cell and he had never been charged with such an offence. There was no evidence of any risk of escape, either.

14. The source further emphasizes the severe psychological impact of such solitary confinement and isolation upon Mr. Georgiou's mental health. Prisoners in the HRMU are experiencing stress and frustration, anger and a feeling of injustice over the continual deprivation of necessary goods which ordinary discipline prisoners receive. This situation has motivated continuous incidents of physical and verbal altercation between prisoners and correctional staff.

15. In addition, it was reported that Mr. Georgiou had to wait eight years for shoulder reconstruction surgery at an external hospital and that only some hours after emerging from surgery he was transported back to his isolated cell.

16. According to the source, the placement of this person in solitary confinement at the HRMU is arbitrary and violates his right to fair proceedings protected by article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights and Principles 7 and 31 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

17. The source adds that Mr. Georgiou has been condemned to disciplinary punishment inside the prison without having been given the opportunity to be heard by the authorities before the disciplinary action was taken. In addition, the source mentions that this disciplinary punishment at the HRMU is contrary to articles 1, 10, 11, 12, 16 of the Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment as well as to article 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

18. In its reply, the Australian Government contests the Working Group's authority to address the merits of the claims made in the communication. It considers that there is nothing in any of the resolutions establishing the Working Group, or in any of the comments or reports of the Working Group to suggest that its mandate extends to prison administration or to investigating prison conditions.

19. The Government upholds that the transfer of Mr. Georgiou to the HRMU was an administrative action and not a punishment and even if it is considered to amount to 'punishment', the communication remains inadmissible because the Working Group's mandate does not extend to prison disciplinary offences. The Government further stated that even if the mandate of the Working Group extended to applicable international instruments dealing with the right to a fair hearing for prison disciplinary offences, to its knowledge, however, the Working Group has never commented on this particular issue. The Government also raises the issue of limited resources and duplication with other United Nations human rights mechanisms if the Working Group interprets its mandate beyond arbitrary detention to include prison conditions and prison disciplinary offences.

20. Notwithstanding its belief that the communication is beyond the mandate of the Working Group, the Government submits in a spirit of cooperation, the following information in response to the claims made in the communication: On 22 July 2003, Mr. Georgiou was transferred from Lithgow Correctional Centre to the HRMU in accordance with the HRMU referral guidelines. In New South Wales (NSW), the transfer between correctional institutions is an administrative matter, based on operational considerations, including security. Mr. Georgiou's transfer to the HRMU was not a punishment for a disciplinary offence, but an administrative decision based on security considerations. There is no requirement under the Crimes

(Administration of Sentences) Act 1999 NSW (the Act) or the Crimes (Administration of Sentences) Regulations 1999 NSW (the Regulations) that inmates be provided with written notice of an impending transfer.

21. Under the Act, all inmates in NSW prisons are given a security classification. The High Security Inmate Management Committee (HSIMC) advises the Commissioner on whether serious offenders should be classified as a High Security Inmate (HSI) or as an Extreme High Security Inmate (EHSI). The HSIMC is a committee of the Serious Offenders Review Council (SORC) which is a statutory body comprised of judicial members, community members and departmental members.

22. If the HSIMC recommends that an inmate be given an HSI or EHSI classification, the Commissioner can only act on that recommendation if there is material that identifies the inmate as either a danger or an extreme danger to other people, or a threat or an extreme threat to good order and security. The HSINIC recommended to the Commissioner on 6 February 2003 that Mr. Georgiou be classified as an EHSI. The Commissioner approved this recommendation on 16 February 2003.

23. Mr. Georgiou was transferred to the HRMU because of serious concerns about his ability to be securely detained in other correctional centres. Mr. Georgiou is known to have strong ties with the outlaw "Rebels Motorcycle Gang", and has been assessed as posing a high escape risk. Security concerns are also evidenced by the fact that he was found guilty of two correctional centre disciplinary offences relating to the possession of mobile phones. Mobile phones represent a serious threat to the security of a correctional centre, as they can be used to intimidate correctional centre staff and their families, to interfere with witnesses, and to organize an escape from custody.

24. The classification of all inmates designated as EHSI is regularly reviewed by the HSIMC. In addition, Mr. Georgiou is entitled to apply to the SORC at any time for it to reconsider his classification and placement. Mr. Georgiou's classification has been reviewed on 20 occasions between September 2003 and March 2007, and the HSIMC has maintained the view that Mr. Georgiou ought to be designated as an EHSI. The Commissioner has agreed with this recommendation on each occasion.

25. If Mr. Georgiou is aggrieved by administrative decisions, including his classification, he may also complain to the NSW Ombudsman, who has jurisdiction to consider serious complaints by inmates which cannot be, or have not been, resolved by the Department of Corrective Services.

26. With regard to the claim that the rules in the HRMU change on a daily basis, which would violate Principle 30, paragraph 1, of the Body of Principles, the Government explains that centre routine and the offences which amount to disciplinary offences are set out in the Act and Regulations. If it is alleged that an inmate has committed a disciplinary offence, the general manager of the correctional centre may charge the inmate with the offence and conduct an inquiry into the allegation. Formal disciplinary action cannot be taken without an inmate being charged and found guilty of a disciplinary offence.

27. The Act and Regulations provide that an inquiry must be conducted with as little formality and technicality, and with as much expedition and fairness to the

inmate charged as the requirements of the Act and Regulations and the proper consideration of the charge permit. The inmate is entitled to be heard at any hearing during the inquiry and to examine and cross-examine witnesses.

28. A General Manager may refer serious disciplinary offences to a Visiting Magistrate for hearing and determination. An inmate is entitled to be represented by a legal practitioner at such hearing. The General Manager or Visiting Magistrate can only impose penalties in form of a reprimand or caution, withdrawal of privileges, confinement to a cell, and the cancellation of any additional payments for work performed. General Managers and Visiting Magistrates do not have the power to transfer an inmate to another prison.

29. The Australian Government is of the view that the procedures outlined above and contained in the Act and Regulations are sufficient to meet any obligations under international law Australia might have towards prisoners accused of disciplinary offences.

30. The Government also gives detailed information to challenge the allegations related to conditions at the HRMU, to solitary confinement and to access to rehabilitative and medical care. It is affirmed that solitary confinement is prohibited from being used as a punishment in all NSW prisons.

31. The observations of the Government were transmitted to the source, which has not commented on them, despite having been invited to do so.

32. In the light of the foregoing, the Working Group agrees with the Government that its mandate does not extend to the control of execution of prison sentences or of prison conditions as such. However, the Working Group has always considered itself to be competent to deal with questions related thereto in two situations. First, the Working Group examines the conditions in detention of pretrial detainees if they affect the right to fair trial, particularly the right to defence and the right not to be compelled to testify against oneself or to confess guilt.⁹ Second, the Working Group resumes competence if the conditions of detention during the serving of a prison term or if disciplinary measures imposed upon the prisoner without observing the guarantees contained in articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights have an impact on the possibility for early release.¹⁰

33. Since the source has not addressed the question of a potential impact of the situation of Mr. Georgiou on the possibility of his early release in its communication submitted to the Working Group and has failed to comment on the observations of Government and to contest them, the Working Group considers that it is lacking sufficient information to conclude that the detention of Mr. Georgiou is of an arbitrary nature.

⁹ See the following reports of the Working Group on Arbitrary Detention: A/HRC/4/40, para. 66; A/HRC/4/40/Add.2, paras. 90 and 98; E/CN.4/2005/6, paras. 68 et seq.; E/CN.4/2005/6/Add.3, paras. 48 et seq.; E/CN.4/2004/3/Add.3, paras. 32 et seq.; E/CN.4/2005/6/Add.2, paras. 65 et seq.

¹⁰ See the Working Group on Arbitrary Detention's reports E/CN.4/2002/77/Add.1, Opinion No. 34/2000 (Jan Borek/United States of America), page 16; E/CN.4/2004/3/Add.1, Opinion No. 16/2002 (George Atkinson/United Arab Emirates), page 7; A/HRC/7/4/Add.2, paras. 85 et seq.

34. In the light of the foregoing, the Working Group renders the following Opinion:

The detention of Mr. Konstantinos Georgiou is not arbitrary.

Adopted on 27 November 2007