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Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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Excellency,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health pursuant to Human Rights Council resolutions 15/18 and 15/22.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the ongoing detention of **Abdul Wahid Rezaee** under the mandatory detention regime contained in sections 189 and 196 of the Migration Act of 1958 (Cth), as well as his deteriorating mental health.

According to the information received:

Mr. Abdul Wahid Rezaee was born in Afghanistan on 4 May 1971 and is an ethnic Hazara who fled Afghanistan in fear of his life. Mr. Rezaee reportedly travelled through Pakistan, Malaysia and Indonesia before travelling to Australia to seek asylum. He arrived in Australia on 12 June 2010 on boat number AUS 047 and was transferred to Christmas Island for processing. On 20 December 2010, Mr. Rezaee had an interview as part of his Refugee Status Assessment and on 27 April 2011 he was notified of his positive Refugee Status Assessment outcome.

According to the information received, Mr. Rezaee has been subject to the mandatory detention regime contained in sections 189 and 196 of the Migration Act 1958 (Cth) since his arrival in Australia. These sections require that 'unlawful non-citizens' be held in immigration detention until they are either granted a visa or removed from the country.

In addition, section 65(1) of the Migration Act of 1958 reportedly requires that the Minister for Immigration and Citizenship must be satisfied that the person passes a 'character test' set out in section 501(6) of the Migration Act before they are granted a visa. If an individual is considered to be a threat to the protection of

Australia's territorial and border integrity, they will not receive a security clearance from the Australian Security Intelligence Organization (ASIO) and their visa application will be rejected under section 65(1) of the Migration Act.

On 23 September 2011, the Australian Federal Police (AFP) reportedly provided the Department of Immigration and Citizenship (DIAC) and the ASIO with a report that contained information 'in relation to potential security concerns relating to the client'. According to the information received, the documents contained in Mr. Rezaee's DIAC file show that the 'security concerns' that have prevented him from being granted a visa relate to alleged people smuggling activities. However, to date Mr. Rezaee has reportedly not been interviewed by the AFP and no charges have been laid.

Mr. Rezaee has allegedly been held in immigration detention for more than 28 months, including for 18 months following his positive refugee status assessment. He has reportedly not yet received the security clearance required for the grant of a protection visa and thus remains under immigration detention.

According to the information received, it is still unclear if and when DIAC will finally process Mr. Rezaee's security check. Repeated inquiries from concerned case managers, migration lawyers and refugee advocates appear to have resulted in Mr. Rezaee's case being officially 'prioritised' or 'escalated', yet there is still no indication that any decision is pending or imminent.

While administrative processes and detention continue, Mr. Rezaee's mental health allegedly continues to deteriorate. According to the information received, he has a history of being subject to torture and trauma and his mental health has allegedly been negatively affected by his ongoing detention, with depression and anxiety being part of it. According to the information received, he has Major Depressive Disorder and is at risk of self-harm and/or expressing his immense frustration in a way that may cause him personal harm and jeopardies his future. He has reportedly already threatened to engage in homicidal acts, to kill a psychologist, the International Health and Medical Services staff generally, as well as suicide, which is taken as further proof for his volatile state of health.

Reportedly, Mr. Rezaee's situation of prolonged immigration detention could have been eased by considering the possibility of 'community detention' under section 197AB of the Migration Act. This is a form of immigration detention that enables people in detention to reside and move about freely in the community without needing to be accompanied or restrained by an officer. Only the Minister for Immigration and Citizenship can approve community detention for people in immigration detention and this power is non-compellable.

According to the information received, several requests have been made to the Minister for Immigration and Citizenship to exercise his discretion to allow Mr. Rezaee to reside in the community while his security clearance is processed.

These applications have reportedly been unsuccessful despite alleged evidence of Mr. Rezaee's declining mental state.

Without expressing at this stage an opinion on the facts of the case and on whether the detention of Mr. Rezaee is arbitrary or not, we would like to appeal to your Excellency's Government to take all necessary measures to guarantee his right not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

With respect to Mr. Rezaee's deteriorating health condition, we wish to refer your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights, which your country acceded to on 10 December 1975 and which specifically provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes an obligation on the part of all States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially the most vulnerable or marginalized sections of the population, without discrimination. In addition, we wish to refer your Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which provides that, "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services..." (para.34).

We would also like to take this opportunity to recall previous concluding observations provided by international human rights mechanisms regarding the mandatory detention system. In 2009, the Committee on Economic, Social and Cultural Rights encouraged Australia to implement without delay its new "seven values" policy, and carry out the Australian Human Rights Commission's recommendations adopted in its 2008 Immigration Detention Report, including the repeal of the mandatory immigration detention system and the closure of the Christmas Island Detention Centre. We also wish to recall the recommendation made to your Excellency's Government regarding health conditions in mandatory immigration detention centers during the Universal Periodic Review and which recommends to "Consider alternatives to the detention of irregular migrants and asylum-seekers, limit the length of detentions, ensure access to legal and health assistance and uphold its obligations under the Vienna Convention on Consular Relations" (recommendation 131, A/HRC/17/10).

Furthermore, we would further like to refer your Excellency's Government to the report from the Special Rapporteur on the right to health following his visit to Australia in 2009 (A/HRC/14/20/Add.4). In the report, the Special Rapporteur urges your Excellency's Government "to reconsider the appropriateness of detention facilities continuing to operate on Christmas Island, and assess provision of mental health services to this population as a matter of priority". Moreover, the report recommends "to place detainees with a history of torture and trauma in community detention, or arrange a

bridging visa upon diagnosis, and develop a consistent policy to this effect” as well as “to ensure appropriate further training is provided to non-medical personnel who are involved in identifying or referring immigration detainees with potential mental health issues, or develop different mechanisms for detainees to access necessary services”.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of Mr. Rezaee in compliance with the above international instruments. Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary of the case accurate?
2. Please provide information concerning the legal grounds for the ongoing detention of Mr. Rezaee and how this measure is compatible with international norms and standards as stated, inter alia, in the UDHR and the ICCPR.
3. What measures are being taken to ensure the enjoyment of the right to health of persons in immigration detention?
4. Please also provide a detailed explanation as to why his case has not been considered for community detention in the interest of his health and in regard of his prolonged detention.

We undertake to ensure that your Excellency’s Government’s response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the above mentioned person are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that your Excellency’s Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

El Hadji Malick Sow
Chair-Rapporteur of the Working Group on Arbitrary Detention

Anand Grover

Special Rapporteur on the right of everyone to the enjoyment of the highest
attainable standard of physical and mental health