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Human Rights Council Working Group on Arbitrary Detention

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No. 8/2015 (Australia)

Communication addressed to the Government on 23 February 2015

Concerning Sayed Abdellatif, Ms. A and their six children, whose names are known to the Working Group on Arbitrary Detention

The Government replied to the communication on 23 April 2015.

The State is party to the International Covenant on Civil and Political Rights.*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 International Covenant on Civil and Political Rights (category II);

* Australia acceded to the International Covenant on Civil and Political Rights on 13 August 1980.



(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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Sayed Abdellatif is an Egyptian national born on 9 January 1971. He is in possession of immigration documents issued by the Australian authorities on 11 May 2012. Mr. Abdellatif is married to Ms. A, an Albanian national born on 9 April 1976. Together they have six children: B (female), C (female), D (female), E (female), F (male) and G (male).

4. On 11 May 2012, Mr. Abdellatif, his wife and six children were arrested by the Australian Department of Immigration and Border Protection upon their arrival at Christmas Island, Australia, by boat. The arrest was made pursuant to section 189 of the Migration Act, 1958, regarding irregular maritime arrivals. Mr. Abdellatif and his family were notified by a warrant presented by the authorities that they had been arrested for being considered unlawful non-citizens, having entered Australia without valid travel documents. They were notified that they did not have family or support in the community and that they were not entitled to apply for a visa at that stage.

5. Mr. Abdellatif and his family were initially detained at the Christmas Island Detention Centre for 15 days. On 26 May 2012, they were transferred to Inverbrackie Alternative Place of Detention in South Australia, where they remained detained for 11 months. On 17 April 2013, they were transferred to Villa Wood Detention Centre in Sydney, where they remain. Since the transfer to Villa Wood Detention Centre, Mr. Abdellatif has been housed separately from his family.

6. On 6 June 2012, Mr. Abdellatif and his family were determined to have prima facie claims to trigger the protection obligations of Australia and were “screened in” to the refugee status determination process. However, the family’s protection visa application was halted owing to an International Criminal Police Organization (INTERPOL) Red Notice issued by the Egyptian authorities against Mr. Abdellatif.

7. The source informs that the INTERPOL Red Notice was issued on the basis of the mass trial of 107 persons in Egypt in 1999, at which time Mr. Abdellatif was sentenced in absentia to 15 years of imprisonment with hard labour on charges of involvement in terrorist activities. It is alleged that the trial did not comply with the international standards of fair trial guarantees, including because it relied on coerced confessions obtained through torture to secure convictions.

8. As a result of the INTERPOL Red Notice, Mr. Abdellatif and his family have not been able to continue their application for protection as refugees. In order for them to do so, the Minister for Immigration would have to lift the “bar” that prevents “offshore entry persons” from applying for refugee status pursuant to section 46A of the Migration Act,

1958. Mr. Abdellatif and his family have been detained for nearly three years because their refugee status has not been resolved.

9. On 1 May 2013, the Australian Federal Police ceased its investigations into the INTERPOL Red Notice. On 13 June 2013, the Egyptian authorities dropped all charges against Mr. Abdellatif relating to his involvement in terrorist activities. The source informs the Working Group that documents issued by the Egyptian Supreme Military Court providing confirmation of this were provided to the Australian Department of Immigration and Border Protection. On 13 March 2014, the Australian Inspector General of Intelligence and Security issued a security report in the case of Mr. Abdellatif clearing him of any terrorism-related charges and concluding that he does not present a security risk to Australia. In September 2014, Mr. Abdellatif received his security clearance. Nonetheless, the source notes that he continues to be detained apart from his family.

10. On 20 September 2013, Mr. Abdellatif and his family were notified that a section 46A submission had been prepared in their case, taking into account the revised INTERPOL Red Notice from the Egyptian authorities, and that it was then undergoing final clearances. They have not received any further update on progress made in processing that submission.

11. On 18 December 2013, the Australian Human Rights Commission provided a notice to the Australian Department of Immigration and Border Protection under section 29 (2) of the Australian Human Rights Commission Act setting out its findings with regard to a complaint made by Mr. Abdellatif in August 2012 alleging breaches of his family's human rights by the Department (*Abdellatif v. Commonwealth (Department of Immigration and Border Protection)*).

12. The Australian Human Rights Commission determined that the delay by the Australian Department of Immigration and Border Protection in making a referral to the Minister for Immigration to consider whether to allow the family to apply for a visa, after it was prima facie found to be owed protection obligations, resulted in arbitrary detention contrary to article 9 (1) of the International Covenant on Civil and Political Rights and, in the case of the children, to articles 3 and 37 (b) of the Convention on the Rights of the Child.

13. The Commission further determined that the administrative detention of Mr. Abdellatif for more than 18 months after being found to be owed protection obligations prima facie, of which more than 10 months passed without a referral being made to the past three Ministers for Immigration to consider lifting the ban under section 46A, is not proportionate to the legitimate aim of safeguarding the Australian migration system. (These periods of time relate to the time up to the Commission's notice to the Australian Department of Immigration and Border Protection of its findings in December 2013). The Commission found that the delay in referral was not justified in the case of Mr. Abdellatif by the nature of the investigations described by the Department in its submissions; the security and character checks would form part of the substantive assessment of the protection obligations of Australia if the Minister for Immigration lifted the bar under section 46A.

14. Furthermore, the Commission determined that the Department could have chosen to process the applications for protection of other family members pending the receipt of character and security checks in relation to Mr. Abdellatif, as there was no suggestion that his wife or children were involved in any illegal activities abroad. The Commission concluded by recommending that the Department promptly finalize the submission to the Minister for Immigration to consider lifting the bar under section 46A in relation to the application for protection by Mr. Abdellatif and his family.

15. The source submits that the deprivation of liberty of Mr. Abdellatif and his family may be considered arbitrary according to category IV, that is, when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy.

16. The source argues that the detention of Mr. Abdellatif and his family is arbitrary, as it goes beyond a reasonable amount of time necessary to conduct identity and security checks as well as refugee status interviews. The family remains in detention because the authorities have not yet referred the section 46A submission to the Minister for Immigration, who may consider lifting the bar for over 24 months.

17. Furthermore, the source reports that, since 20 September 2013, the family members have received no information as to whether their refugee claim was being processed or any indication as to how long their detention would last. The source points out that there is no limit on the length of detention and that the detention could last indefinitely. The source argues that this is a violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights.

18. The source further recalls that, since the date of arrest, Mr. Abdellatif and his relatives have been denied the right to bring proceedings before a court to challenge the lawfulness of their detention and to be released if the court finds the detention unlawful pursuant to article 9 (4) of the Covenant. Furthermore, requests to the authorities to receive legal representation have gone unheeded.

Response from the Government

19. The Working Group addressed a communication to the Government of Australia on 23 February 2015, requesting that detailed information about the current situation of Mr. Abdellatif, Ms. A and their six children and clarification of the legal basis and justification for their continued detention be transmitted within 60 days, in accordance with paragraph 15 of the Working Group's methods of work.

20. The Government, in a letter dated 23 April 2015, requested an extension of the timeline within which to submit a response owing to ongoing consultations within the Government. The Working Group considered that request and decided not to grant the extension on the basis that it deemed the reasons given insufficient.

21. The Working Group considers that it is in the position to render its opinion on the detention of Mr. Abdellatif and his family, in conformity with paragraph 16 of its methods of work. The Working Group has been much assisted by the findings of the Australian Human Rights Commission in "*Abdellatif v. Commonwealth (Department of Immigration and Border Protection)*: report into arbitrary detention and the best interests of children".

Discussion

22. The cases of Mr. Abdellatif, Ms. A and their six children will be discussed under category IV, which applies when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. Australia is bound by international law on human rights regarding its detention of Mr. Abdellatif. The International Court of Justice, in its 2010 judgment on *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, stated that article 9 (1) and (2) of the Covenant applies in principle to any form of detention, "whatever its legal basis and the objective being pursued".

23. The Working Group set out its own conclusions on the detention regime for migrants in Australia in its opinion No. 52/2014 (Australia and Papua New Guinea) concerning Reza Raeesi against the background of its own jurisprudence and statements on the detention of migrants in general. The Working Group also set out the jurisprudence of

the Human Rights Committee and other United Nations bodies.¹ Special mention was made of the conclusions of the Working Group's 2002 visit to Australia at the invitation of the Government and as a part of the international system of human rights supervision. In its report on that visit, the Working Group raised several concerns about the mandatory detention of persons arriving in Australia without authorization because of the automatic and indiscriminate character of such detention, its potentially indefinite duration and the absence of juridical control of its legality; the psychological impact of detention on asylum seekers, who suffer "collective depression syndrome"; the denial of family unity in several cases; children in detention; and the amendments to the Migration Act, 1958, that restricted judicial review. The Working Group was particularly concerned about the detention of vulnerable persons, particularly children, about the whole legal process governing the detention of asylum seekers and about the lack of adequate information given to the detainees. Other matters of concern mentioned in the report are the lack of proper complaints mechanisms and the implications of the management of the detention centres by a private company (see E/CN.4/2003/8/Add.2). In the present opinion, the Working Group reiterates the position set out in its opinion No. 52/2014 that, under article 9 (4) and under peremptory norms of customary international law (*jus cogens*), Australia has a duty to guarantee judicial review of detention. Moreover, the Working Group holds that the judicial review available to immigration detainees generally in Australia does not meet this requirement.

24. The Human Rights Committee, in its general comment No. 35 on liberty and security of person, requires detention to be justified as reasonable, necessary and proportionate in the light of the circumstances, and reassessed as it extends in time. Relevant factors must be assessed on a case-by-case basis and children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention. The Committee on the Rights of the Child has clarified the requirements under international law in its general comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration. Note should also be taken of the joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and general comment No. 18 of the Committee on the Rights of the Child on harmful practices. The Working Group agrees with the statement made in general comment No. 14 that article 3 (1) creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court. In detention cases, this is a very strict obligation, falling on anyone involved.

25. The Working Group now turns to the application of international law to Mr. Abdellatif, his wife and their six children, who were detained when they arrived at Christmas Island, Australia, by boat on 11 May 2012 and sought asylum. In December 2013, the Australian Human Rights Commission informed the Government of its preliminary assessment that the detention was arbitrary.

26. In March 2014, the Commission concluded, in "*Abdellatif v. Commonwealth (Department of Immigration and Border Protection)*: report into arbitrary detention and the best interests of children", that the detention was arbitrary and contrary to article 9 (1) of the International Covenant on Civil and Political Rights and, in the case of the children, to article 37 (b) of the Convention on the Rights of the Child. It explained the circumstances surrounding the Egyptian court proceedings and serious allegations against Mr. Abdellatif. It stated that the administrative detention of Mr. Abdellatif and his family for more than 18 months after being found to be *prima facie* owed protection obligations, and for more than 10 months without a referral being made to the last three Ministers for Immigration to

¹ Including the 2014 concluding observations on Australia of the Committee against Torture.

consider lifting the bar under section 46A, is not proportionate to the legitimate aim of ensuring the effective operation of the Australian migration system.

27. Mr. Abdellatif, his wife and their six children are still in detention three years after they arrived and applied for asylum.

28. This detention is clearly disproportionate and in breach of article 9 of the Covenant and, in relation to the children, of articles 3 and 37 (b) of the Convention on the Rights of the Child.

29. The case falls into category IV. The conclusions reached by the Working Group in the present opinion, including the conclusions on the remedies below, apply to other migrants finding themselves in detention (see opinion No. 52/2014).

30. Under international law, Australia has a duty to release Mr. Abdellatif, his wife and their six children and accord them an enforceable right to compensation for which they are jointly and severally liable. The duty to comply with international law rests on everyone, including domestic authorities and private individuals, and international and domestic law must provide remedies to make international law effective (see opinion No. 52/2014).

Disposition

31. In the light of the preceding, the Working Group renders the following opinion:

The deprivation of liberty of Sayed Abdellatif, his wife and their six children is arbitrary and in contravention of 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. It falls into category IV of the categories applicable to the consideration of the cases submitted to the Working Group.

32. Consequent upon the opinion rendered, the Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Abdellatif, his wife and their six children and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

33. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Abdellatif, his wife and their six children and accord them an enforceable right to compensation in accordance with article 9 (5) of the International Covenant on Civil and Political Rights.

[Adopted on 24 April 2015]
