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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 23 April–3 May 2019

Opinion No. 7/2019 concerning Ebrahim Toure (Canada)

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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 7 January 2019 the Working Group transmitted to the Government of Canada a communication concerning Ebrahim Toure. The Government replied to the communication on 8 April 2019. 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).

Submissions

Communication from the source

4. Mr. Toure is an asylum seeker, likely from the Gambia although he does not have any identity documents. Mr. Toure was born in 1971 and used to work as a labourer.

5. According to the source, Mr. Toure sought refugee status in Canada on 28 February 2011, claiming to be a national of Guinea. On 7 June 2012, his refugee claim was denied on the basis of a lack of credibility. As a result of this denial, a conditional departure order, which had been issued to him when he made his refugee claim, became enforceable. He was required to report for an interview with the Canada Border Services Agency on 5 November 2012. Allegedly, Mr. Toure was never aware of this request for an interview as he did not receive any letter convoking him. As he failed to attend the interview on that date, the Agency issued an arrest warrant pursuant to section 55 (1) of the Immigration and Refugee Protection Act. The warrant was issued on the basis of Mr. Toure's status as a foreign national subjected to an enforceable removal order and who was deemed unlikely to appear for removal.

6. The source explains that, on the basis of the Canada Border Services Agency warrant, Mr. Toure was arrested by the Toronto Police Service on 23 February 2013. Upon arrest, he was transferred into the custody of the Agency. He was subsequently detained until the end of September 2018, thus for more than five and a half years.

7. Furthermore, the source indicates that Mr. Toure was initially held at the Toronto Immigration Holding Centre, a specialized immigration detention facility. In March 2013, the Canada Border Services Agency attempted to remove Mr. Toure to Guinea on the basis of a Guinean birth certificate provided by him. The Guinean authorities found the birth certificate to be fraudulent and refused entry to Mr. Toure. He was therefore sent back to Canada, where he was detained in maximum-security provincial correctional facilities. Initially, he was held at the Toronto West Detention Centre. On 19 August 2013, he was transferred to the Central East Correctional Centre, in Lindsay, Ontario.

8. Reportedly, Mr. Toure remained in the latter facility until 5 October 2017, at which time he was transferred back to the Toronto Immigration Holding Centre upon an order of the Superior Court of Justice for Ontario. The order was based on the Court's finding that Mr. Toure's detention for four and a half years in maximum-security detention centres was cruel and unusual and therefore in violation of his rights under the Canadian Charter of Rights and Freedoms. The source also indicates that the Minister of Public Safety and Emergency Preparedness successfully challenged this finding in a cross-appeal at the Court of Appeal for Ontario. However, the Minister did not seek an order to transfer Mr. Toure to a higher-security institution.

9. According to the source, the duration and conditions of Mr. Toure's detention were particularly concerning given the fragile state of his mental health. Throughout his time in detention, Mr. Toure has been treated by mental health professionals and prescribed anti-psychotic and anti-depressant medication. The source explains that a psychiatrist assessed Mr. Toure's mental health in August 2017 and concluded that he was suffering from major psychiatric and mental health conditions. Specifically, according to this psychiatrist, Mr. Toure presented a "schizophrenic-like appearance" with a "marked disturbance in his cognitive functioning and memory ... related to his psychiatric disorder". He also found Mr. Toure to be suffering "from visual and auditory hallucinations, blunted affect and frequent dissociation". Mr. Toure's problems included "very poor" memory and concentration, and difficulty focusing on answering questions because of distractions caused by hallucinations. Mr. Toure's continued detention would have had a negative effect on his mental health, and it had likely resulted in him continuing to be "preoccupied with the disturbed thoughts in his mind", and withdrawing further into himself. Moreover, the source reports that the Superior Court of Justice for Ontario relied on these conclusions when it found that Mr. Toure's rights had been breached and reached the conclusion that there was no evidence of malingering on his part.

10. The source further indicates that, at the end of September 2018, Mr. Toure was released because the authorities acknowledged that he could not be deported. However, Mr. Toure does not have a status and he has not been compensated in any way.

Legal analysis

11. According to the source, Mr. Toure's detention is contrary to Canadian constitutional law, as provided by sections 7 and 9 of the Charter of Rights, and to article 9 (1) of the International Covenant on Civil and Political Rights.

12. Specifically, the source argues that Mr. Toure's detention is arbitrary because he has been detained longer than reasonably necessary in view of the circumstances and it is thus disproportionate.

13. The source explains that, while Mr. Toure previously attempted to maintain that he was a national of Guinea, he admitted in December 2015 that he was a national of the Gambia. There is thus no more dispute about his nationality. In addition, there is no prospect that Mr. Toure would be able to obtain a Gambian travel document, to facilitate his removal, within a reasonable time. Allegedly, at two of Mr. Toure's detention reviews (on 20 July 2018 and on 21 August 2018), the Immigration Division recognized that there was no reasonable prospect of removal within a reasonable time, and that his detention had been excessively lengthy. In the decision issued in connection with the July 2018 review, the Division stated that the length of Mr. Toure's detention favoured release. It also stated in the decision that the challenges of removing Mr. Toure were "immense", that there was no clear path to securing a travel document, and that there was no way of estimating how long it would take to administer the removal of Mr. Toure. The source submits that the decisions issued in connection with the reviews, in themselves, are sufficient to demonstrate that Mr. Toure's detention has become arbitrary.

14. In addition, the source claims that Mr. Toure's detention has been arbitrary since the Canada Border Services Agency concluded that he was a national of the Gambia and that he lacked the necessary documents to obtain a Gambian travel document. Indeed, the source notes that Mr. Toure does not and has never possessed Gambian identity documents, which are required to obtain a travel document from the Gambian authorities for purposes of deportation. The Agency has reportedly known since at least 2014 that Mr. Toure lacks identity documents. Since that time, it has thus been apparent that there is no reasonable prospect of removal within a reasonable time. According to the source, this was also confirmed in the reasoning in the decision issued in connection with the August 2018 detention review by the Immigration Division. To date, there has been no interview with the Gambian authorities, nor has there been any progress towards arranging such an interview in order to organize a removal. According to the source, the prospect of such an interview taking place and leading to the issuance of a travel document is remote. Therefore, the source argues that neither this "pending" interview nor the Agency's attempts to pursue the assistance of the Gambian authorities provide a basis for a reasonable prospect of removal within a reasonable time.

15. The source also indicates that, in both of the detention review decisions, the finding of a reasonable prospect of removal is connected to Mr. Toure's cooperation with Canadian authorities. Moreover, the source reports that the Superior Court of Justice for Ontario found that the combination of Mr. Toure's cooperation and such an interview would lead to a "breakthrough". The source claims, however, that Mr. Toure's cooperation cannot possibly provide a basis – alone or in combination with the interview – for a reasonable prospect of removal to exist. In this regard, the source provides the following three-part reasoning.

16. Firstly, the source explains that, for the first two and a half years of his detention, Mr. Toure provided false information to the authorities on numerous occasions. However, since December 2015, he has admitted to his Gambian nationality and cooperated with the Canada Border Services Agency.

17. In this context, the source also indicates that the Agency contended that his name was Bakaba Touray, not Ebrahim Toure, and that his failure to identify as Bakaba Touray impeded the removal process. They did so on the basis of an International Criminal Police

Organization (INTERPOL) report allegedly documenting a Gambian police interview of Mr. Toure's mother in the Gambia in 2015. The source emphasizes that this report has not been disclosed to Mr. Toure. The source claims that, based on the available information about the report, it does not constitute evidence that Mr. Toure is not cooperating. An Agency investigator reportedly stated that he had received the report from INTERPOL, indicating that the mother of Mr. Toure had identified Mr. Toure as her son, Bakaba Touray, also known as Ebrahim Touré, also known as Haruna Touray. Nevertheless, according to the investigator, the phrasing in the citation was not the words spoken by the mother. This investigator is also reported to have specified that Mr. Toure's mother could not read or write, and that she had not registered the birth of her son. Other sources stated that Bakaba was Mr. Toure's nickname, as he himself contends. The source explains that the accuracy of the INTERPOL report became a pivotal issue, because the report could demonstrate the failure of Mr. Toure to correctly identify himself, as well as his non-cooperation.

18. The source further explains that there is no evidence that Mr. Toure is not cooperating with the authorities. Mr. Toure has provided the information that he is able to provide. In this regard, the legal counsel of Mr. Toure reportedly sent a letter to the Canada Border Services Agency on 18 May 2017, asking for a list of "any further actions or information requested of him for purposes of facilitating his deportation". However, the Agency hearings officer, to whom the letter was directly addressed, did not respond. In addition, the officer tasked with Mr. Toure's deportation reportedly testified that Mr. Toure was never made aware of the request.

19. Therefore, according to the source, given that he is already cooperating, it cannot be said that Mr. Toure's cooperation would lead to his removal.

20. Secondly, in any case, the source indicates that there is no evidence that Mr. Toure's cooperation would lead to his removal. This is reportedly acknowledged in the July 2018 detention review decision of the Immigration Division. In its decision, the Division found that Mr. Toure continued to obstruct his removal in several ways, even though he had provided his true name to the Canada Border Services Agency. Yet, in spite of his supposed obstruction, the Division stated in the decision that there was no clear path to securing a travel document, and that there was no way of estimating how long it would take to administer the removal of Mr. Toure.

21. Thirdly, the source argues that a lack of cooperation on the part of Mr. Toure cannot provide a justification for his continued detention. Yet, the source highlights that the Court of Appeal for Ontario has stated that although Mr. Toure's supposed failure to cooperate is not the reason for his detention, it has become the main argument by which his continuing detention is legally justified. The source claims that, in view of the court's rationale, Mr. Toure's lack of active cooperation with the removal proceedings would justify indefinite detention, thereby making it lawful. In other words, the rationale is that indefinite detention is a just punishment for non-cooperation with deportation. The source argues, however, that indefinite detention on grounds of non-cooperation with removal is contrary to both the principles of fundamental justice and the international legal obligations of Canada.

22. The source also explains that those detained in Canada under the Immigration and Refugee Protection Act have three avenues for pursuing their release: (a) the possibility of release exists, in theory, at each detention review before the Immigration Division, (b) a detainee can also apply for judicial review of a detention review decision before the Federal Court and (c) a detainee can seek release by way of habeas corpus.

23. Mr. Toure has reportedly had 68 detention reviews. At each of the reviews, the Immigration Division ordered his continued detention on the basis that he was a flight risk. While the reviews allow for the Immigration Division to decide whether detention is still authorized by statute, they are inherently flawed.

24. Firstly, the source argues that there is no procedural protection for detainees. At each detention review, the Minister of Public Safety and Emergency Preparedness is represented by a hearings officer who presents oral submissions. The officer does not normally present evidence in support of the allegations made in those submissions. The officer is neither sworn in as a witness, nor subject to cross-examination. Generally, he or she has no first-

hand knowledge of the facts alleged in the submissions, relying instead on file notes and correspondence from other Canada Border Services Agency officers. The facts presented in support of continued detention are, therefore, unsworn hearsay. In addition, according to the source, recent media coverage has made it clear that hearings officers do not remain neutral in this process.

25. Secondly, the Immigration Division is not required to release a detainee where his or her detention has become disconnected from its immigration-related purpose, namely, where there is no reasonable prospect of removal within a reasonable time. The source claims that this was demonstrated in the July 2018 detention review decision of the Immigration Division. Despite finding that the legal validity of Mr. Toure's continued detention was strained and that it would be wrong for the State to continue to exercise its power of detention over Mr. Toure, the Immigration Division declined to order his release on the basis that a reasonable release plan had not been put forward to overcome concerns about Mr. Toure's likelihood of appearing for removal.

26. The source further explains that another option available to immigration detainees is to pursue judicial review of a detention review decision before the Federal Court. Mr. Toure has not pursued judicial review of any of the decisions made in his detention reviews, due to the alleged inadequacy of judicial review in the context of immigration detention. The source explains that the Federal Court is a statutory court – it has only those powers granted to it by the statute that created it. The source adds that the Federal Courts Act does not grant the Federal Court habeas corpus jurisdiction.¹ The Court therefore does not have the jurisdiction to order the release of a detainee. The Court can only return the decision to the administrative body that made it – the Immigration Division. If leave for judicial review is granted, the review is on the standard of reasonableness, not correctness. The source also indicates that, similarly to the Immigration Division, the Federal Court is not “tasked with the question of determining whether the immigration detention no longer reasonably furthers the machinery of immigration control and is or has become illegal based on Charter or human rights principles”.² Given that the Court must decide whether a decision made by the Immigration Division was reasonable, the review operates within the framework of the detention review process developed above. Given that detention reviews occur every 30 days, there is little motivation to pursue a remedy that only leads back to the Immigration Division.

27. The source also explains that the Court of Appeal for Ontario found that applications for habeas corpus should be available for immigration detainees on the basis that the prospective remedy is more advantageous than that provided for in the Immigration and Refugee Protection Act. The source notes, however, that the jurisdictional test for a court to hear an immigration detainee's habeas corpus application has been applied with variations by the courts. Some of the variations reportedly render habeas corpus a far less accessible mechanism for immigration detainees.

28. The source explains that Mr. Toure sought release through a habeas corpus application to the Superior Court of Justice for Ontario, which rendered its decision on 5 October 2017 (see para. 8 above). In the decision, the Court declined to order Mr. Toure's release, but it found that detaining him in maximum-security institutions violated his right not to be subjected to cruel or unusual treatment or punishment. The Court ordered, as a remedy, that Mr. Toure be removed forthwith to the immigration holding centre. The decision of the Superior Court of Justice for Ontario to decline release under habeas corpus was appealed to the Court of Appeal for Ontario. A cross-appeal was commenced by the Minister of Public Safety and Emergency Preparedness against the finding that Mr. Toure's rights had been violated. The Court of Appeal rendered its judgment on 13 August 2018, dismissing the appeal and granting the cross-appeal. The court did not recognize that there was no reasonable prospect of Mr. Toure's removal within a reasonable time, and it

¹ Section 18 (2).

² Court of Appeal for Ontario, *Chaudhary v. Canada (Public Safety and Emergency Preparedness)*, 20 October 2015, para. 82.

declined to order his release. The source submits that in doing so, the Court of Appeal failed to protect Mr. Toure against arbitrary detention.

Response from the Government

29. On 7 January 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. It requested the Government to provide, by 8 March 2019, detailed information about the current situation of Mr. Toure and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Canada under international human rights law.

30. On 28 February 2019, the Government of Canada requested an extension, which was granted on 1 March 2019 with the new deadline of 8 April 2019. On 22 March 2019 the Government of Canada sought a further extension. However, in accordance with paragraph 16 of the Working Group's methods of work, only one extension can be granted, and the request was therefore denied.³ The Government of Canada submitted its reply on 8 April 2019.

31. The Government submits that its immigration detention regime and Mr. Toure's detention are consistent with international human rights law and that his detention was not unreasonable, arbitrary or disproportionate. It states that Mr. Toure had access to a robust statutory scheme through which to challenge his detention that provided for regular detention reviews by an independent decision maker, the ability to apply for judicial review overseen by the Federal Court and to apply for a writ of habeas corpus to a provincial superior court, all while under the protection of the constitutional safeguards contained within the Charter of Rights.

32. In particular, the Government explains that Canada Border Services Agency officers are statutorily authorized to detain foreign nationals without a warrant under the limited circumstances set out in subsection 55 (2) of the Immigration and Refugee Protection Act. These circumstances include if the officer has reasonable grounds to believe that the foreign national is inadmissible or is unlikely to appear for examination, an admissibility hearing, or removal from Canada. The Government further indicates that there is continuous review of the legality of such a detention by the Immigration Division, beginning immediately after the detention is initiated. According to subsection 58 (1) of the Act, the Immigration Division must release the foreign national unless it is satisfied that one of the five grounds for detention enumerated in that subsection continues to apply.

33. Moreover, the Government states that the detention framework in Canada is based on the principle that detention is to be used only as a measure of last resort, in limited circumstances where alternatives to detention are unavailable, and is to be carried out in accordance with the procedural safeguards and rights guaranteed by the Charter of Rights.

34. The Government states that while there is no time limit or "cap" on the length of any individual detention, Canadian law does not permit indefinite detention for immigration purposes. The length of detention is determined on a case-by-case and contextual basis. The Government submits that the statutory scheme outlined above complies with Canadian and international law by providing a meaningful process for ongoing review of detention that takes into account the context and circumstances of the individual case. Individuals are also granted the right to challenge their continued detention during regular detention reviews before the Immigration Division. They may also challenge the Immigration Division's decisions by requesting judicial review by the Federal Court or habeas corpus before a provincial superior court. The Government states that where long-term detention of a particular individual is found to be in violation of the Charter of Rights an appropriate remedy will be available.

35. The Government states that Mr. Toure was initially determined to be a flight risk by the Immigration Division. After the attempted removal to Guinea, he was temporarily placed in a maximum-security provincial facility because he did not meet the criteria for detention at a lower-risk facility. During his detention Mr. Toure went through several

³ See also opinion No. 84/2018, para. 23.

detention reviews with the Immigration Division, at each of which it appears he continued to be perceived as a flight risk. The Government points out that although it was his right, Mr. Toure did not seek judicial review of those decisions from the Federal Court. He did apply to the Superior Court of Justice for Ontario for a writ of habeas corpus, whereupon his detention was found to be lawful, but the duration and conditions of his detention in a maximum-security prison were found to be cruel and unusual and in violation of section 12 of the Charter of Rights. However, on appeal, the Court of Appeal for Ontario found that there was insufficient evidence to establish that his treatment had been cruel or unusual and that the trial judge had erred in the determination of the treatment as such. The Government further states that there is no compensation owing to Mr. Toure because after due consideration the courts did not find that his rights had been violated.

36. In addition, the Government indicates that the decision to place an individual into a provincial correctional facility as opposed to an immigration holding centre is based on national risk assessments for detention, implemented in 2017. Detainees are assessed on several risk and vulnerability factors, including, but not limited to, serious criminality, violent crime, flight risk, behavioural issues, verbal or physical resistance and history of escape/attempted escape. This risk assessment is re-evaluated every 60 days or at any point where new information arises and/or a change in risk is observed in the individual detainee's case. The Government notes that the Canada Border Services Agency is taking steps to improve its ability to accept higher risk individuals at its immigration holding centres. Further, only those individuals who can be effectively managed through alternatives-to-detention programming are considered for release from detention.

37. The Government observes that Mr. Toure was subject to a lawful deportation order and that, as a foreign national, he does not have a right to any particular immigration status under international or domestic law. Mr. Toure's request for refugee status was given due consideration and he was determined not to be in need of protection. Regarding his detention, the Government submits that Mr. Toure was determined, on an ongoing basis, by the Immigration Division to be a flight risk on the basis of his prior conduct and it was for this reason that his continuing detention was justified. It further states that while the level of cooperation that an individual has with the requisite authority is a significant factor in determining whether an individual may be a flight risk, it is not the sole basis for Mr. Toure's continuing detention.

38. Further, the Government argues that the Immigration Division consistently concluded that there was a reasonable prospect of removal, although, as the source states, it did express concern over the length of Mr. Toure's detention. The suggested release plan provided by Mr. Toure and his counsel was found to be unreasonable, as it was considered that the parties that had offered to post bail and supervise his release could not be relied upon to ensure his appearance at his removal. The Immigration Division determined that a reasonable plan was needed to effect his release; when one was provided in September of 2018, the Immigration Division ordered Mr. Toure's release from detention.

39. In response to the source's argument that there is "no procedural protection for detainees", the Government submits that the detention review process is judicial and adversarial in nature, with a representative of the Minister and the detainee and their counsel making submissions in favour of their cases before an impartial adjudicator. While it is correct that the hearings officer is not neutral in the detention review process, the Immigration Division member presiding over the detention review hearing is the key decision maker. The Government states that the Immigration Division member undergoes extensive training and is bound by a code of conduct to remain neutral, impartial and independent in his or her decision-making. Hearings officers have delegated authority from the Minister of Public Safety and Emergency Preparedness to make submissions in favour of continuing detention and at all times have the burden of establishing that legitimate grounds for detention continue to exist. The detainee may make submissions in response, may be represented by legal counsel, and may call witnesses. The Immigration Division member's decision reflects several different factors and is rendered only after the detainee or his or her counsel have had the opportunity to test the evidence against the detainee.

40. The Government further argues that Mr. Toure's lack of motivation to seek judicial review by a Federal Court is not, in and of itself, evidence that the system is inadequate.

Canada observes that the reasonableness standard is typical of judicial review systems in other common law jurisdictions where supervision of administrative tribunals is allotted to statutory courts. In regard to the argument of the inadequacy of the remedy of habeas corpus, the Government states that Mr. Toure's complaint is, in effect, an appeal by someone who is simply dissatisfied with the court's judgments in his case.

41. The Government states that its immigration detention regime and Mr. Toure's detention in particular are compatible with the obligations of Canada under international human rights law as outlined by the Human Rights Committee. It submits that its legislative and policy framework for immigration detention, coupled with robust constitutional protections against arbitrary detention and active oversight by the courts, all combine to ensure that detention can be justified as reasonable, necessary and proportionate in light of the circumstances of the particular case. Mr. Toure's assessment was conducted in accordance with this process and his particular circumstances were taken into account.

42. The Government notes that steps have been taken to address instances of prolonged detention in the immigration context, including expanding alternatives to detention, reducing reliance on provincial correctional facilities and providing better medical and mental health services at Canada Border Services Agency immigration holding centres. In August of 2016, one year prior to Mr. Toure's transfer to an immigration holding centre and two years prior to his release, the Minister of Public Safety and Emergency Preparedness announced the new National Immigration Detention Framework, which is aimed at accomplishing those goals. The Government states that in support of that Framework, the Canada Border Services Agency is committed to improving and minimizing the use of immigration detention for minors, vulnerable persons and long-term detainees as much as possible. Further, in July 2018, Canada expanded its Alternatives to Detention programmes to close the gap in programming availability and place priority on the release options for vulnerable individuals.

43. The Government further emphasizes that the Canada Border Services Agency has also made efforts to expand access to health-care services for those in immigration holding centres; it has done so since 2018 in some facilities and will complete others by mid-2019. All detainees held in immigration holding centres are provided with health-care coverage.

Additional information submitted by the source

44. The response from the Government was transmitted to the source on 8 April 2019 for its further comments.

45. The source reiterates the claims contained in its original submissions to the Working Group. It notes that the Government has focused on the compliance of the domestic regime and its impact on Mr. Toure with regard to domestic human rights norms and not international law.

46. The source points out that, contrary to what the Government claims, Mr. Toure's detention was never justified as proportionate; that neither his physical nor mental health were taken into consideration during reviews, despite his falling into the category of vulnerable people being treated for a mental illness; that he was placed in a punitive detention facility; and that it was precisely the Government's inability to deport Mr. Toure that was relied upon to justify his detention.

47. The source also indicates that the Government failed to respond to the opinions of the Working Group and Views of the Human Rights Committee in which those bodies called upon Canada to legislate maximum periods of detention. Moreover, section 58 (2) of the Immigration and Refugee Protection Act empowers the Immigration Division to maintain detention when it finds that the individual is a danger to the public or a flight risk after merely considering the listed factors in section 58 (1). The source submits that this statutory regime empowers the Immigration Division to allow any other factor to outweigh the length of the detention and/or the fact that detention is indefinite because there is no reasonable prospect of removal and therefore to maintain detention in circumstances where it is arbitrary and in violation of article 9 of the Covenant.

48. Further, the source submits that domestic law requires an assessment of the context and circumstances of the individual case. However, the Superior Court decision, which was later overturned by the Court of Appeal, found that the detention review process that Mr. Toure was subjected to excluded several critical elements of his case, in particular his mental health and the fact that he was held in a maximum-security criminal facility.

49. The source submits that the Government has not denied any of its initial factual statements. While indefinite detention is still at issue in Canadian law, the Government has failed to address the source's complaints in regard to international law, namely, article 9 of the Covenant. Most of the above-mentioned efforts made by the Government to reduce the length of detention and ameliorate the situation of detainees post-date Mr. Toure's detention and had no bearing on his detention or release. The source states that the Government's submission concerning access to health-care services, focusing on services established after Mr. Toure's release, is an implicit acknowledgement that the health-care services previously offered were deficient. Moreover, Mr. Toure met none of the criteria for placement in a maximum-security facility and was released by court order and not by the procedure referenced by the Government.

50. Furthermore, the source states that its initial complaints surrounding international law have not been addressed by the Government in its response nor by Canadian courts. While the courts found no breach of Mr. Toure's rights under the Charter of Rights they did not make reference to the obligations of Canada under the Covenant. The decisions were made under the presumption that the statutory scheme is consistent with the Charter of Rights and with the international human rights obligations of Canada, but the source points to the failure of the State to legislate a maximum period of detention.

51. In response to the Government's assertion that Mr. Toure's detention was not solely based on his non-cooperation, the source references several detention review decisions relating to Mr. Toure that cite his non-cooperation as the reason for which his detention, in both length and indefinite nature, was legally justified. The source also points out that Mr. Toure was not represented by counsel at the vast majority of his detention reviews.

52. The source submits that detainees are not granted a full opportunity to test the evidence against them in a fair process. In support of this submission it makes reference to a decision in which the Immigration Division refused to order the Minister to disclose relevant evidence and declined Mr. Toure's request to cross-examine the officer whose statements were being invoked against him throughout his detention reviews.

53. Moreover, the alternative to detention that was accepted for Mr. Toure and ensured his release in September 2018 was not new. The source states that Mr. Toure received sufficient disclosure to refute the Minister's claim of a reasonable prospect of removal and that it is inaccurate to portray the change in circumstances as an improvement in the release plan.

54. In conclusion, the source notes that the Government has not denied that Mr. Toure was detained for five and a half years nor that he was held in a maximum-security facility for the first four and a half years, that his mental health and conditions of detention were never taken into consideration in the decisions to maintain detention, or that throughout this time there remained no reasonable prospect of removal within a reasonable time.

Discussion

55. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter.

56. As a preliminary matter, the Working Group notes that Mr. Toure was released from detention on 21 September 2018 and therefore is no longer in a detention facility. The Working Group however observes that Mr. Toure was in detention from 23 February 2013 until the date of his release on 21 September 2018, which is a considerable period of just over five and a half years. Moreover, while not detained, Mr. Toure also is not fully free as he is now being subjected to an alternative to detention. The Working Group also considers that the present case raises a serious issue of the permissible length of immigration detention in international law. Consequently, and consistent with paragraph 17 (a) of its

methods of work, in which the Working Group reserves the right to render an opinion, on a case-by-case basis, as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned, the Working Group proceeds to examine the submission.

57. Without invoking any of the categories employed by the Working Group, the source has argued that the detention of Mr. Toure was arbitrary. The Working Group observes that the Government has denied the allegations, arguing that the detention of Mr. Toure has been fully consistent with the obligations of Canada under international human rights law.

58. The Working Group notes that the source has not contested the legality of Mr. Toure's initial detention. Mr. Toure was arrested on 23 February 2013 pursuant to an arrest warrant issued by the Canada Border Services Agency. The disagreement between the source and the Government concerns the period after Mr. Toure was arrested, during which he spent a considerable amount of time in maximum-security provincial correctional facilities until removed to the Toronto Immigration Holding Centre on 5 October 2017, where he remained until 21 September 2018. The source argues that Mr. Toure's detention became arbitrary due to the length of time he was detained without any reasonable prospect of removal from Canada. The Government argues that the case of Mr. Toure was regularly and periodically reviewed and that he was released as soon as an adequate release plan was provided.

59. The Working Group has consistently held that the deprivation of liberty in the context of migration must be an exceptional measure of last resort, which should only be employed for the shortest period of time and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.⁴ Therefore, while detention in the course of proceedings for the control of migration is not arbitrary per se, it must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.⁵ It must not be punitive in nature⁶ and should be based on the individual assessment of each individual.

60. Mr. Toure was in detention from 23 February 2013 to 21 September 2018. During this time, he spent some four years in maximum-security provincial correctional facilities until he was removed to the Toronto Immigration Holding Centre on 5 October 2017, where he spent nearly a year. This is an exceptionally long period of time to have spent in detention in the migration context. Moreover, for two thirds of this period Mr. Toure was held in a maximum-security correctional facility.

61. The source has submitted that there was a dispute over the name and nationality of Mr. Toure and that Mr. Toure initially misled the authorities about his true nationality. However, the source submitted that in December 2015, Mr. Toure admitted to being a national of the Gambia. Moreover, the Working Group observes that the Government has denied that the failure to cooperate with the authorities had been the reason for his continued detention.

62. The Working Group accepts that the past behaviour of Mr. Toure in absconding after the unsuccessful asylum claim in 2011 may have served as a legitimate reason for the authorities to detain Mr. Toure. However, the Working Group can accept this as a legitimate reason only if it was to pursue a legitimate aim, which in this case would be the intention of the Canadian authorities to remove Mr. Toure from Canada as an illegal foreign national. The Working Group is unable to do so as the Government has failed to produce any account of the efforts it undertook to secure the deportation of Mr. Toure from Canada

⁴ Revised deliberation No. 5, paras. 12 and 16. See also A/HRC/10/21, para. 67.

⁵ See opinions No. 42/2017 and No. 28/2017. see also Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 18.

⁶ Revised deliberation No. 5, para. 14; opinions No. 42/2017 and No. 28/2017; 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, para. 45; E/CN.4/2006/7, para. 85; A/HRC/10/21, para. 75 and Human Rights Committee, general comment No. 35, para. 18. See also A/HRC/27/48/Add.4, para. 130 (h); A/HRC/30/36/Add.3, para. 73; A/HRC/30/36/Add.1, para. 81; and A/HRC/36/37/Add.1, para. 99 (a).

since his detention in 2013. Notably, the Government has not replied to the submission made by the source that, to date, there has been no interview with the Gambian authorities nor has there been any progress towards arranging such an interview in order to organize a removal.

63. The Working Group observes that, since December 2015, the Canadian authorities has known that Mr. Toure is national of the Gambia, yet they have failed to make any attempt to engage with the Gambian authorities to establish the requisite details for the possible removal of Mr. Toure from Canada. The source has cited several decisions made by the Canadian authorities that all, at different times, indicate that unless travel documents for Mr. Toure are secured, his removal from Canada is unlikely. The Government has provided no account of what it did to ensure that such documents would be secured. Equally, it has not explained what Mr. Toure could have done to secure such documents or how he could have assisted with the process. In fact, the Working Group observes a further failure on behalf of the Government to respond to the allegation made by the source that Mr. Toure's legal counsel sent a letter to the Canada Border Services Agency hearings officer on 18 May 2017, asking what further actions or information was needed from Mr. Toure to facilitate his deportation. The source has alleged that no reply was ever given to Mr. Toure, an allegation the Government has chosen not to respond to although it had an opportunity to. It seems therefore clear to the Working Group that there was nothing Mr. Toure could have done to facilitate the process. It however remains puzzled as to what the Canadian authorities did to secure his deportation during the five and a half years that Mr. Toure spent in detention.

64. The Working Group further notes that the Government has argued that the Immigration and Refugee Protection Act does not authorize indefinite detention in the context of migration proceedings because it provides a meaningful process for ongoing review of detention, taking into account the circumstances of each individual case. The Working Group cannot agree with this reasoning. Indeed, the fact that the Act does not authorize indefinite detention explicitly does not exclude the possibility that such indefinite detention could nevertheless occur, which is why the Working Group has required that a maximum period for the detention in the course of migration proceedings must be set by legislation and that upon the expiry of the period for detention set by law, the detained person must be automatically released.⁷ The Working Group rejects the Government's submission that the length of detention is governed in a more context-dependent way whereby regular individual assessment is carried out to ensure the continued legality and proportionality of detention. To follow the 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 detention, which cannot be remedied even by the most meaningful review of detention on an ongoing basis.

65. The Working Group wishes to underline once again that indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary.⁸ As 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.

66. This appears to be precisely the case of Mr. Toure, who spent five and a half years in detention awaiting removal from Canada while the Canadian authorities appear to have done little to secure and expedite such removal. The Working Group specifically notes that, on several occasions, the Immigration Division alluded to the possibility that, potentially,

⁷ Revised deliberation No. 5, para. 25. See also A/HRC/13/30, para. 61.

⁸ Revised deliberation No. 5, para. 26. See also opinions No. 42/2017 and No. 28/2017 and A/HRC/13/30, para. 63.

indefinite detention of Mr. Toure may occur. Yet nobody did anything to secure the removal, which led Mr. Toure to remain in detention without any clear prospect of when he might be released. This is arbitrary in international law and the Working Group therefore concludes that there has been a breach of article 9 (1) of the Covenant, since Mr. Toure spent five and half years in detention in the context of migration proceedings.⁹

67. Furthermore, the Working Group is mindful that, in its response, the Government has not explained why it was deemed necessary or indeed appropriate to hold Mr. Toure in a maximum-security correctional facility for four and a half years. The Working Group notes that Mr. Toure had not committed any criminal offence and that he was not serving a sentence imposed by a court of law.

68. The Government has claimed that, in 2013, when arrested, Mr. Toure was “temporarily” placed in the maximum-security provincial facility as he did not meet the criteria for detention at a lower-risk facility. In view of the duration, the Working Group considers that this placement could not be qualified as a “temporary” measure. Equally, the Working Group cannot agree that those detained in the context of migration proceedings could be held in facilities other than those that are suitable for such purpose and that respect the non-convicted status of such individuals.¹⁰ In the present case, the Working Group is also mindful that this appears to have had a significant negative impact upon the health of Mr. Toure. Consequently, the Working Group cannot accept that Mr. Toure was detained in a maximum-security prison for four and a half years due to his migratory status alone.

69. The Working Group recalls that during its visit to Canada in 2005 it expressed concerns over the holding of immigration detainees in provincial correctional facilities.¹¹ This was also a concern expressed by the Committee against Torture in its 2018 concluding observations on the seventh periodic report of Canada.¹² The Working Group regrets that these concerns and recommendations of international human rights bodies have been ignored. It therefore finds that holding Mr. Toure in a maximum-security correctional facility for four and a half years was a further breach of article 9 (1) of the Covenant.

70. Given all of the above, the Working Group concludes that the detention of Mr. Toure from 23 February 2013 to 21 September 2018 was arbitrary and falls under category IV. 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.

71. The Working Group wishes to express its concern over the reported health issues of Mr. Toure. While the Government has provided an overview of the variety of health services that are available to those detained in the context of migration proceedings, the Working Group observes that most of those are recent initiatives that would not have been in place during the detention of Mr. Toure. Moreover, he is no longer in a detention facility. The Working Group calls upon the Canadian authorities to ensure that Mr. Toure’s right to health is duly respected and safeguarded and that he receives all appropriate treatment and medication, free of charge.

72. Finally, the Working Group would welcome the opportunity to conduct a country visit to Canada so that it can engage with the Government constructively and offer assistance in addressing its concerns relating to the arbitrary deprivation of liberty. The Working Group notes that the Government has had a standing invitation to all thematic special procedure mandate holders since April 1999, and looks forward to a positive response from the Government to the country visit request that was made on 11 April 2018.

⁹ The Working Group wishes to contrast the facts of the present case with the communication of *Jalloh v. Netherlands* (CCPR/C/74/D/794/1998), considered by the Human Rights Committee, where the applicant, having absconded from an open facility, was detained in a closed facility for three and a half months until he was released following the conclusion of authorities that there was no realistic prospect of expelling him.

¹⁰ Revised deliberation No. 5, para. 44.

¹¹ E/CN.4/2006/7/Add.2, paras. 81 and 92 (c).

¹² CAT/C/CAN/CO/7, paras. 34–35.

Disposition

73. In the light of the foregoing, the Working Group renders the following opinion:
- The deprivation of liberty of Ebrahim Toure, being in contravention of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category IV.
74. The Working Group requests the Government of Canada to take the steps necessary to remedy the situation of Mr. Toure 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.
75. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Toure unconditionally and accord him an enforceable right to compensation and other reparations, in accordance with international law.
76. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Toure and to take appropriate measures against those responsible for the violation of his rights.
77. The Working Group urges the Government to ensure that everyone, including those detained in the context of migration proceedings, is able to exercise his or her right to habeas corpus effectively.
78. 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.
79. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

80. 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. Toure has been released unconditionally and, if so, on what date;
 - (b) Whether compensation or other reparations have been made to Mr. Toure;
 - (c) Whether an investigation has been conducted into the violation of Mr. Toure'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 Canada with its international obligations in line with the present opinion;
 - (e) Whether any other action has been taken to implement the present opinion.
81. 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.
82. 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.

83. 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.¹³

[Adopted on 25 April 2019]

¹³ Human Rights Council resolution 33/30, paras. 3 and 7.