



Australian
Human Rights
Commission

Mr AP
v Commonwealth of
Australia (Department
of Home Affairs)

[2019] AusHRC 134

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Mr AP v Commonwealth
of Australia (Department
of Home Affairs)

[2019] AusHRC 134

*Report into complaint of arbitrary
detention*

Australian Human Rights Commission 2019



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**Australian
Human Rights
Commission**

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the complaint of Mr AP alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr AP has been detained in an immigration detention centre for over six years and continues to be detained. He complains that his detention is arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the Department's failure to refer Mr AP's circumstances to the Minister for consideration under s 195A of the *Migration Act 1958* (Cth) (Migration Act) until 1 February 2017, and the Department's lengthy delay in referring Mr AP's circumstances to the Minister for consideration under s 197AB of the Migration Act, has resulted in his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

On 30 July 2019, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 23 September 2019. That response can be found in Part 9 of this report. The notice below largely concerns information relevant as at 30 July 2019 when it was issued.

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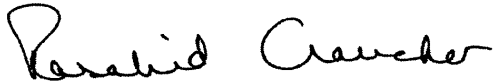
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I note that, on 9 September 2019, the Department referred Mr AP's case to the Minister for consideration of the grant of a visa under either s 195A or s 197AB of the Migration Act. I commend the Department for this constructive response.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

December 2019

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr AP against the Commonwealth of Australia—specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (Department)—alleging a breach of his human rights.
2. Mr AP has been detained in an immigration detention centre for over six years and continues to be detained. He complains that his detention is arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. This notice is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Mr AP's complaint.
5. As a result of this inquiry, I find the following:
 - a) the Department's failure to refer Mr AP's circumstances to the Minister for consideration under s 195A of the *Migration Act 1958* (Cth) (Migration Act) until 1 February 2017, and
 - b) the Department's failure to date to refer Mr AP's circumstances to the Minister for consideration under s 197AB of the Migration Act,has resulted in his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.
6. Mr AP has requested that his name not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect his human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to him by the pseudonym 'AP' in this document.

2 Background

7. Mr AP is a national of Bangladesh who arrived in Darwin as an unauthorised maritime arrival on 28 February 2013. He was detained in Darwin at the Northern Immigration Detention Centre pursuant to s 189(1) of the Migration Act.
8. On 8 March and 11 March 2013, Mr AP participated in two entry interviews with officers of the Department. During these interviews, he stated that he was wanted by the Bangladeshi police on fabricated murder charges.

9. On 2 April 2013, Mr AP was found to have *prima facie* claims to engage Australia's protection obligations and was 'screened in' to the refugee status determination process.
10. On 12 June 2014, Mr AP lodged an application for a protection visa (PV). In the written statutory declaration that accompanied his PV application he stated that there was no fabricated murder case against him and that he had falsified this claim on the advice of others in detention.
11. On 17 June 2014, Mr AP's application was converted to a temporary protection visa (TPV).
12. On 14 August 2014, Mr AP was part of a group of Bangladeshi nationals who met with their Case Managers to discuss their self-confessed criminal allegations. The group renounced their allegations and claimed that they were advised by others in detention to fabricate criminal charges in order to improve their chances of remaining in Australia.
13. On 29 October 2014, Mr AP's interview for a TPV was conducted. He confirmed the falsity of the fabricated murder charges and reiterated that he was told by others to fabricate these charges to increase his claims for protection.
14. On 7 November 2014, Mr AP provided a written statement to the Delegate of the (then) Minister stating that his claims relating to the murder charge were untrue.
15. On 19 December 2014, Mr AP's application for a TPV was refused by the Delegate. In making this decision, the Delegate said that Mr AP had reiterated at the TPV interview that his murder claims were made up. On this basis, the Delegate was 'satisfied that the applicant has not expressed any claims which suggest he holds a subjective fear of returning to Bangladesh in light of any murder allegations'.
16. On 24 December 2014, Mr AP lodged a review application with the (then) Refugee Review Tribunal (RRT) of the Delegate's decision to refuse his application for a TPV.
17. On 5 February 2015, the decision to refuse Mr AP's TPV application was upheld by the RRT.
18. On 2 March 2015, Mr AP lodged an appeal of the decision of the RRT at the Federal Circuit Court (FCC), seeking judicial review.
19. On 4 May 2015, Mr AP's application for judicial review was successful at the FCC and the matter was remitted back to the RRT.
20. On 8 May 2015, the RRT re-heard the matter and reserved its decision.
21. On 15 October 2015, the RRT again refused Mr AP's application for a TPV.
22. On 19 January 2016, Mr AP lodged an appeal of the second decision of the RRT at the FCC seeking judicial review.

23. On 2 February 2016, Mr AP's FCC hearing date was scheduled for 21 September 2016. I have no further information about this FCC proceeding or its outcome.
24. On or around 27 March 2016, Mr AP was involved in an incident at Wickham Point Immigration Detention Centre which was described as an 'incident of unrest'.
25. On 13 April 2016, the incident involving Mr AP and other detainees at Wickham Point Immigration Detention Centre was 'closed' following a mediation session. Mr AP's 'minor acuity' rating does not appear to have changed following the incident and no issues appear to have been raised to warrant a review of his placement in subsequent Case Reviews.
26. On 16 June 2016, Mr AP was transferred from Wickham Point Immigration Detention Centre to Yongah Hill Immigration Detention Centre.
27. On 1 February 2017, Mr AP's circumstances were referred to the Minister for consideration under s 195A of the Migration Act. On 13 February 2017, the Minister decided 'not to consider' granting Mr AP a Bridging Visa E (BVE) under s 195A of the Migration Act.
28. On 14 February 2019, Mr AP's case was referred on a group submission to the former Assistant Minister to brief her on a number of long-term detention cases. The submission provided the former Assistant Minister with the opportunity to indicate whether she was willing to consider the cases on an individual basis.
29. On 28 February 2019, the former Assistant Minister indicated that Mr AP's case should not be referred for consideration under the Minister's personal intervention powers.
30. As at 1 June 2019, Mr AP is being detained at the Yongah Hill Immigration Detention Centre.

3 Conciliation

31. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

4 Procedural history of this inquiry

32. On 19 February 2019, I issued a preliminary view in this matter and gave both the complainant and the Department the opportunity to respond to my preliminary findings.
33. On 3 May 2019, the Department responded to my preliminary view and provided additional information regarding Mr AP's circumstances.

5 Legislative framework

5.1 Functions of the Commission

34. Section 11(1)(f) of the AHRC Act provides that the Commission has the function of inquiring into any act or practice that may be inconsistent with, or contrary to, any human right.
35. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
36. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

5.2 What is an 'act' or 'practice'?

37. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
38. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
39. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.¹

5.3 Act or practice of the Commonwealth?

40. From 28 February 2013, Mr AP was detained by the Commonwealth pursuant to s 189(1) of the Migration Act.
41. As he arrived in Australia by boat without a valid visa, Mr AP was an 'unlawful non-citizen', and therefore the Migration Act required that he be detained.
42. While the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister can exercise to detain Mr AP in a manner less restrictive than a closed immigration detention facility. Specifically, the Minister could have granted him a temporary visa under s 195A of the Migration Act or made a residence determination pursuant to s 197AB of the Migration Act.

43. I consider two acts of the Commonwealth as relevant to this inquiry:
- (a) the Department's failure to refer Mr AP's circumstances to the Minister for attention under s 195A of the Migration Act until 1 February 2017, and
 - (b) the Department's failure to date to refer Mr AP's case to the Minister under s 197AB of the Migration Act.

5.4 What is a 'human right'?

44. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
45. Article 9(1) of the ICCPR relevantly provides:
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

6 Arbitrary detention

46. Mr AP complains about his continuing detention in an immigration detention centre. This requires consideration to be given to whether his detention is 'arbitrary' contrary to article 9(1) of the ICCPR.

6.1 Law on article 9 of the ICCPR

47. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention²
 - (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances³
 - (c) 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁴
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵

48. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁶
49. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the State Party's immigration policy (for example, the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.⁷
50. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a General Comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. 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 particular reasons 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. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.⁸
51. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty—in this case, continuing closed immigration detention—must be necessary and proportionate to a legitimate aim of the State Party—in this case, the Commonwealth of Australia—in order to avoid being 'arbitrary'.⁹
52. It is therefore necessary to consider whether the detention of Mr AP in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9(1) of the ICCPR.

6.2 Delay in referring Mr AP's circumstances to the Minister for consideration under s 195A of the Migration Act

53. Upon entry to Australia, Mr AP disclosed information that raised questions about his potential involvement in a serious offshore crime. Recalling the authority of the General Comment on article 9 of the ICCPR above, I accept that Mr AP's initial detention may not have been 'arbitrary' in the relevant sense in 2013. I do not have the material before me to make findings on this issue. In principle, however, detention for the purpose of investigating a crime, or determining whether an individual poses a threat to national security, might be reasonable, necessary and proportionate in the circumstances.
54. However, it is now June 2019 and Mr AP continues to be detained, notwithstanding the fact that the Department has confirmed to the Commission that he has been assessed as posing a low risk of harm to the community and is appropriate for community placement.
55. Mr AP formally recanted his disclosure on 12 June 2014 when he provided a written statutory declaration to accompany his PV application stating that there was no fabricated murder case against him and that he had falsified this claim to increase his chances of being granted a PV.
56. On the material before the Commission, Mr AP has consistently maintained this position since 2014, including during meetings with his Case Manager, in a written letter to the Delegate of the (then) Minister dated 7 November 2014, in his interview for a PV and in proceedings at the RRT and the FCC.
57. It also appears that this retraction was relied upon by the Delegate in refusing Mr AP's TPV application when they referenced the fabricated murder charges and stated that they were 'satisfied that the applicant has not expressed any claims which suggest he holds a subjective fear of returning to Bangladesh in light of any murder allegations'.
58. Similarly, both the (then) RRT¹⁰ and the Migration & Refugee Division of the Administrative Appeals Tribunal¹¹ pointed to the fabricated criminal charges as evidence of Mr AP's lack of credibility and willingness to lie to obtain an immigration outcome.
59. Between 9 May 2014 and 29 July 2014, Mr AP's Case Reviews noted that he was excluded from consideration for a (BVE) because he was 'of interest' for alleged involvement in criminal activity in Bangladesh.
60. However, on 26 January 2015, Mr AP's regular Case Reviews changed from stating that he was 'of interest [redacted] due to alleged involvement in criminal activities in Bangladesh to being 'previously of interest [redacted] due to alleged involvement in criminal activities in Bangladesh—escalated by CM re eligibility for BVE grant'. This statement also appeared in subsequent Case Reviews.

61. In its response to my Preliminary View dated 3 May 2019, the Department stated:

Mr AP was recorded in the departmental systems as a 'person of interest' due to his self-disclosed allegation. He remained a person of interest throughout the Department's investigations. The purpose of this record was to indicate to departmental officers that there was adverse information that may need to be considered by the officer. The Department ceased investigating the allegation in December 2014 and, at the same time, departmental systems were updated to show that he was no longer of interest.

62. On 16 December 2015—a year after it ceased investigating the allegation—the Department assessed Mr AP's circumstances against the guidelines for referral to the Minister for consideration of his intervention under s 195A of the Migration Act.
63. It is noted in this assessment that, while Mr AP had self-confessed to a criminal allegation, his 'allegation is no longer being investigated by the Department'.
64. On 16 December 2015, a decision was ultimately made that Mr AP's circumstances did not meet the s 195A guidelines for referral to the Minister's office and he was not referred by the Department.
65. On 13 July 2016, Mr AP's circumstances were assessed by the Department a second time against the s 195A guidelines for referral to the Minister for consideration of a BVE. The Department noted that, on 8 April 2016, it had conducted an Interpol search regarding Mr AP with 'no matches found'.
66. In again deciding not to refer Mr AP to the Minister for consideration of a BVE, the Department stated that this decision was made 'based on the security concerns identified by ASIO'. This appears to be the first time Australian Security Intelligence Organisation (ASIO) concerns were identified in the documents provided to the Commission.
67. On 3 August 2017, the Commission wrote to the Department seeking further information about the nature of the security concerns regarding Mr AP during this time.
68. Specifically, the Commission asked:
- (a) If the security concerns referred to in [the Department's] response relate solely to Mr AP's disclosure regarding the offshore murder charges?
 - (b) If not, what other security concerns did DIBP have about Mr AP?
 - (c) Which external agency, or agencies, investigated the security concerns?
 - (d) When were each of the security concerns first referred to the external agency/agencies?
 - (e) How long did the external agency take to investigate each set of the security concerns?

69. On 4 September 2017, the Department replied:

In the process of assessing Mr AP's case against the guidelines for possible referral under s 195A, he was identified as a potential match against security concerns. Subsequent advice confirmed that Mr AP was not a security concern, but was identified as being of character concern. Consequently, his case was not referred to an external agency for investigation. ...

Mr AP's case was referred to the Minister on a section 195A submission in February 2017 (refer to attached document). The allegations against Mr AP were addressed in this submission, were classified as character concerns and not security concerns, and the Minister declined to consider granting him a Bridging visa on 13 February 2017.

70. This indicates that Mr AP's case was never referred to an external agency and that the Department itself completed the relevant investigation into his disclosure.

71. On 3 August 2017, the Commission also asked the Department:

Please also advise of what steps, if any, were taken to identify any specific risks the complainant might pose if allowed to reside in the community, and what steps, if any, were taken to consider how any such risk might be mitigated?

72. The Department confirmed that, prior to referring Mr AP's case to the Minister for consideration on 1 February 2017, departmental systems had been investigated and indicated that Mr AP posed no specific risks to the community, apart from his 'offshore criminality'.

73. As there was no information in the material before the Commission to indicate other 'offshore criminality', and given repeated references in Mr AP's file of him being of 'low risk' to the community, in my Preliminary View, I understood this to be a reference to his self-disclosed—and later retracted—disclosure relating to the fabricated murder charges.

74. In its response to my Preliminary View dated 3 May 2019, the Department confirmed that this reference to 'offshore criminality' related only to the retracted allegation.

75. On 10 October 2016, Mr AP was assessed through the Community Protection Assessment Tool (CPAT) as posing a low risk of harm to the community.

76. On 1 February 2017, the Department referred Mr AP's circumstances to the Minister for his consideration for a BVE under s 195A of the Migration Act. The reasons listed for the Department's decision to refer him were as follows:

- (a) his ongoing judicial review
- (b) the length of time he has spent in immigration detention (being almost four years at this date)
- (c) his assessment of low risk of harm throughout the CPAT, and
- (d) his diagnosed mental health issues.

77. The referral letter from the Department to the Minister confirmed that Interpol and Five Country checks had been conducted on Mr AP with 'no matches'. It also indicated that, although Mr AP had a 'character alert' on departmental systems relating to his fabricated self-disclosed allegation, there were no national security concerns in his case. On the basis of Mr AP's low-risk CPAT assessment, the Department recommended the granting of a Tier-1 BVE.
78. On 13 February 2017, the Minister decided 'not to consider' granting Mr AP a BVE under s 195A of the Migration Act.
79. Mr AP first told the Department that he had fabricated the fake murder charges in June 2014. The Department ceased investigating this self-disclosed allegation in December 2014. His matter was first referred by the Department to the Minister for consideration of intervention under s 195A on 1 February 2017—over two years later.
80. In its response to my Preliminary View dated 3 May 2019, the Department submitted that Mr AP's circumstances did not meet the 195A Guidelines for referral to the Minister prior to 1 February 2017.
81. It said:
- Under the 195A Guidelines in 2015, cases were referred to the Minister where one or more of the following criteria were met:
- the person had individual needs that could not be properly cared for in a secured immigration detention facility;
 - there were strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit;
 - the person had no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practical;
 - there are unique and exceptional circumstances which justify consideration of the use of the Minister's public interest powers and there was no other intervention power available to grant a visa to the person;
 - the person presents well-founded non-refoulement claims.
82. The Department's assessment of Mr AP's case against the s 195A Guidelines finalised on 16 December 2015 as 'guidelines not met' considered that:
- IHMS had advised the Department that Mr AP did not have any health conditions that were unable to be cared for within a held detention environment;
 - Mr AP had no identified family members in the community;

- he had no ongoing processes before the Department, had been found not to engage Australia’s protection obligations and was considered on a removal pathway;
- there were no unique or exceptional circumstances identified to warrant referral to the Minister.

83. The phrase ‘unique or exceptional circumstances’ is not defined in the s 195A Guidelines, however it was defined in similar guidelines relating to the Minister’s power to grant visas in the public interest.¹² In those guidelines, factors that were relevant to an assessment of ‘unique or exceptional’ circumstances included:
- circumstances that may bring Australia’s obligations as a party to the ICCPR into consideration, and
 - the length of time the person has been present in Australia (including time spent in detention).
84. When the Department first assessed Mr AP’s case against the s 195 Guidelines in 16 December 2015, Mr AP had been in closed detention for over 33 months. The Department had ceased investigating his self-disclosed allegation nearly 12 months previously.
85. On 4 May 2015, Mr AP’s application for judicial review was successful at the FCC and his matter was remitted back to the RRT. At this stage, the Department would have also been on notice that his case was likely to be protracted given the ongoing litigation.
86. Recalling the relevant jurisprudence of the UN HR Committee discussed above, detention will become arbitrary under article 9(1) of the ICCPR unless it is reasonable, necessary and proportionate on the basis of reasons specific to an individual, and in light of the available alternatives to closed detention.
87. There is no information before the Commission to suggest that the Department had concerns at the time of the first s 195A Guideline assessment that Mr AP had an individualised likelihood of absconding or posed a risk to the community or national security. Indeed, subsequent reviews have emphasised that Mr AP poses a low risk of harm to the community if released from detention.
88. Consequently, in December 2015, I consider that there were circumstances that may have brought Australia’s obligations as a party to the ICCPR into consideration sufficient to fall within the ‘unique or exceptional circumstances’ ground of referral to the Minister.
89. As I cannot be satisfied that Mr AP’s detention at this time was reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention, I find that the delay in referring Mr AP’s matter to the Minister until 1 February 2017 resulted in his detention becoming arbitrary, contrary to article 9 of the ICCPR.

6.3 Department's failure to refer Mr AP's case to the Minister under s 197AB of the Migration Act

90. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.
91. In assessing the less restrictive options available to the Commonwealth in cases of immigration detention, it is important to note the residence determination powers. Section 197AB of the Migration Act provides:
- If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a residence determination) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).
92. Further, the definition of 'immigration detention' in s 5(1) includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.¹³
93. Section 197AB of the Migration Act permits the Minister, where he or she thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. This is commonly referred to as community detention. Further, it is open to the Minister to exercise the power conferred by s 197AB subject to additional conditions: see s 197AB(2)(b) of the Migration Act.
94. The Commission has asked the Department whether alternative, less restrictive detention options have been considered for Mr AP. On 28 October 2016, the Department replied that:
- In October 2016, the Department was informed that Mr AP's security issues had been resolved. Given the recent change in Mr AP's circumstances, the Department is now planning to refer a submission to the Minister for consideration of alternative placement options for Mr AP. No timeframe can be provided for when this will be finalised.
95. On 13 February 2017, the Minister declined to consider intervening to grant Mr AP a bridging visa under s 195A of the Migration Act.

96. Relevantly however, it does not appear that Mr AP has been the subject of a formal assessment for referral to the Minister under s 197AB of the Migration Act.
97. The Department uses a placement model whereby persons with a range of individual circumstances may meet the guidelines for referral to the Minister under s 197AB for consideration of a community detention placement.
98. In Mr AP's six years in immigration detention there have been five different sets of guidelines regarding the s 197AB powers which have applied to his circumstances, made by four successive Ministers.
99. When the 2013 guidelines came into effect, the (then) Minister the Hon Brendan O'Connor MP indicated that he would consider exercising his discretion in favour of single adults with 'diagnosed mental illness'. This was retained, although slightly modified, in the 2014, 2015 and most recent 2017 Guidelines which stated that the Minister would consider referrals of single adults if they had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'.
100. The health sections of Mr AP's Case Reviews are partially redacted and I have little information available to me addressing his mental health. However, there is some information available to suggest that, at some stage during his lengthy detention, he may have been diagnosed with a mental health illness that requires ongoing medical intervention.
101. In a Case Review dated 26 January 2015, Mr AP said that he found the prolonged detention difficult and his Case Manager noted that he appeared very quiet and withdrawn.
102. On 5 June 2015, Mr AP was prescribed Mirtazapine, an anti-depressant medication.
103. In a Case Review dated 15 January 2016, Mr AP's Case Manager noted that he was only sleeping for 2-3 hours per day and referred him to International Health and Medical Services (IHMS) and Mental Health. His Case Manager also discussed Mr AP's food and fluid refusal behaviour.
104. On 22 February 2016, an IHMS summary report stated that Mr AP had been diagnosed with a depressive illness and had previously been prescribed anti-depressants. IHMS advised that he continued to receive mental health support but was no longer being prescribed medication by his treating doctors and did not appear mentally unwell. The report concluded by noting that Mr AP reported suffering from memory loss which was exacerbated by remaining in prolonged detention.
105. In a Case Review dated 20 April 2016, Mr AP's Case Manager noted that he was engaging with Mental Health because he felt depressed and stressed that he had not seen his family in such a long time.

106. On 1 February 2017, the Department referred Mr AP to the Minister for his consideration under s 195A of the Migration Act. Mr AP's 'diagnosed mental health issues' were one of four reasons listed in the Department's decision to refer him. The Department stated that:

The latest report from International Health and Medical Services (IHMS), dated 10 November 2016 states, 'On 1 Mar 2016 Mr AP was seen by the IHMS GP and re-commenced on an antidepressant medication to manage his symptoms of low mood and insomnia. At his mental health review on 8 Nov 2016 he still described a low mood and was referred for Torture and Trauma counselling and to see a Psychiatrist.' The report further states, 'While Mr AP has reported frustration at his current situation in detention, there is no indication that his health professionals are of the view currently that his health is being exacerbated by remaining in detention'.

107. Based on the documentation before me, it appears that, at some stage over the past six years, Mr AP may have become a person with a 'diagnosed mental illness' or a 'mental health illness requiring ongoing medical intervention' appropriate for referral under the 2013 or subsequent guidelines.
108. In its response to my Preliminary View dated 3 May 2019, the Department said:

Status Resolution has not been informed that Mr AP has been diagnosed with a mental health illness that requires ongoing medical intervention which cannot be provided by the detention health service provider International Health and Medical Services (IHMS).

109. In any event, as with the s 195A Guidelines, a 'unique or exceptional circumstances' provision is found in each set of s 197AB guidelines applying to Mr AP's circumstances.
110. Viewed cumulatively, I consider the following factors relevant to my finding that Mr AP's case presents 'unique or exceptional' circumstances:
- he has now been detained in an immigration detention centre for over six years
 - he has been assessed as being a 'low security risk' if released into the community
 - there do not appear to be personalised reasons to justify such a prolonged period of detention such as a higher risk of absconding or a threat to the community or national security
 - given his lengthy detention, there are circumstances that bring Australia's obligations as a party to the ICCPR into consideration
 - he has previously been diagnosed with a depressive illness and insomnia and prescribed anti-depressant medication and medication for his insomnia
 - the Department has noted concerns about the deterioration of Mr AP's mental health caused by his prolonged detention
 - he has indicated that his lengthy detention has caused him to feel anxious, depressed and stressed.

7 Findings

111. Mr AP has been detained in a closed immigration detention centre for over 75 months—more than six years and three months.
112. Having considered the material before me, I cannot be satisfied that Mr AP's lengthy and continuing detention in an immigration detention centre is necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of its migration system.
113. On the material before the Commission, once Mr AP's security concerns were resolved, the Department has provided no particular reasons for his lengthy detention specific to him.
114. Mr AP has been repeatedly identified by the Department as being a low security risk. This suggests that if he were placed in community detention or released from detention on a bridging visa he would not be a risk to the community while his remaining review procedures are completed.
115. Consequently, I have formed the view that the failure of the Department to refer Mr AP's case to the Minister under s 195A of the Migration Act until 1 February 2017, and its failure to date to refer his circumstances to the Minister for consideration under s 197AB of the Migration Act, has resulted in his detention becoming arbitrary, contrary to article 9 of the ICCPR.

8 Recommendations

116. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁵ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁶

Recommendation 1

The Department refer Mr AP's case to the Minister under s 197AB of the Migration Act.

9 The Department's response to my findings and recommendations

117. On 30 July 2019, I provided the Department with a notice of my findings and recommendations.
118. On 23 September 2019, the Department provided the following response to my findings and recommendations:

AHRC's finding

The failure of the Department to refer Mr AP's case to the Minister under section 195A of the Migration Act until 1 February 2017, and its failure to date to refer his circumstances to the Minister for consideration under section 197AB of the Migration Act, has resulted in his detention becoming arbitrary, contrary to article 9 of the ICCPR.

Department's response to finding

As per the Department's response to the section 27 notice of the AHRC regarding this case, prior to Mr AP's case being referred to the Minister on 1 February 2017, he has been assessed against the section 195A guidelines on two occasions, in December 2015 and again in July 2016. The Department considers that it did not fail to refer Mr AP's case for consideration under section 195A before February 2017, as it assessed his case on two occasions and Mr AP's circumstances did not meet the guidelines for referral to the Minister.

Mr AP's case was referred to the Minister in February 2017, and the Minister declined to intervene in his case.

In February 2019, Mr AP's case was referred to the former Assistant Minister in a submission briefing her on a number of detention cases. The submission asked the former Assistant Minister to indicate whether she was willing to consider the cases on an individual basis under either section 195A or section 197AB.

In response to the section 27 notice, the Department informed the AHRC that the former Assistant Minister indicated on 28 February 2019 that Mr AP's case should not be referred for consideration under the Minister's personal intervention powers. This information was incorrect. At the time, the former Assistant Minister indicated that Mr AP's case should be referred for consideration. As a result, Mr AP's case is currently included in a submission sent to the Minister on 9 September 2019 for consideration of a visa grant under section 195A and section 197AB.

The Department notes that notwithstanding the error in the advice to the AHRC, there have been no errors in the Department's administration of the former Assistant Minister's decision.

As noted in the response to the section 27 notice, Mr AP's case has been, and continues to be reviewed regularly.

AHRC's recommendation

The Department refer Mr AP's case to the Minister under section 197AB of the Migration Act.

Response to recommendation

The Department notes the AHRC's recommendation.

Mr AP's case is currently included in a submission sent to the Minister on 9 September 2019 for consideration of a visa grant under section 195A and section 197AB of the *Migration Act 1958*.

119. I report accordingly to the Attorney-General.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

December 2019

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- 2 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communication No. 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*).
- 3 UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18]; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6].
- 4 *Manga v Attorney-General [2000] 2 NZLR 65, 71 [40]–[42] (Hammond J)*. See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (11 November 1999) (*Spakmo v Norway*).
- 5 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*) (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*).
- 6 UN Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).
- 7 UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288 /2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007) (*Shams & Ors v Australia*); UN Human Rights Committee, *Views: Communication No. 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*); UN Human Rights Committee, *Views: Communication No. 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- 8 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18], footnotes omitted.
- 9 UN Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 1 [6]; UN Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*).
- 10 Decision record (Refugee Review Tribunal, RRT No 1421375, 5 February 2015) 19.
- 11 Decision record (Administrative Appeals Tribunal, MRT No 1506540, 15 October 2015) 73.
- 12 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on Ministerial powers* (s345, s 351, s 417 and s 501j), 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- 13 *Migration Act 1958* (Cth) s 5.
- 14 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 15 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 16 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).

Further Information

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