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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. 2/2019 concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 19 October 2018 the Working Group transmitted to the Government of Australia a communication concerning Huyen Thu Thi Tran and Isabella Lee Pin Loong. The Government replied to the communication on 17 December 2018. 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,

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



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. Huyen Thu Thi Tran, born on 10 April 1989, is a Vietnamese national, married to a national of Mauritius. On 15 March 2018, while in detention, Ms. Tran gave birth to a baby girl, Isabella Lee Pin Loong. As a person born in Australia to non-citizens, the infant is reportedly stateless. Both the mother and child currently reside at the Melbourne Immigration Transit Accommodation, Victoria, Australia.

### *Arrest and detention*

5. According to the source, on 19 March 2011, Ms. Tran came to Christmas Island, Australia by boat in order to seek asylum. Upon arrival, she was immediately detained by the Department of Home Affairs of the Australian Commonwealth Government (as it is now known). The source notes that it is likely that Ms. Tran was presented with a document showing that she must be detained. However, no copy of this document is currently available.

6. On 13 July 2011, Ms. Tran submitted an application to have her protection claims assessed under the Protection Obligations Evaluation process. In 2011 and 2012, she underwent various non-statutory assessments conducted including the Protection Obligations Evaluation and the Independent Protection Assessment, to assess her protection claims. The assessments were unsuccessful.

7. The source reports that, in August 2012, the Department made a residential determination for Ms. Tran. Such determinations require the person to reside at a particular address and are classified as “detention” under the Migration Act 1958. In September 2012, Ms. Tran commenced residential placement.

8. On 19 June 2014, Ms. Tran left residential placement. According to the source, she became concerned that the Department would deport her to Viet Nam because two of her friends had recently been deported. She left residential placement without permission.

9. On 9 September 2014, the Department commenced an International Treaties Obligations Assessment. In February 2015, the assessment was unsuccessful.

10. On 9 November 2017, Ms. Tran was taken into closed immigration detention after a nun submitted an application for a Safe Haven Enterprise Visa for her. According to the source, Ms. Tran was not eligible to submit such an application due to her classification as an “unauthorized maritime arrival” (see para. 22 below). The submission of the application alerted the Department of her whereabouts, and she was taken into closed detention. On 14 November 2017, the application was found to be invalid.

11. On 24 January 2018, the Asylum Seeker Resource Centre submitted a ministerial request under section 46A on behalf of Ms. Tran. The request reportedly asked the Minister to lift the bar and allow a client to apply for a protection visa under the statutory process. On 25 January 2018, the Department notified Ms. Tran that it would not refer the request to the Minister for consideration. The request was therefore rejected.

12. On 27 January 2018, the Department provided a removal notice to Ms. Tran, stating that she would be removed from Australia on 29 January 2018. The following day, the Asylum Seeker Resource Centre assisted Ms. Tran in lodging an application to the Federal Circuit Court of Australia for judicial review of the International Treaties Obligations Assessment decision. It also sought interlocutory injunctive relief to prevent her deportation, which was unsuccessful.

13. The source reports that, on that same day, the Department attempted to deport Ms. Tran to Viet Nam when she was approximately seven months pregnant. This is despite the fact that International Health and Medical Services, the medical organization contracted by

the Department to provide medical care to detainees, holding the view that Ms. Tran was not fit to travel due to her gestational diabetes and psychiatric condition. She was subsequently removed from the plane a few minutes prior to take-off and returned to detention in the Melbourne Immigration Transit Accommodation.

14. On 9 March 2018, Ms. Tran signed a form consenting for her unborn child to be held in immigration detention with her once she had given birth.

15. According to the source, Ms. Tran gave birth on 15 March 2018; the child was placed in detention with her. On 26 March 2018, both mother and child were transferred to Broadmeadows Residential Precinct (part of the Melbourne Immigration Transit Accommodation), defined as an Alternative Place of Detention under the Migration Act 1958.

16. On 13 April 2018, the Asylum Seeker Resource Centre submitted a ministerial request under section 195A (the Minister may intervene to grant persons in detention a visa). On 18 July 2018, Ms. Tran received a letter from the Director of the Complex Case Resolution Section of the Department stating that she did not meet the 195A guidelines for referral to the Minister. She received another letter on 6 August 2018 from the Department stating that she did not meet the section 195A guidelines for referral to the Minister.

17. According to the source, Ms. Tran has thus exhausted all domestic remedies to secure her release into the Australian community. Under the current situation, it is unknown how long the Department intends to keep Ms. Tran and her baby in detention. Furthermore, Ms. Tran remains liable to deportation.

18. According to the source, Ms. Tran's husband holds a temporary Australian working visa (class 457). As the infant is a dependent on that visa, she is not required to be detained. However, Ms. Tran is breastfeeding her baby, and the signed consent form permits her detention.

19. The source submits that, despite Ms. Tran signing a form consenting to her baby residing in detention, such consent was given under duress. Ms. Tran signed the consent form six days prior to giving birth. At that time, there was no evidence or indication that the Department was considering to release Ms. Tran from detention; she therefore faced the choice of either being separated from her newborn baby immediately after birth or consenting to her baby being held in a detention centre with her. Furthermore, Ms. Tran is breastfeeding her baby; it would be practically impossible for the child to reside with her father in the community and still be breastfed by Ms. Tran. This is due to practical difficulties as well as restrictions on the time and frequency of visitation rights.

20. Furthermore, as noted above, Ms. Tran's husband holds a working visa. If he were to assume full-time care of the infant, he would be required to cease working. This would result in him being in breach of his visa conditions, and being required to leave Australia.

21. The source states that Ms. Tran is being detained on the basis of the Migration Act 1958. The Act specifically provides in sections 189 (1), 196 (1) and 196 (3) that unlawful non-citizens must be detained and kept in detention until they are (a) removed or deported from Australia; or (b) granted a visa. The source submits that, while the infant is as such not officially detained under the Act, she is, in substance, the subject of open-ended administrative detention.

22. Ms. Tran is also classified as an "unauthorized maritime arrival" under section 5AA of the Migration Act 1958. Accordingly, she is excluded from the statutory refugee status determination process with full review rights (sections 46A and 494AA). As such, Ms. Tran may be deported to Viet Nam without being given the opportunity to submit a valid protection visa application in Australia.

#### *Health condition of Ms. Tran and her baby*

23. According to the source, since her closed immigration detention commencing on 9 November 2017, Ms. Tran's mental and physical health have deteriorated. The above events have caused significant distress for Ms. Tran, and she has been diagnosed with severe depression.

24. The source notes that the infant exhibits signs of attachment-related anxiety and is at risk of developmental problems due to her mother's depression and her prolonged detention. The lack of positive emotional interactions in detention is also likely to have an ongoing negative impact on the infant's development.

25. The source also notes that, if Ms. Tran were deported, it is unclear what would happen to the infant. She may be able to reside with her father. In the event that the father's visa expires or he is unable to work due to care responsibilities for the infant and his visa is withdrawn, she would become an unlawful non-citizen and subject to administrative detention. As she is stateless and does not currently hold citizenship in either Viet Nam or Mauritius (her father's nationality), she may be subject to long-term arbitrary administrative detention.

26. Above and beyond mental health concerns, the infant has reportedly also experienced illness in detention and been hospitalized. Furthermore, there are concerns that Ms. Tran is not receiving the appropriate nourishment she needs to be able to effectively breastfeed her child. In addition to Ms. Tran's general clinical depression, she has also been identified as being a "prime candidate" for postnatal depression.

27. The source adds that it appears that, due to her detention, Ms. Tran has not received appropriate postnatal care and advice, including about how to put her baby down for sleep to avoid cot death. This situation is exacerbated by the lack of assistance that Ms. Tran and her baby receive in detention; the detaining authorities have apparently been instructed not to hold or comfort the infant or to look after her in any way (including, for example, if Ms. Tran needs to take a shower). The source submits that the situation of the infant is urgent due to the ongoing harm that detention is causing her at a vital stage in her development.

#### *Analysis of violations*

28. The source asserts that the detention of Ms. Tran and her baby constitutes an arbitrary deprivation of their liberty under categories II, IV and V of the categories applicable to the consideration of cases by the Working Group.

#### *Category II*

29. The source submits that Ms. Tran has been deprived of liberty as a result of the exercise of her rights guaranteed by article 14 of the Universal Declaration of Human Rights, according to which everyone has the right to seek and to enjoy in other countries asylum from persecution.

30. According to the source, Ms. Tran has also been discriminated against, in contravention of article 26 of the International Covenant on Civil and Political Rights. As a person arriving by boat to seek asylum in Australia, she has not been granted the same legal rights and avenues of review as an asylum seeker who arrived by other means.

31. The source adds that the infant has been deprived of liberty as a result of the exercise of her mother's rights guaranteed by article 14 of the Universal Declaration of Human Rights. She has also been discriminated against, in contravention of article 26 of the Covenant. As a person born in Australia to non-citizens, she is stateless and therefore not given the same citizenship rights as a person born in Australia to Australian parents. She cannot challenge her detention as a citizen could and is therefore unequal before the law.

#### *Category IV*

32. The source submits that Ms. Tran, as an asylum seeker who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy. As mentioned above, she has very limited avenues of judicial review due to her status as an "unauthorized maritime arrival". These avenues have all been exhausted.

33. The source recalls that, in 2014, the Department commenced an International Treaties Obligations Assessment to establish whether Ms. Tran was someone to whom Australia owed protection obligations under international law; the assessment concluded that she was not (see para. 7 above). An appeal against that decision has been lodged and is currently pending consideration by the Federal Circuit Court of Australia. A decision by the

Federal Circuit Court of Australia on the International Treaties Obligations Assessment process will not, however, automatically lead to the granting of a visa or release from detention. Additionally, the source states that there have been cases where the Department has deported asylum seekers even while their appeals are pending.

34. According to the source, there are no avenues of review that may be applied for on behalf of the infant to secure her mother's release and therefore her own release.

35. With regard to both Ms. Tran and her baby, the source notes that the High Court of Australia, in its decision *Al-Kateb v. Godwin*, upheld mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia. The source further notes that the Human Rights Committee in *Mr. C. v. Australia* held that there is no effective remedy for people subject to mandatory detention in Australia.<sup>1</sup> As such, they lack any chance of their detention being the subject of a real administrative or judicial review remedy.

#### *Category V*

36. According to the source, Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The decision of the High Court in *Al-Kateb v. Godwin*, as referred to in the preceding paragraph, stands for the proposition that detention of non-citizens pursuant to, inter alia, section 189 of the Migration Act 1958 does not contravene the Australian Constitution. The effective result of this is that, while Australian citizens can challenge administrative detention, non-citizens cannot.

#### *Response from the Government*

37. On 19 October 2018, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 18 December 2018, detailed information about the current situation of Ms. Tran and Ms. Loong, and to clarify the legal provisions justifying their continued detention, as well as its compatibility with the State's obligations under international human rights law, and in particular with regard to the treaties it has ratified. Moreover, the Working Group called upon the Government of Australia to ensure their physical and mental integrity.

38. In its reply of 17 December 2018, the Government stated that, on 19 March 2011, Ms. Tran was detained under section 189 (3) of the Migration Act 1958 after arriving on Christmas Island as an illegal maritime arrival. On 25 August 2011, Ms. Tran was found not to engage the State's protection obligations under the Act through an administrative Protection Obligation Determination assessment. That decision was reviewed through an Independent Protection Assessment; on 19 March 2012, Ms. Tran was found not to be owed protection.

39. On 15 August 2012, the Minister intervened under section 197AB of the Migration Act 1958 and placed Ms. Tran in community detention under residence determination arrangements. On 23 July 2014, Ms. Tran absconded from community detention. On 13 April 2015, the Minister revoked Ms. Tran's residence determination under section 197AD of the Act.

40. On 9 January 2014, the Department updated Ms. Tran's date of birth based on her national identity card. Ms. Tran was found to have previously supplied false information about her age.

41. On 6 March 2015, Ms. Tran was found not to engage the State's non-refoulement obligations through an International Treaties Obligations Assessment undertaken by the Department.

42. On 29 September 2017, the Department received a Safe Haven Enterprise (subclass 790) visa application from Ms. Tran, which was deemed invalid under section 46A of the Migration Act 1958.

<sup>1</sup> CCPR/C/76/D/900/1999.

43. On 9 November 2017, Ms. Tran was located and placed in an onshore immigration detention facility. Owing to her history of absconding and remaining unlawfully in the community for several years, she did not meet the section 197AB guidelines for referral to the Minister to consider the granting of a residence determination.

44. On 28 November 2017, the Department commenced removal planning for Ms. Tran as she had no applications before the Department. On 24 January 2018, the Department received a request for ministerial intervention. On 25 January 2018, the Department found that Ms. Tran's case did not meet the guidelines for referral under section 46A (2). On 28 January 2018, Ms. Tran's scheduled involuntary removal did not proceed due to changes in the assessment of her fitness to travel on the date of her removal.

45. On 28 January 2018, Ms. Tran sought judicial review of her negative International Treaties Obligations Assessment by the Federal Circuit Court of Australia.

46. On 1 February 2018, the Department amended its records from previous information supplied by Ms. Tran to reflect Ms. Tran's name as Thi Thu Huyen Tran, after sighting her Vietnamese travel document.

47. On 15 March 2018, Ms. Tran gave birth to Ms. Loong. As Ms. Loong is a non-citizen, she is taken to be the holder of the same temporary work (skilled) (subclass 457) visa as her father. Ms. Tran has signed a consent form for Ms. Loong to reside with her in the immigration detention facility as a guest.

48. On 3 May 2018, Ms. Tran was identified for a possible referral to the Minister under section 197AB of the Migration Act 1958 for consideration of a community detention placement. On 18 May 2018, the Department found Ms. Tran did not meet the section 197AB guidelines for referral. On 17 July 2018, Ms. Tran's case was deemed to not meet the guidelines for a referral to the Minister under 195A of the Act to consider granting a visa.

49. On 12 October 2018, the Federal Circuit Court of Australia dismissed Ms. Tran's application for review of her negative International Treaties Obligations Assessment.

50. On 24 October 2018, the Department received a further request for consideration against the Minister's section 195A guidelines from Ms. Tran's migration agent. The Department is reassessing Ms. Tran's case against the Minister's guidelines.

51. Ms. Tran is on an involuntary removal pathway. Although the Department has taken steps to expedite her removal, Ms. Tran has prolonged her detention by refusing to apply for citizenship for Ms. Loong and obtain a travel document, which would allow Ms. Tran to request that her daughter be removed with her under section 199.

52. According to the Government, the State's immigration status resolution practices ensure that any person who is detained understands the reason for their detention and the choices and pathways which may be available to them, including choosing to return to their country of origin or deciding whether to pursue legal remedies.

53. Ms. Tran has been supported by the International Health and Medical Services mental health team since returning to detention in November 2017. She has received extensive and ongoing postnatal care and advice both from its clinicians and the visiting midwife and maternal child health nurse. On 29 September 2018, Ms. Tran was reviewed by the International Health and Medical Services psychiatrist, who noted an impression of "adjustment stresses", but that she did not present as being clinically depressed.

54. In early April 2018, International Health and Medical Services clinicians noted that Ms. Tran was not eating adequately. They provided dietary supplements and discussed the case with the stakeholders. On 10 April 2018, Ms. Tran met with the site chef to discuss her dietary preferences. The clinicians continued to monitor Ms. Tran's intake and no further concerns regarding nutritional requirements were reported.

55. According to the Government, Ms. Tran's husband may have arrangements for leave without pay approved by his sponsoring employer, including paternity or parental leave. This would not be a breach of his visa conditions. In addition, he may place Ms. Loong in

childcare while he is at work. Furthermore, he may sponsor Ms. Tran as his dependent were she to depart Australia.

56. Ms. Tran consulted with her lawyer and husband before signing the consent form to allow Ms. Loong to reside with her. It is a matter for Ms. Tran and her husband to decide where Ms. Loong resides, and they may request that she depart detention at any time.

57. The Government notes that Ms. Loong is eligible to claim both Vietnamese and Mauritian citizenship. On 26 April 2018, Ms. Tran's migration agent reported that Ms. Loong would not be registered with the Vietnamese authorities to obtain identity documents, thereby prolonging their detention.

58. The Government reports that Ms. Loong is regularly visited by International Health and Medical Services primary health clinicians and a maternal and child health nurse. Ms. Loong is reviewed by a general practitioner and a paediatrician when needed. Ms. Loong is described in clinical records as a happy child who is meeting developmental milestones and is up to date with her immunizations.

59. The Government states that the State's universal visa system and mandatory detention policy require unlawful non-citizens to be detained until they are granted a visa or are removed from Australia. Where a person has exhausted all avenues to remain in Australia, they must depart. Non-citizens who do not depart may be detained and are subject to removal as soon as reasonably practicable. Detention under the Migration Act 1958 is administrative in nature and not for punitive purposes. The Government affirms that it is committed to ensuring that all persons in immigration detention are treated in a manner consistent with the State's international legal obligations.

60. According to the State's legislative framework, the length of immigration detention is not limited by a set time frame but is dependent on a number of factors, including identity determination, administrative appeals and the complexity of processing due to individual circumstances relating to health, character or security matters. Relevant assessments are completed as expeditiously as possible to facilitate the shortest possible time frame for detaining persons in immigration detention facilities.

61. The Government's position is that the immigration detention of an individual because the individual is an unlawful non-citizen is not arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. Held detention is the last resort for the management of unlawful non-citizens. Ms. Tran's decision to abscond from community detention and to remain unlawfully in the community precludes her eligibility for less restrictive forms of detention. Ms. Tran has also prolonged her detention by refusing to register her daughter with the Vietnamese authorities or deciding that Ms. Loong may reside with her father.

62. With regard to review mechanisms, the Government states that, on 6 August 2018, the Department submitted a report covering the previous 48 months to the Commonwealth Ombudsman in relation to Ms. Tran's ongoing detention. The Department provides the Ombudsman with a report for every person who has been in immigration detention for more than two years, and every six months thereafter. The Ombudsman will, as required, report to the Minister, providing an assessment of the appropriateness of the arrangements for the detention of the person concerned.

63. The Government states that Australian citizens and non-citizens are able to challenge the lawfulness of their detention before the Federal Court of the High Court of Australia. The basis on which a court may order release depends on the type of detention. Ms. Tran's detention has been reviewed under case management processes at meetings held by the Case Management and Detention Review Committee.

64. According to the Government, individuals may, pursuant to the Migration Act 1958, make a request to the Minister to exercise, in a range of circumstances, his personal discretionary and non-compellable powers to intervene in their case.

65. The Government states that the right to seek a remedy against an officer of the Commonwealth under the Constitution or in the Federal Court is available to Australian citizens and non-citizens alike. The decision in *Al-Kateb v. Godwin* does not alter a non-

citizen's ability to have access to and to use these provisions to challenge the lawfulness of their detention.

66. The Government states that, although the Universal Declaration of Human Rights is not legally binding, articles of the Declaration are reflected in international law, such as by being codified in other legally binding instruments as international law.

67. In response to the source's claims that Ms. Tran has been deprived of her liberty in contravention of article 26 of the Covenant because of the means by which she entered Australia, the Government states that she is detained as an unlawful non-citizen, as required by section 189 of the Migration Act 1958. Ms. Tran was previously placed in community detention under a residence determination; however, owing to her own actions, by absconding from community detention, she is no longer eligible for residence determination. She has been placed in the least restrictive form of detention available to her. Ms. Tran's protection claims have been assessed and she has no right to remain in Australia. Her ongoing detention is not the result of her mode of arrival, but rather her actions to delay removal by not registering her daughter with the Vietnamese authorities or deciding to allow Ms. Loong to reside with her father.

68. With regard to the source's claim that Ms. Loong has been deprived of her liberty, the Government states that Ms. Loong's residence in an immigration detention facility is not the actions of the Government but a decision made by her parents, which may be withdrawn at any time.

69. It is a matter for the Government 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, in the circumstance that a visa is not held, a non-citizen is subject to immigration detention.

70. In conclusion, the Government recalls that the State remains committed to an effective and robust international protection programme, premised on the fundamental obligation of non-refoulement. The Government reiterates that it has a long-standing commitment to cooperating with the United Nations, and that it has a strong human rights record.

*Further comments from the source*

71. The Government's reply was transmitted to the source for further comments on 26 December 2018, which were submitted on 9 January 2019.

72. The source notes the failure of the Government to comply with the Working Group's seven previous opinions on the matter of immigration detention.

73. The source is concerned that the Government's reply attributes the cause for the ongoing detention to Ms. Tran and her partner. The source indicates that, although Ms. Tran signed a consent form for Ms. Loong to remain in detention with her as a guest, she faced the impossible choice of being separated from her newborn or bringing her into the detention environment. It would be unreasonable to expect her partner, who is also financially responsible for his mother, to request leave without pay in order to care for his daughter. The Government's reply focuses on the fact that Ms. Tran absconded from her placement in residence detention, but has failed to consider how her circumstances have changed dramatically, given her relationship with her partner and the birth of Ms. Loong. Furthermore, the Government focuses on the fact that Ms. Tran has not applied for a Vietnamese passport for Ms. Loong. In this way, it fails to consider that Ms. Tran fears harm if she and Ms. Loong were to return to Viet Nam or that any deportation of the mother-daughter pair would separate them from Ms. Tran's partner and the father of Ms. Loong.

74. The source states that Ms. Tran's ongoing detention, and by association Ms. Loong's, is mandated by the Migration Act 1958 due to her mode of arrival by boat, not as a result of any action or inaction by her. Therefore, the Act makes the administrative detention of unlawful non-citizens mandatory; it is a first resort rather than a last resort. Furthermore, although Ms. Tran may raise a habeas corpus challenge, her detention is lawful under current Australian legislation, a fact that has been criticized previously by the



Working Group. Moreover, the Case Management and Detention Review Committee is not a judicial body, nor is it independent. The fact of the detention itself is the primary concern in the present case, and there is no compelling reason why Australian policy cannot be applied flexibly to allow Ms. Tran and Ms. Loong to reside in the community.

75. The source makes a humanitarian appeal, pointing to the fact that Ms. Loong is 10 months old and has spent her entire life in detention. Raising children in detention centres has been shown to lead to developmental and psychosocial issues. The quality of the medical care provided to Ms. Tran and Ms. Loong remains disputed. Moreover, their presence in a detention centre environment is the cause of many of the medical issues afflicting them; if they were released into the community, these issues would likely fall away. Furthermore, the source states that every State Member of the United Nations is required to comply with the Charter of the United Nations, the principles of which are reflected in the Universal Declaration of Human Rights.

### **Discussion**

76. The Working Group thanks the source and the Government for their submissions, and appreciates the cooperation and engagement of both parties in this matter. The Working Group shall proceed to examine the allegations made by the source in relation to each of the applicants.

#### *Situation of Ms. Huyen Thu Thi Tran*

77. The source has submitted that the detention of Ms. Tran is arbitrary and falls under categories II, IV and V of the Working Group. While not addressing the categories as employed by the Working Group specifically, the Government of Australia rejects these submissions. The Working Group will examine these in turn.

78. The Working Group observes that it is not disputed that Ms. Tran arrived on Christmas Island, Australia on 19 March 2011 and was detained. The Government only explains that this detention was in accordance with section 189 (3) of the Migration Act 1958, as she was an illegal maritime arrival. Notably, the Working Group observes that the Government failed to provide any further reasons for Ms. Tran's detention. She remained detained until 15 August 2012, when she was placed in community detention under residence determination agreements. The Working Group notes that the source has specified that this is still considered to be detention under Australian law, an argument that the Government has chosen not to respond to.

79. The Working Group regrets that it must, once again, as it has done in a number of cases concerning Australian immigration detention,<sup>2</sup> emphasize that deprivation of liberty in the immigration context must be a measure of last resort, and that alternatives to detention must be sought in order to meet the requirement of proportionality (A/HRC/10/21, para. 67).<sup>3</sup> Moreover, as the Human Rights Committee argued in its general comment No. 35 (2014) on liberty and security of person, 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 a particular reason 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.

80. In the present case, the Working Group notes that Ms. Tran was simply detained upon arrival and she remained detained until 15 August 2012. This is a period of 17 months, which cannot be described as a "brief initial period", to use the language of the Human Rights Committee. The Government has presented no explanation of the reasons that warranted the detention of Ms. Tran except for citing section 189 (3) of the Migration Act 1958. The Working Group therefore concludes that there was no other reason for detention

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

<sup>3</sup> See also A/HRC/39/45, annex, paras. 12 and 16.

than the fact that Ms. Tran was an asylum seeker and therefore subject to the automatic immigration detention policy of Australia. In other words, Ms. Tran was detained for having exercised her legitimate rights under article 14 of the Universal Declaration of Human Rights. This in turn renders the initial detention of Ms. Tran from the time of her arrival on 19 March 2011 until her release in community detention on 15 August 2012 arbitrary, falling under category II.

81. The Working Group notes that the source has also argued that the placement of Ms. Tran in community detention under residence determination agreements was in fact continued detention of Ms. Tran. The Working Group notes that the source has provided no further explanation why these arrangements should be considered detention, except for citing that these are classed as “detention” under the Migration Act 1958. The Working Group observes that the Government has not responded to this point.

82. The Working Group observes that the Australian Human Rights Commission has described the community detention as measure alternative to detention and in the following manner:

People in community detention are generally not under physical supervision, and can move about in the community. However, there are conditions attached to their residence determination, which can include requirements such as reporting to authorities on a regular basis, and sleeping at a particular residence every night.<sup>4</sup>

83. The Working Group has consistently held that deprivation of liberty is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave a place of detention, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected (A/HRC/36/37, para. 56). Therefore, the Working Group is unable to agree with the source that just because Australian national legislation considers community detention to be “detention”, so should the Working Group.

84. The Working Group maintains that house arrest amounts to a deprivation of liberty, provided that it is carried out in closed premises that the person is not allowed to leave.<sup>5</sup> In determining whether this is the case, the Working Group considers whether there are limitations on the person’s physical movements, on receiving visits from others or on various means of communication, as well as the level of security around the place where the person is allegedly detained.<sup>6</sup>

85. In the present case, noting the description provided by the Australian Human Rights Commission, the Working Group observes that people in community detention (a) are not under physical supervision; (b) are free to move around in the community; (c) may be required to report at regular intervals; and (d) may be required to sleep in a particular residence.

86. In the specific circumstances of the present case, while the reporting and other conditions that were likely imposed on Ms. Tran appear restrictive, the conditions of akin to house arrest are not met. Ms. Tran was not detained in closed premises that she was prevented from leaving. Therefore, on the basis of this description and in the absence of any further explanation from the source, the Working Group is unable to agree that Ms. Tran’s placement in community detention amounted to detention in this case. In the view of the

<sup>4</sup> See [www.humanrights.gov.au/alternatives-detention](http://www.humanrights.gov.au/alternatives-detention). See also Australian Human Rights Commission, *Inspection of Melbourne Immigration Transit Accommodation: Report. 9–10 March 2017* (available from [www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-melbourne-immigration-transit](http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/inspection-melbourne-immigration-transit)), p. 26.

<sup>5</sup> See for example opinions No. 13/2007 and No. 37/2018. See also E/CN.4/1993/24, para. 20, deliberation No. 1 on house arrest.

<sup>6</sup> See for example opinion No. 16/2011, para. 7, describing how an individual under house arrest could not meet with foreign diplomats, journalists or other visitors at her apartment, and her mobile telephone and the Internet connections were cut off. She was not allowed to leave her apartment, except on short approved trips and under police escort, and the entrance to the compound was guarded by security agents. See also opinions No. 21/1992, No. 41/1993, No. 4/2001, No. 11/2001, No. 11/2005, No. 18/2005, No. 47/2006, No. 12/2010, No. 30/2012, and No. 39/2013.

Working Group, Ms. Tran's personal liberty was only restricted and, as such, the community detention was a measure alternative to being in a closed immigration detention facility. The Working Group therefore concludes that Ms. Tran was not detained from 15 August 2012 until she was arrested 9 November 2017 for absconding from the community placement.

87. The Working Group accepts that Ms. Tran was arrested on 9 November 2017 and accepts that the Government may have had a legitimate reason for this arrest, given that Ms. Tran had absconded some five years earlier from the community detention arrangements.<sup>7</sup> The Working Group notes, however, that since the arrest, Ms. Tran has been detained due to her migration status, and therefore all the safeguards that are in place to guard against arbitrary detention must be observed.

88. The Working Group notes that Ms. Tran has now been in detention for 17 months since she was rearrested. During this time, the authorities attempted to deport Ms. Tran, who was then heavily pregnant and, owing to her health, not able to fly. She thus remains in a closed detention facility, where her child was born on 15 March 2018. The Working Group notes that, on 26 March 2018, Ms. Tran and her newborn child were moved to Broadmeadows Residential Precinct, which is part of the same detention facility, the Melbourne Immigration Transit Accommodation, where they both remain.

89. The Working Group further observes that the Government has not been able to identify a solution for the case of Ms. Tran. Instead, the Government appears to be apportioning blame to Ms. Tran, arguing that if she applies for nationality for her child on the basis of her own Vietnamese nationality or on the basis of the Mauritian nationality of the child's father, she could then request that she and her child be removed from Australia, thus ending their detention.

90. The Working Group cannot help but highlight the vicious circle that this proposed course of action would put in motion; if Ms. Tran does not wish or fails to apply for either of these nationalities for her child or her application is rejected, she and her child would remain in detention indefinitely. The Working Group cannot accept this as a legitimate outcome, and reminds the Australian authorities that the onus is on the detaining authority to ensure that every instance of detention complies with international human rights law.

91. The Working Group agrees with the argument presented by the Government in relation to article 26. It wishes to recall, however, that the Human Rights Committee, in its general comment No. 15 (1986) on the position of aliens under the Covenant, quoted by the Government, also makes it clear that aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the International Covenant on Civil and Political Rights, as provided for in article 2 thereof. Aliens have the full right to liberty and security of the person.

92. Ms. Tran is therefore entitled to the right to liberty and security of person as guaranteed in article 9 of the Covenant; and when guaranteeing this right to her, Australia must ensure that this is done without distinction of any kind, as required under article 2 of the Covenant. In the present case, Ms. Tran's de facto indefinite detention due to her immigration status runs counter to article 2, in conjunction with article 9, of the Covenant. The Working Group therefore considers also that Ms. Tran's detention since her arrest on 9 November 2017 is arbitrary and falls under category II.

93. The source has further argued that Ms. Tran, as an asylum seeker, who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy. This, according to the source, means that her detention is arbitrary and falls under category IV. The Government rejects these allegations and argues that the Case Management and Detention Review Committee has reviewed the case of Ms. Tran on a number of occasions, always concluding that the detention remains appropriate and lawful. The source has argued that the significant changes in Ms. Tran's circumstances, namely that she is now married to a legal resident of Australia and is now a mother of a

<sup>7</sup> See opinion No. 7/2019, para. 62.

newborn child, have been disregarded. The source has argued that alternatives to detention should have been applied to Ms. Tran.

94. 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 (A/HRC/30/37, paras. 2–3). That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty (*ibid.*, para. 11) and applies 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 military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention (*ibid.*, para. 47 (a)). Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary (*ibid.*, para. 47 (b)).

95. The Working Group emphasizes that, although there have been numerous reviews by the Case Management and Detention Review Committee, as the Working Group has already clearly stated in its previous opinions,<sup>8</sup> this Committee is not a judicial body as required by article 9 (4) of the Covenant. The Working Group observes the repeated failure by the Government to explain how the reviews carried out by the Committee satisfy the guarantees encapsulated in the right to challenge the legality of detention enshrined in article 9 of the Covenant.<sup>9</sup> The Working Group therefore finds that Ms. Tran's right to challenge the legality of her detention before a judicial body, the right enshrined in article 9 (4) of the Covenant, has been violated. 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>10</sup>

96. Moreover, the Working Group has already examined the fact that, at the moment, the detention of Ms. Tran appears to be indefinite, which is contrary to the obligation that Australia has undertaken under international law and article 9 of the Covenant in particular. The Working Group therefore concludes that Ms. Tran has been denied the right to challenge the continued legality of her detention, in breach of article 9 of the Covenant, and that her detention is therefore arbitrary, falling under category IV.

97. Furthermore, the source submits that Ms. Tran's detention falls under category V, as Australian citizens and non-citizens are not equal before the courts and tribunals of Australia owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens may challenge administrative detention, non-citizens may not. The Government denies those allegations, arguing that, in the cited case, the High Court held that the provisions of the Migration Act 1958 requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

98. The Working Group is puzzled by the explanation provided again by the Government in relation to the High Court's decision in that case,<sup>11</sup> as it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the

<sup>8</sup> See opinions No. 20/2018, para. 61, No. 50/2018, para. 77, and No. 74/2018, para. 112.

<sup>9</sup> *Ibid.*

<sup>10</sup> See *C. v. Australia* (CCPR/C/76/D/900/1990), *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001), *Shafiq v. Australia* (CCPR/C/88/D/1324/2004), *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270 and 1288/2004), *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002), *D and E, and their two children v. Australia* (CCPR/C/87/D/1050/2002), *Nasir v. Australia* (CCPR/C/116/D/2229/2012) and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

<sup>11</sup> See opinions No. 21/2018, para. 79, No. 50/2018, para. 81, No. 74/2018, para. 117 and 1/2019, para. 88.

foreseeable future. In other words, the Government has actually failed to explain how such non-citizens can challenge their continued detention after that decision.

99. The Working Group notes the numerous findings by the Human Rights Committee (see para. 95 above), and also notes that the effect of the decision of the High Court of Australia in the above-mentioned case is such that non-citizens have no effective remedy against their continued administrative detention.

100. In that respect, the Working Group specifically notes the jurisprudence of the Human Rights Committee, in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.<sup>12</sup>

101. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,<sup>13</sup> and this remains the position of the Working Group in the present case. The Working Group emphasizes that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Ms. Tran is arbitrary, falling under category V.

#### *Situation of Isabella Lee Pin Loong*

102. The Working Group notes that Ms. Loong is the infant child born on 15 March 2018 while Ms. Tran was detained in the Melbourne Immigration Transit Accommodation. Given that her mother had signed a request to allow Ms. Loong to stay as a "guest" with her, Ms. Loong has lived with her mother in the same detention facility since birth.

103. The source submits that, since Ms. Loong is detained because of the migratory status of her mother, her detention is arbitrary and falls under category II. The Government denies this, arguing that Ms. Loong is not detained and is in fact free to leave to live with her father.

104. As a preliminary issue, the Working Group must address the current situation of Ms. Loong. According to the source, she is detained together with her mother. The Government disputes that Ms. Loong could be considered "detained" since her mother, Ms. Tran, who is detained, signed a document requesting permission for her then unborn child to reside with her in the Broadmeadows Residential Precinct, part of the Melbourne Immigration Transit Accommodation, as a guest after her birth. The Government argues that it is therefore wrong to qualify the situation of Ms. Loong as detention since her parents can withdraw the request to stay as a guest at any time, and she can stay with her father, who has a valid visa and is not detained.

105. In the view of the Working Group, the situation of Ms. Loong undoubtedly qualifies as detention. The argument presented by the Government that Ms. Loong is not detained because Ms. Tran requested that her child be allowed to stay in the detention facility as a guest simply cannot be accepted, as Ms. Tran clearly had little choice in the matter if she was to see her newborn baby and look after her. In this regard, the Working Group recalls the concluding observations of the Committee against Torture in relation to another State that also employed the practice of "housing" children in immigration detention as their parents' "guests" (CAT/C/CAN/CO/7, paras. 34–35). This practice was rejected by the Committee and the State in question was required to ensure that children would not be thus detained due to the migratory status of their parents.

106. The requirement for Ms. Tran to sign the request to allow her child to remain with her as a "guest" in the detention facility was nothing more than an attempt by the authorities to circumvent the prohibition of detention of children in the context of migration. The Working Group cannot accept this as legitimate. It therefore concludes that both Ms.

<sup>12</sup> See *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 9.3.

<sup>13</sup> See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018 and No. 1/2019.

Tran and Ms. Loong are currently detained in the Broadmeadows Residential Precinct, part of the Melbourne Immigration Transit Accommodation.

107. Moreover, the Working Group observes that the situation of Ms. Loong remaining in the Melbourne Immigration Transit Accommodation has never been duly authorized by any judicial authority in Australia. In fact, the only document explaining why Ms. Loong has been in the facility since her birth is the request made by her mother. This is incompatible with article 9 of the Covenant, given that such a request cannot be deemed to be an appropriate legal basis for deprivation of liberty.

108. The detention of Ms. Loong has not been reviewed by a judicial body as required by article 9 (4) of the Covenant, which would have had to assess whether the best interests of Ms. Loong are being served by being detained. In this regard, the Working Group specifically refers to joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, which states that, recognizing that the best interests of the child – once assessed and determined – might be in conflict with other interests or rights (for example, of other children, the public and parents) and that potential conflicts have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise, the Committee on the Rights of the Child stresses in paragraph 39 of its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

109. In the present case, the Working Group observes that no judicial body has ever examined the detention of Ms. Loong while taking into account her best interests as the primary consideration. If such an examination were to be made, it would have to take note of the clear position of the Working Group expressed in its revised deliberation No. 5, namely that detaining children because of their parents' migration status will always violate the principle of the best interests of the child, and constitutes a violation of the rights of the child (A/HRC/39/45, annex, para. 32).<sup>14</sup> Noting that children must not be separated from their parents and/or legal guardians, the Working Group has always held the view that the detention of children whose parents are detained cannot be justified on the basis of maintaining the family unit, and that alternatives to detention must be applied to the entire family instead (*ibid.*).<sup>15</sup> Consequently, since remaining with her mother and not being detained is clearly in the best interests of Ms. Loong, her mother's detention status should not have been allowed to dictate her detention, while alternatives to detention should have been applied to both Ms. Loong and Ms. Tran.

110. Moreover, the Working Group recalls that, just like her mother, Ms. Loong is being subjected to indefinite detention. In this regard, the Working Group refers to its consideration of the issue (see paras. 89–90 and 96 above).

111. The Working Group therefore concludes that the detention of Ms. Loong since birth is arbitrary, as it lacks legal basis and therefore falls under category I. 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.

#### *Migration Act 1958*

112. The Working Group observes that the present case is the latest in the number of cases from Australia that have come before the Working Group since 2017 and all concerning the same issue, namely the mandatory immigration detention in Australia

<sup>14</sup> See also A/HRC/10/21, para. 60 and A/HRC/30/37, para. 46.

<sup>15</sup> See also A/HRC/36/37/Add.2, paras. 43 and 92 (j).

pursuant to the Migration Act 1958.<sup>16</sup> The Act stipulates that unlawful non-citizens must be detained and kept in immigration detention until they are removed from Australia or granted a visa. In addition, section 196 (3) of the Act states that, “to avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1) (a), (aa) or (b)) unless the non-citizen has been granted a visa”. Consequently, provided that there is some sort of process relating to the grant of a visa or to removal (even if removal is not reasonably practicable in the foreseeable future), the detention of an unlawful non-citizen is permitted under Australian law.

113. The Working Group emphasizes that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights and in the Convention relating to the Status of Refugees, and the Protocol thereto.<sup>17</sup> The Working Group notes that these instruments constitute international legal obligations undertaken by Australia, and also notes in particular the undoubtedly legally binding nature of the Convention relating to the Status of Refugees and the Protocol thereto in relation to Australia.

114. The Working Group must once again emphasize that deprivation of liberty in the immigration context must be a measure of last resort, and that alternatives to detention must be sought in order to meet the requirement of proportionality.<sup>18</sup> Moreover, as the Human Rights Committee has argued in its general comment No. 35 (2014) on liberty and security of person, 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 a particular reason 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.

115. The provisions of the Migration Act 1958 stand at odds with these requirements of international law, as sections 189 (1) and 189 (3) of the Act provide for de facto mandatory detention of all unlawful non-citizens, unless they are being removed from the country or granted a visa. The Working Group observes furthermore that the Act does not reflect the principle of exceptionality of detention in the context of migration as recognized in international law, nor does it provide for alternatives to detention to meet the requirement of proportionality.<sup>19</sup>

116. The Working Group is alarmed at the rising number of cases emanating from Australia concerning the implementation of the Migration Act 1958 that are being brought to its attention. It is equally alarmed that, in all these cases, the Government has argued that the detention is lawful because it follows the stipulations of the Act. The Working Group wishes to clarify that such an argument can never be accepted as legitimate in international law. The fact that a State follows its own laws does not in itself bring those laws into conformity with the obligations that the State has undertaken under international law. No State can legitimately avoid its obligations arising from international law by hiding behind its domestic laws and regulations.

117. The Working Group emphasizes that it is the duty of the Government of Australia to bring its national legislation, including the Migration Act 1958, into line with its obligations under international law. Since 2017, the Government has been consistently and repeatedly reminded of these obligations by numerous international human rights bodies and experts, including the Human Rights Committee (CCPR/C/AUS/CO/6, paras. 33–38), the Committee on Economic, Social and Cultural Rights (E/C.12/AUS/CO/5, paras. 17–18), the Committee on Elimination of All Forms of Discrimination against Women (CEDAW/C/AUS/CO/8, paras. 53–54), the Committee on the Elimination of All Forms of

<sup>16</sup> See opinions No. 28/2017, No. 42/2017, No. 71/2017, No. 20/2018, No. 21/2018, No. 50/2018, No. 74/2018 and No. 1/2019.

<sup>17</sup> See opinions No. 28/2017, No. 42/2017 and No. 50/2018. See also A/HRC/39/45, annex, para. 9.

<sup>18</sup> See A/HRC/10/21, para. 67. See also A/HRC/39/45, annex, paras. 12 and 16.

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

Racial Discrimination (CERD/C/AUS/CO/18-20, paras. 29–33), the Special Rapporteur on the human rights of migrants (see A/HRC/35/25/Add.3) and the Working Group.<sup>20</sup> The Working Group finds it inconceivable that the unison voice of numerous independent, international human rights mechanisms can be disregarded, and therefore calls upon the Government to review without delay the Act in the light of the State's obligations under international law.

118. The Working Group welcomes the invitation dated 27 March 2019 from the Government for the Working Group to conduct a visit to Australia in the first quarter of 2020. The Working Group looks forward to this 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.

### **Disposition**

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

(a) The deprivation of liberty of Huyen Thu Thi Tran, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights, and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V;

(b) The deprivation of liberty of Isabella Lee Pin Loong, 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 I.

120. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Huyen Thu Thi Tran and Isabella Lee Pin Loong without delay, and to 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.

121. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Huyen Thu Thi Tran and Isabella Lee Pin Loong immediately and to accord them an enforceable right to compensation and other reparations, in accordance with international law.

122. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Huyen Thu Thi Tran and Isabella Lee Pin Loong, and to take appropriate measures against those responsible for the violation of their rights.

123. 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.

124. 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.

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

### **Follow-up procedure**

126. 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 Huyen Thu Thi Tran and Isabella Lee Pin Loong have been released and, if so, on what date;

<sup>20</sup> See opinions No. 50/2018, paras. 86–89, No. 74/2018, paras. 99–103 and No. 1/2019, paras. 95–97.



(b) Whether compensation or other reparations have been made to Huyen Thu Thi Tran and Isabella Lee Pin Loong;

(c) Whether an investigation has been conducted into the violation of Huyen Thu Thi Tran's and Isabella Lee Pin Loong'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.

127. 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.

128. 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.

129. 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>21</sup>

*[Adopted on 24 April 2019]*

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<sup>21</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.