

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on violence against women, its causes and consequences

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Excellency,

We have the honour to address you in our capacity as Working Group on Arbitrary Detention; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the human rights of migrants; and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 42/22, 33/9, 34/21 and 41/17.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the ongoing detention of Ms. **Huyen Thu Thi Tran** and her child at the Melbourne Immigration Transit Accommodation (MITA) and the threat of imminent removal and separation from her child faced by Ms. Tran.

Ms. **Huyen Thu Thi Tran**, born on 10 April 1989, is a Vietnamese national. While in detention, Ms. Tran gave birth to a child who is, as a person born in Australia to non-citizens, reportedly stateless.

Ms. Tran's case was previously brought to the attention of your Excellency's Government through a communication which gave rise to an Opinion of the Working Group on Arbitrary Detention adopted on 24 April 2019 (A/HRC/WGAD/2019/2): The Opinion concluded that the deprivation of liberty of Ms. Tran was arbitrary in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights (the "UDHR") and articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights (the "ICCPR") and requested her and her child's immediate release, among other dispositions.

As described in the Working Group on Arbitrary Detention's Opinion, Ms. Tran arrived by boat on Christmas Island to seek asylum on 19 March 2011. She was then detained until 15 August 2012 when she was released into community detention, which was considered by the Working Group not to amount to detention. She was subsequently rearrested on 9 November 2017 for absconding from the community placement. She gave birth in detention in March 2018. Ms. Tan currently remains with her infant child at Broadmeadows Residential Precinct (part of the Melbourne Immigration Transit Accommodation), defined as an Alternative Place of Detention under the Migration Act 1958. The Working Group has concluded in its opinion that she was detained since 9 November 2017 due to her immigration status.

Ms. Tran has as a consequence been effectively deprived of her liberty for 41 months in the past 8 years and a half.

According to the information received:

On 4 November 2019, Ms. Tan was handed over a “Notice of intention to remove from Australia” on or after Monday 25 November 2019. The notice relates to Ms. Tran only. As a consequence it is anticipated and feared that Ms. Tran will be separated from her child who is approximately 18 months old.

According to this removal notice, “there will likely be restrictions on [Ms. Tran] being granted a visa to travel to Australia in the future”. Moreover, Ms. Tran “will be liable for the cost of [her] removal [...]; and it is likely that [Ms. Tran] will not be able to be granted any further Australian visa until that debt has been repaid”. The notice finally states that Ms. Tran “may not be eligible for the grant of an Australian visa for three (3) years from the date” she leaves Australia. This means that Ms. Tran would not be able to return to Australia and see her infant child for at least 3 years following her removal from Australia.

It is worth noting that Ms. Tran’s husband, the father of the child, holds a working visa and legally resides in Australia.

Ms. Tran has been diagnosed by a psychiatrist, in a report dated 13 June 2019, to be suffering from a major depressive episode, while her child is suffering from a reactive attachment disorder. The psychiatrist recommends that Ms. Tran is urgently reviewed and treated with anti-depressant medication with appropriate monitoring for her mood and anxiety. She also suffered falling and fainting episodes which require further investigation and possible treatment. Ms. Tran has since been given access to anti-depressant and been seen by a government health provider in November 2019. Her child is currently exhibiting signs of development failure, in particular with regards to social and emotional interactions. It is clear that Ms. Tran’s ongoing psychological distress is related to her past and current situation, which is inappropriate and harmful. She talks about killing herself rather than being separated from her infant child.

The child being born to two migrants of different nationalities, she is currently stateless and has no right to travel or to reside in either her parents’ countries of origin.

Without making any judgment as to the accuracy of the information made available to us, we express grave concern that should these allegations be correct, the facts alleged would amount to a violation of articles 2, 9, 23 and 24 of the International Covenant on Civil and Political Rights (ICCPR); and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) both of which have been ratified by Australia.

Article 9 (1) of the ICCPR establishes that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law. Article 9 (4) of the ICCPR provides that anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court. The Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37) elaborated by the Working Group on Arbitrary Detention at the request of the Human Rights Council, provide universal guidance applicable to persons deprived of their liberty.

The notice of removal of Ms. Tran from Australia would separate her infant child and her husband, with negative impact on the mental health of her child and herself. Article 23 of the ICCPR establishes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. We also recall that article 24 further states that every child has the right to acquire a nationality. Article 12 of the ICESCR establishes States' obligation to protect, respect and fulfill the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health states that the undermining of family unity in the context of human mobility and its detrimental impact on the mental health and well-being of children and adolescents on the move is a rights violation and presents a challenge whose effects could last for years or even generations to come (A/73/216).

With regard to the ongoing detention of the child of Ms. Tran, we would like to stress that "every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child (CMW/C/GC/4-CRC/C/GC/23).

We also wish to recall the findings of the Working Group on Arbitrary Detention ("Working Group") in its Opinion on Ms. Tran's case (A/HRC/WGAD/2019/2). The Working Group emphasized that "deprivation of liberty in an immigration context must be a measure of last resort [...] To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual". It concluded that the initial period of detention of 17 months could not be described as a brief initial period to use the language of the Human Rights Committee. Regarding the second detention period, the Working Group noted that "since the arrest, Ms. Tran has been detained due to her immigration status and therefore all the safeguards that are in place to guard against arbitrary detention must be observed". The Working Group concluded that "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 ICCPR. 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 of its criteria to determine the arbitrariness of a detention".

Moreover, the Working Group found that “Ms. Tran’s right to challenge the legality of her detention before a judicial body, a right enshrined in article 9 (4) of the ICCPR, has been violated”. The Working Group added that it had “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 ICCPR 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 ICCPR, and that her detention is therefore arbitrary, falling under category IV”.

Finally, the Working Group emphasized that the situation of detention of Ms. Tran and her infant child was discriminatory and contrary to article 16 and 26 of the ICCPR, and concluded that the detention of Ms. Tan was arbitrary under category V.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

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 the above-mentioned person(s) in compliance with international instruments.

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 be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please urgently ensure Ms. Tran is not separated from her child.
3. Please explain how the factual and legal grounds for the arrest and continued, prolonged detention of Ms. Tran are compatible with Australia’s international human rights obligations under the ICCPR and ICESCR.
4. Please describe the steps taken to remedy the situation of Ms. Tran and to bring it into conformity with the relevant international norms, including those set out in the UDHR, the ICCPR and the ICESCR.
5. Please provide information on the steps taken for the immediate release of Ms. Tran and her child and to accord her an enforceable right to compensation and other reparations, in accordance with international law, and for the implementation of all measures suggested by Opinion A/HRC/WGAD/2019/2 of the Working Group on Arbitrary Detention.
6. Please provide the details, and where available the results, of any investigation in particular ordered in connection with the allegations that Ms. Tran was arbitrarily detained for the first 17 months of her

stay in Australia and for the past two years, including the detention of her infant child. If no inquiries have taken place into these allegations, or if they have been inconclusive, please explain why.

7. Please provide information on the measures taken to ensure that Ms. Tran is and was protected against any abuse of power while in detention, and that her health and well-being as well as her child's are taken into consideration.
8. Please provide information on the measures taken to ensure that the child of Ms. Tran does not remain stateless.

While awaiting a reply, we urge that prompt measures are considered to ensure that Ms. **Huyen Thu Thi Tran** is not removed from Australia and consequently separated from her child and husband.

We may consider to bring our concerns in this case to the attention of the public, given its wider human rights implications, and would appreciate a prompt response to this communication, including the view of Your Excellency's Government and the measures taken to address our concerns. Should we take this step, we will indicate that we have been in contact with your Excellency's Government to clarify the issues in question.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Leigh Toomey
Vice-Chair of the Working Group on Arbitrary Detention

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