Mandates of the Special Rapporteur on extreme poverty and human rights; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and the Special Rapporteur on the human rights of migrants

REFERENCE:
AL AUS 6/2017

31 October 2017

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 35/19, 34/9 and 34/21.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **denial of income and housing support to asylum seekers through the issuance of "final departure Bridging E Visas"**.

According to the information received:

Approximately 400 asylum seekers are currently in "community detention" in Australia, having been transferred from the Regional Processing Centres ("RPCs") in Nauru, and Manus Island in Papua New Guinea, to receive medical treatment which is not available in either country. While at the RPCs, they suffered severe injuries or serious ill-health, which left many of them at risk of permanent disability or death without appropriate medical treatment. They include men who have been seriously injured at the RPC in Manus Island, women who have been sexually assaulted or raped by security guards and service providers at the RPC in Nauru, and children who suffer from serious mental health illness caused by prolonged detention in the RPC in Nauru. The transfer was also necessitated by the significant risk of serious physical and psychological harm that the asylum seekers faced in Nauru or Papua New Guinea. These risks included physical and sexual violence and assaults within and outside the RPCs, attempted suicide and acts of self-harm including self-immolation, and serious mental illness particularly among children. The asylum seekers who are reportedly in community detention in this framework include persons from Afghanistan, Bangladesh, Iran, Sri Lanka and Syria, as well as Rohingyas from Myanmar. In total there are 83 single adult men, 14 single adult women, and families with over 50 babies and infants born in Australia and 66 school children. In 2016, the asylum seekers commenced legal proceedings in the High Court of Australia, seeking not to be returned to Nauru or Manus Island in light of their ongoing medical needs and protection concerns.

On 28 August 2017, the Australian Government issued a "final departure Bridging E Visa" (hereinafter "final departure BVE") to over 60 adult asylum seekers among this group. The final departure BVE is a temporary visa which allows them to remain in Australia for a period of six months, during which time they are expected to make arrangements to leave Australia. The Government's support in the form of income and public housing is discontinued during this period. Previously, this group of asylum seekers received approximately AUD200 each fortnight for their costs of living. As of 28 August 2017, this support was immediately terminated on the basis that the final departure BVE carries work rights and that the asylum seekers are responsible for supporting themselves financially. The final departure BVE does not permit the visa holders to undertake studies or training, unless they are under 18 years of age. The adults over 18 years who cannot find employment to support themselves are simply expected to "return to a regional processing country or any country where [they] have a right of residence". In addition, those who have been issued with the final departure BVE are obliged to vacate their government-supported accommodation in public housing within three weeks of the issuance of the visa. No alternative housing has been offered to them and they are expected to find their own accommodation. While the Government-funded health care, Medicare, will continue to be provided, access to other critical health services, such as torture trauma counselling, is no longer to be available.

The affected asylum seekers were not consulted or asked to provide any information about their circumstances to the Government, prior to receiving the notice of 28 August 2017. They were informed by telephone that they had an appointment at the Department for Immigration and Border Protection and received the final departure BVE in the course of that appointment. There is no indication that the Government carried out an individualized assessment of each person's needs and circumstances before reaching the decision to issue the final departure BVE.

It has been alleged that the immediate and direct effects of the final departure BVE are to leave the asylum seekers in situations of poverty, destitution and homelessness. Although this visa provides for work rights, it is unreasonable and practically impossible for them to find employment and earn an independent living, especially since many of them suffer from serious physical and mental health issues for which ongoing medical treatment is needed. Given that they had been subjected to long-term detention at the RPCs in Nauru and Manus Island, described by international human rights mechanisms as "cruel, inhuman and degrading treatment or punishment", most are also not physically or mentally fit to work. Furthermore, the fact that they hold only a temporary visa makes it difficult for them to find paid work. Similarly, it is unrealistic to expect that this group of asylum seekers will be able to find alternative accommodation in the private rental market, particularly when Australia reportedly suffers from a

persistent shortage of affordable housing[1] and it is already difficult for low-income earners to find housing in the private market. It is feared that the asylum seekers were effectively rendered homeless as a result of the final departure BVE. In this light, the introduction of the final departure BVE effectively forces the asylum seekers to leave Australia –in possible violation of the principle of non-refoulement- in order to survive.

The affected asylum seekers have so far been supported by charities, church groups and non-profit organizations which have helped them find alternative, short-term accommodation and provided them with support for other basic needs, such as food, clothing and cash. However, the support provided by such groups is temporary, precarious and not sustainable in the long run. In addition, this initial group of 60 people only represents a small portion of the 400 people at risk of having the final departure BVEs imposed upon them. There are concerns that the Government may proceed to impose these visas on the rest of the group, including families and children. The limited support currently available to the affected asylum seekers will be clearly inadequate to address the needs of the entire group.

It is reported that this scheme is motivated by a misconceived perception that this group of asylum seekers is exploiting the system to their advantage. Government Ministers have made various public statements suggesting that these asylum seekers are suspect and wasting the taxpayer's money. For instance, the Minister for Immigration and Border Protection, Mr. Peter Dutton, has been quoted as saying that "the game is up" for the asylum seekers and that they are "ripping the system off" by instigating legal action against the Government and seeking to stay in Australia.

While we do not wish to prejudge the accuracy of these allegations, we express our deep concern about the devastating impact of the final departure BVE on this group of asylum seekers, who are effectively left with no means of survival and plunged into a situation of poverty and destitution. In our view, this violates Australia's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified on 10 December 1975. We are also deeply concerned that the Australian Government's expectation that asylum seekers "return to a regional processing country or any country where [they] have a right of residence" may be in violation of the principle of non-refoulement.

The principles of non-discrimination and equality

The ICESCR guarantees a number of economic and social rights that are at stake in this situation, including the rights to an adequate standard of living, including adequate food and housing, to the highest attainable standard of physical and mental health, and to social security. The Committee on Economic, Social and Cultural Rights ("the Committee") has consistently emphasized that these rights must be interpreted in

[1] Committee on Economic, Social and Cultural Rights, Concluding Observations on Australia, 11 July 2017, E/C.12/AUS/CO/5, para. 41.

conjunction with the non-discrimination provision of article 2, paragraph 2, of the ICESCR, and the Covenant rights apply to "everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[2] While certain limitations of the Covenant rights may be permitted vis-à-vis non-nationals, the Committee has clearly stated that any distinction, exclusion, restriction or preference or other differential treatment on grounds of nationality or legal status must be "in accordance with the law, pursue a legitimate aim, and remain proportionate to the aim pursued".[3] Any differential treatment that does not satisfy such conditions is considered as "unlawful discrimination prohibited under article 2, para. 2 of the ICESCR".[4]

On the basis of these criteria, the final BVE scheme does not appear to be a permissible restriction of the social rights of the concerned asylum seekers. Firstly, in order for limitations of the Covenant rights to be "in accordance with the law", the law itself must be consistent with international human rights law and must not "be arbitrary or unreasonable or discriminatory".[5] The *Migration Act 1958* (Cth), which provides the basis for the final departure BVE scheme and requires immigration and law enforcement officers to remove, as soon as reasonably practicable, an "unauthorised maritime arrival" from Australia to a regional processing country, has been widely condemned as arbitrary, unnecessarily punitive, and discriminatory against asylum seekers who have arrived in Australia by boat.[6] Secondly, the final departure BVE seems to lack a reasonable and objective justification. Based on available information, it appears that the sole aim of the scheme is to force the asylum seekers in community detention in Australia to return to the regional processing centres whose conditions have been described by United Nations human rights mechanisms as amounting to cruel, inhuman and degrading treatment. In light of a growing number of reports on the inhumane conditions of detention and the serious risk of physical and psychological harm that they face in the regional processing centres, the legitimacy of such an aim is highly questionable. Thirdly, the imposition of the final departure BVE does not seem to be a proportionate measure, having regard to the serious consequences that flow from it. Immediately cutting off welfare support from people in desperate need does not seem to reflect careful consideration of what is the most appropriate and least restrictive measure, but rather a political decision to remove

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2 Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20 (2009), para. 30.

3 Committee on Economic, Social and Cultural Rights, The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, para.5

4 Committee on Economic, Social and Cultural Rights, The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, para.5

5 Principle 49, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex.

6 See: Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, A/HRC/35/25/Add.3 (2017), paras. 34-38; Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, E/C.12/AUS/CO/5 (2017), para.17.

the asylum seekers from Australia as soon as possible, regardless of its impact on their human rights.

Furthermore, the decision renders people homeless. As the Special Rapporteur on adequate housing has noted in her report on homelessness and the right to adequate housing (A/HRC/31/54, para 49), States have an immediate obligation to ensure that every decision or policy is consistent with the goal of the elimination of homelessness. Any decision that results in homelessness must be regarded as unacceptable and contrary to human rights. Policy and planning must apply the maximum of available resources, including unused or vacant housing units, with a view to ensuring access to housing for marginalized groups. This obligation is linked with ensuring access to effective remedies to the homeless, thus enabling respect for obligations linked to the progressive realization of the right to housing and the elimination of homelessness.

Prohibition on retrogressive measures

There is also a strong presumption that deliberately retrogressive measures are prohibited under the ICESCR and such measures would require "the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".[7] In assessing whether retrogressive measures in relation to the right to social security are permissible under the ICESCR, the Committee on Economic, Social and Cultural Rights assesses whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.[8]

None of these criteria seems to have been satisfied in imposing the final departure BVE. As discussed above, the necessity of the measure is unclear and there is no evidence that less restrictive alternatives were carefully considered. The concerned asylum seekers were reportedly never consulted or given an opportunity to express their views on the implementation of this visa scheme, despite the fact that it would have a serious impact on the enjoyment of their rights to social security and an adequate standard of living. Furthermore, we are not aware that there has been any independent review of the visa scheme. In this light, the final departure BVE cannot be considered as a permissible retrogressive measure, which is fully justified by reference to the totality of the Covenant rights.

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[7] Committee on Economic, Social and Cultural Rights, General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant), E/1991/23, para. 9.

[8] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security (art. 9), E/C.12/GC/19, para. 42.

The minimum core obligations

Even when the Covenant rights are limited or restricted in accordance with the ICESCR, the essential minimum content of each right much be preserved in *all* circumstances, and the corresponding duties extended to *all* people under the State's effective control, without exception.[9] This "minimum core" obligation includes at the very least a duty to "ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education".[10] Immediate and outright withdrawal of income and housing support to asylum seekers who rely on such support for their living seems to be fundamentally incompatible with Australia's minimum core obligation under the ICESCR. According to the information available, the asylum seekers who have been issued with the final departure BVE risk being homeless and deprived of adequate food, water and sanitation services, health care that they require, and above all, a basic sense of dignity. It must be stressed in this context that any limitations on rights affecting the subsistence or survival of the individual or integrity of the person are incompatible with the *raison d'être* of the ICESCR and considered a breach of the minimum core obligations.

The principle of non-refoulement

Moreover, we would like to remind your Excellency's Government of the principle of non-refoulement as codified in articles 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Australia ratified in 1989. Article 3 provides that no State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds to believe that he would be in danger of being subjected to torture. Furthermore paragraph 9 of the General Comment No. 20 of the Human Rights Committee, states that State parties, in order to fulfill their obligations under article 7 of the International Covenant on Civil and Political Rights, "must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement." This absolute prohibition against refoulement is broader than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee status under article 33 of the 1951 Refugee Convention or domestic law. Accordingly, non-refoulement under the CAT must be assessed independently of refugee status determinations, to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed.

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[9] Committee on Economic, Social and Cultural Rights, The Duties of States Towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, para. 9.

[10] Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security (art. 9), E/C.12/GC/19, para. 59 (a).

We appeal to the Government of Australia, also in its capacity as a newly elected member of the UN Human Rights Council, to immediately halt the final departure BVE scheme, which we consider is in violation of Australia's obligations under the ICESCR and the principle of non-refoulement.

As 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, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Could you please provide justifications for imposing the final departure BVE on asylum seekers in community detention in Australia?

3. Did the Government carry out any impact assessment of the final departure BVE on the human rights of the asylum seekers? If so, please provide details of the findings and recommendations.

4. Please provide information with regard to the measures that have been taken to ensure that Australia meets its international human and humanitarian obligations to ensure the non-refoulement of asylum seekers who are forced to leave Australia as a result of the imposition of the final departure BVE.

5. Could you please provide evidence demonstrating that the Government has considered all available alternatives to the final departure BVE scheme and has objectively determined that it was the least restrictive measure?

6. Have any of the concerned asylum seekers been consulted or given an opportunity to express their views, before receiving the final departure BVE? Has the Government carried out any individualized assessment of their circumstances and health conditions in issuing the final departure BVE?

7. Does the Government intend to issue the final departure BVE to the rest of the group, including families and children? If so, what factors has the Government taken into account in assessing the impact of the measure? What measures does the Government plan to implement in ensuring that their human rights are fully respected, particularly those of children?

8. Could you please explain what specific measures were taken by the Government to ensure that no individual would be rendered homeless? What alternative accommodation was offered by the Government or would be offered in response to the BVE?

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

Philip Alston
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Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

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