Australian Human Rights Commission

# Mr MH v Commonwealth of Australia (Department of Home Affairs)

**[2024] AusHRC 165**

May 2024

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Australian Human Rights Commission
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[2024] AusHRC 165

*Report into arbitrary detention*

Australian Human Rights Commission 2024

The Hon Mark Dreyfus KC 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 human rights complaint of Mr MH, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr MH arrived in Australia by boat at Christmas Island from Iraq, and was transferred into a regional processing centre in Papua New Guinea in October 2013. After his transfer to the Australian community, his visa was cancelled in May 2019 pending the outcome of his criminal charges, and Mr MH was returned to closed immigration detention. On appeal of his case in March 2022, several charges were dropped, and Mr MH received no further custodial sentence. However, Mr MH continued to remain in immigration detention until his release in June 2023.

Mr MH consequently complained that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

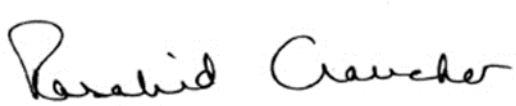
As a result of this inquiry, I have found that Mr MH's continued detention could not be justified as reasonable or proportionate to any risk he may have posed, particularly considering the outcome of his criminal appeal, his serious mental and physical health concerns attributable to his ongoing detention, and the hardships his detention posed to his Australian family.

I therefore consider that the Department's delay in referring Mr MH's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the *Migration Act 1958* (Cth) is inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.

On 4 March 2024, 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 26 April 2024. That response can be found in Part 7 of this report.

I enclose a copy of my report.

Yours sincerely,



Emeritus Professor Rosalind Croucher AM FAAL
**President**
Australian Human Rights Commission
May 2024

## Contents

# 1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr MH against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of human rights. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

2. Mr MH complains that his immigration detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). This inquiry is focused on the period of time that Mr MH was held in immigration detention in Australia between 10 March 2020 and 22 June 2023.

3. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, outside seeking a writ of *habeas corpus*, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.[1]

4. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.

5. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.

6. This document comprises a report of my findings in relation to this inquiry and my recommendations to the Commonwealth.

7. Mr MH has been accepted as a refugee, and this inquiry has considered sensitive information about him. I consider it necessary for the protection of Mr MH's privacy and human rights to make a direction under section 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

# 2 Summary of findings and recommendations

8. As a result of this inquiry, I find that the following omissions by the Department contributed to the detention of Mr MH becoming arbitrary, contrary to article 9(1) of the ICCPR:

    - the failure of the Department to refer Mr MH's case to the Minister in order to consider whether to exercise their discretionary powers under section 197AB or 195A of the Migration Act prior to 11 August 2021
    - the failure of the Department to refer Mr MH's case to the Minister again until 17 June 2023.

9. I make the following recommendations:

**Recommendation 1**

The Commission recommends that the Department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.

**Recommendation 2**

The Commission recommends that status resolution officers be required to stay abreast of a detainee's criminal proceedings, and ensure that if there is any outcome which alters the number or severity of their convictions, or reduces their sentence, immediate consideration is given to referring them to the Minister for possible intervention.

Relevant policy documents and training materials should be updated to reflect this requirement.

# 3 Background

## 3.1 Migration and visa history

10. Mr MH arrived in Australia on 26 September 2013, being taken to Christmas Island by Australian authorities after the boat on which he was travelling was intercepted at sea. He was detained pursuant to section 189(3) of the *Migration Act 1958* (Cth) (Migration Act).

11. On 2 October 2013, Mr MH was transferred to Papua New Guinea (PNG) under the regional processing arrangements and pursuant to section 198AD of the Migration Act. Accordingly, he became what is

known as a 'transitory person' as defined in section 5(1) of the Migration Act.

12. Mr MH was brought back to Australia for medical treatment on 21 May 2016, and detained pursuant to section 189(1) of the Migration Act.

13. The Minister intervened to grant Mr MH a Humanitarian Stay (Temporary) visa and Bridging E visa (BVE) on 28 August 2017, and he was released from detention. Subsequent BVEs were granted on 1 March 2018 and 19 September 2018.

14. On 17 May 2019, Mr MH was remanded into custody by Victoria Police due to criminal charges. His BVE was cancelled on 22 May 2019 pursuant to section 116(1)(g) of the Migration Act on the basis of the criminal charges laid against him. He lodged an application for review of the decision to cancel his visa with the Administrative Appeals Tribunal (AAT).

15. On 23 July 2019, Mr MH was granted bail with respect to his criminal charges, and he was detained under section 189(1) of the Migration Act. His place of detention was the Melbourne Immigration Transit Accommodation (MITA).

16. Mr MH was charged with further offences alleged to have occurred while he was at MITA on 14 November 2019, but which were a continuation of the same behaviour which led to the cancellation of his BVE, and transferred to criminal custody.

17. He was convicted and sentenced on 13 December 2019 for offences of:

    - unlawful assault
    - threaten to commit a sexual offence
    - contravene a family violence safety notice (2 counts)
    - persistent contravention of a family violence notice/order
    - contravene a family violence intervention order (2 counts)
    - unauthorised access to or modification of restricted data
    - stalking.

18. The sentence imposed by the Magistrate was 6 months' imprisonment.

19. Mr MH appealed the convictions and sentence imposed and was released on bail. He was transferred back to MITA on 10 March 2020.

20. On 11 August 2021, a submission was received by the Minister's office to consider 46 transitory persons, including Mr MH, for possible intervention by way of making a residence determination to permit them to be

detained in community detention. The Minister decided against intervention on 19 August 2021 for Mr MH.

21. With respect to his criminal appeal, after it became apparent that the complainant was unwilling to give evidence, it appears that Mr MH pleaded guilty to some offences and a number of other offences against Mr MH were withdrawn on 17 March 2022, including the offences of stalking, unlawful assault, threaten to commit a sexual offence, and a number of the contraventions of a family violence order. He was convicted of other offences of contravening family violence orders and using a carriage service to harass. Mr MH was released without further custodial sentence on a 5-year good behaviour bond. No further term of imprisonment was required to be served by him.

22. On 14 April 2022, Mr MH married his wife while in detention. The couple met while Mr MH was in the community holding a BVE. The offences for which he was convicted do not relate to his relationship with his now wife, but rather a woman from a previous relationship.

23. The AAT made its decision to set aside the decision to cancel Mr MH's BVE on 27 December 2022 and substituted a decision not to cancel the visa. However, given the BVE held by Mr MH in May 2019 had already expired, the AAT's decision did not give rise to his release from detention, as he remained an unlawful non-citizen without a visa.

24. While the AAT did find that the grounds for cancellation of Mr MH's BVE were made out, it accepted his submissions that there were factors weighing in favour of not cancelling his visa, which outweighed those in favour of cancellation.

25. Factors considered by the AAT in making its decision were:

    - the best interests of his wife's 2 young children, and his own unborn child (due March 2023)
    - the ongoing hardship caused to him by his continued detention
    - his mental health concerns and the risk of deterioration during his detention.

26. The AAT accepted that Mr MH had shown genuine remorse for his offending behaviour, and determined that no weight was to be given to future risk of offending when weighing up factors for and against cancellation.

27. Mr MH's daughter was born on 23 March 2023. He was permitted to be present at the birth.

28. The Department prepared a submission for the Minister to consider intervening on behalf of 3 transitory persons including Mr MH on 25 May 2023. The Minister indicated his willingness on 17 June 2023 to intervene under section 195A of the Migration Act to grant Mr MH a BVE, and to lift the subsections 46A(2) and 48B(2) bars indefinitely, to allow him to apply for subsequent BVEs.

29. On 22 June 2023, Mr MH was granted a BVE and he was released from detention.

## 3.2 Medical and mental health issues

30. Mr MH has a history of mental health issues and treatment while in detention, including during the period of his detention in PNG.

31. IHMS and departmental notes record Mr MH disclosing a traumatic childhood involving the suicide of a close family member. While on Manus Island, Mr MH self-harmed frequently, and engaged in 9 months of food and fluid refusal which left him emaciated. He also engaged in further self-harm in 2017 after being transferred to Australia.

32. According to IHMS records, soon after his reception into MITA in 2019, Mr MH asked to see a psychiatrist. He stated that he was experiencing auditory hallucinations urging him to hurt himself.

33. The IHMS psychiatrist on 26 July 2019 made notes of their consult including that Mr MH suffered from anxiety and depression, and had a history of substance abuse. He was not found to be psychotic or suicidal at that time.

34. On 29 August 2019, an IHMS counsellor referred Mr MH to Foundation House for torture and trauma counselling, noting that he was 'experiencing severe detention fatigue, PTSD and symptoms of depression'. The referral did not take place at the time due to Mr MH's transfer to prison, but he was re-referred on 13 July 2021.

35. An IHMS counsellor noted on 27 May 2022 that Mr MH was extremely frustrated, having injured both of his hands and feeling that his injuries had not been appropriately cared for. His injuries were sustained through a fall in the bathroom, and by his punching a wall in frustration on 26 May 2022. He also expressed concern about his new partner, who was raising her 2 children alone.

36. While in hospital for surgery on his hands in June 2022, Mr MH was apparently diagnosed with Addison's disease. He was admitted to hospital again in July 2022 for further investigation of the condition. The Department disputes that a diagnosis of Addison's disease was made, however IHMS records provided indicate that it may have been, or at least, that Mr MH suffered from an ACTH (adrenocorticotropic hormone)

deficiency.

37. On 10 August 2022, Foundation House provided IHMS with a health assessment summary in the following terms:

> [MH] is almost thirty-nine years old and has experienced cumulative traumatic events and loss in Iraq forcing him to flee for safety. He is suffering from symptoms of Major Depression and Post Traumatic Stress Disorder. Since his arrival in Australia in 2013, he has experienced prolonged and indefinite detention, amounting to approximately seven years interrupted by prison and two years in the community. He was found to be a refugee in 2016. The length of his detention seems to far outweigh the circumstances of the in total six-month imprisonment.
>
> [MH] impresses as a well-meaning, caring person who has suffered from significant traumatic events in his past and needs a chance to begin a new life. He has tried valiantly to be future orientated and overcome past obstacles however it seems that he is constantly confronting impediments and setbacks. He is struggling with a recent health diagnosis of Addison's disease, the data breach this year identifying his details, the indefinite nature of his detention and lack of resolution to his legal process. He has put in an extraordinary effort to making a life for himself outside of detention, marrying in April this year and resettling his wife and two stepsons successfully in a house in [redacted]. I believe the opportunity to begin a new life with his family in the community will have a profound and positive impact on his psychological functioning and enable physical and mental reduction of disabling symptoms.

38. In September 2022, IHMS mental health practitioners made similar notes about Mr MH's worsening mental health, with a counsellor on 15 September 2022 recording that he was 'currently extremely frustrated, symptoms of reactive depression, heightened psychosomatic concerns'. A mental health nurse on 19 and 28 September 2022 noted Mr MH's ongoing detention fatigue.

39. Serco welfare officers raised concerns with IHMS that they noticed a decline in Mr MH in October 2022 due to him 'keeping [a] low profile, not engaging withdrawing [sic]'.

40. Mr MH reported to an IHMS mental health nurse on 29 December 2022 that he would rather not take his medication 'so he will die rather than dealing any further out of frustration and anger' as quoted in the nurse's notes. This was, according to the notes, related to the outcome from the AAT and advice received from his lawyer.

41. On 14 January 2023, Serco reported to IHMS that Mr MH had not eaten or drunk anything for over 24 hours, nor taken his medication. He was taken

to hospital on 15 January 2023 due to concerns about missed medication and the effect this might have on his condition. The hospital administered intravenous fluids, and Mr MH recommenced eating on the evening of 16 January 2023.

42. On 23 January 2023, Mr MH reported to an IHMS psychiatrist that he had 'ceased food, fluid and medication intake in an attempt to end his life'. He said that he had lost all hope and couldn't see a way forward. The psychiatrist noted the following impression:

> Acute adjustment disorder (from recent court outcome) superimposed on chronic stress of ongoing detention. Presents with cluster B personality traits (feelings of worthlessness, difficulty regulating emotions, self-harm as a coping mechanism, pseudohallucinations).

43. A fire lit in his detention compound on 17 March 2023 was reported by Mr MH to an IHMS counsellor to have triggered his past traumatic experience. The counsellor noted 'risk of further deteriorating of MH status'.

44. On 6 April 2023, an IHMS mental health nurse noted about Mr MH, 'severe detention fatigue, situational crisis worsening his mental health'. The IHMS mental health nurse recorded that Mr MH presented a risk of self-harm if he remained in detention.

45. On 18 April 2023, Mr MH was again admitted to the Northern Hospital following concerns about his physical health after experiencing bouts of diarrhoea and vomiting. He was discharged on 23 April 2023.

## 3.3 Risk assessments

46. There are two tools used by the Department and Serco to assess risk with respect to detainees, and their suitability for release into the community.

47. The Community Protection Assessment Tool (CPAT) is a risk-based placement tool used by the Department to help make assessments of the suitability of detainees for release into the community.[2] The CPAT results in a risk category or 'tier' that corresponds to a recommended placement for a detainee.

48. In April 2020, the CPAT conducted by the Department assessed Mr MH as holding a 'Tier 3 – Held Detention' recommendation. This assessment is based predominantly on his criminal offending and his behaviour impacting others in immigration detention.

49. With respect to his behaviour in immigration detention, one incident of abusive or aggressive behaviour towards or involving another detainee was noted to have occurred in each of the years 2016, 2017, 2019 and 2020 (i.e. four incidents in total).

50. This recommendation remained consistent in the CPATs provided to the Commission until 21 June 2022, when the recommendation was manually substituted for a 'Tier 1 – Residence Determination'. The reasons provided for the substitution were based on his lack of options for any immigration pathway, an ongoing High Court injunction preventing his return to PNG, and his engagement in the US resettlement program. The substituted recommendation remained in place until his release. The CPAT also contains under the heading 'behaviour impacting others': 'Since being detained at MITA, detainee has been involved in a number of incidents relating to abusive/aggressive behaviour, minor damage, disturbance, assault and self-harm. This may be attributed to frustration in detention.'

51. The Security Risk Assessment Tool (SRAT) is a document produced by Serco which uses a series of risk indicators which then impact the placement of a detainee within the immigration detention network, and, for example, whether or not restraints are used by Serco on transfers within and outside of immigration detention.

52. The most recent SRAT provided by the Department to the Commission shows Mr MH as holding a high risk of aggression/violence; high risk criminal profile, and therefore being high risk for both placement and escort. An analysis of the incident history reported in the SRAT shows no incidents in the last 3 months. It appears that the high risk profiles are based on Mr MH's criminal history.

53. Issues with respect to the quality of risk assessments arising from the CPAT and SRAT have been discussed in previous Commission reports.[3]

# 4 Legal framework

## 4.1 Functions of the Commission

54. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.

55. 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.

56. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

## 4.2 What is an 'act' or 'practice'

57. The terms 'act' and 'practice' are defined in section 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.

58. 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.

59. The functions of the Commission identified in section 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.[4]

## 4.3 What is a human right?

60. The phrase 'human rights' is defined in section 3(1) of the AHRC Act to include, among others, the rights and freedoms recognised in the ICCPR.

# 5 Arbitrary detention

61. Mr MH complains about the period between 10 March 2020 and 22 June 2023 when he was detained in closed immigration detention. This requires consideration to be given to whether his detention was 'arbitrary' contrary to article 9(1) of the ICCPR.

## 5.1 Law on article 9 of the ICCPR

62. Article 9(1) of the ICCPR 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.

63. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

- 'detention' includes immigration detention[5]
- lawful 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[6]
- 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 predictability[7]

- detention should not continue beyond the period for which a State party can provide appropriate justification.[8]

64. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR Committee) found detention for a period of 2 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.[9]

65. 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.[10]

66. 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 UN HR 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.[11]

67. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.[12] A similar view has been expressed by the UN HR Committee, which has said:

> if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law … information of the reasons must be given … and court control of the detention must be available … as well as compensation in the case of a breach.[13]

68. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.[14]

69. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.[15]

70. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.

71. It is therefore necessary to consider whether the detention of Mr MH in a closed immigration facility 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 of the ICCPR.

## 5.2 Detention on PNG

72. In his complaint, Mr MH alleges that his detention from 2013 was arbitrary. His complaint requires me therefore to consider the Commission's jurisdiction to inquire into the periods that he was subject to regional processing arrangements, prior to being transferred to Australia for the temporary purpose of medical treatment.

73. The Commission has previously considered its jurisdiction to consider complaints of arbitrary detention in the regional processing centre on Nauru in the report, *Ms BK, Ms CO and Mr DE v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, finding that the detention of the complainants was not an act done by or on behalf of the Commonwealth.[16] The High Court's reasoning in *Plaintiff M68-2015 v*

*Minister for Immigration and Border Protection* (2016) 257 CLR 42 (*Plaintiff M68*) was determinative for the Commission's decision on jurisdiction in that matter.

74. *Plaintiff M68* considered the specific regional processing arrangements between Australia and Nauru. The case was applied in *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622 (*Plaintiff S195*), which was concerned with regional processing arrangements in PNG. While *Plaintiff S195* considered a quite different set of questions to those posed in the special case considered in *Plaintiff M68*, it seems to be accepted by the Court unanimously that, upon delivery of the plaintiff to PNG, he then became subject to PNG law, and that it was the direction of the PNG Minister for Foreign Affairs and Immigration that required his residence at the Manus Regional Processing Centre.[17]

75. Accordingly, the reasoning in *Plaintiff M68* and the Commission's conclusions in *Ms BK, Ms CO and Mr DE v Commonwealth of Australia (Department of Home Affairs)* applies equally to the period of time that Mr MH spent on PNG. For that reason, the Commission has not inquired into whether Mr MH was detained arbitrarily on PNG, as any detention was not an act or practice done by or on behalf of the Commonwealth.

## 5.3 Act or practice of the Commonwealth

76. Mr MH was detained in Australia from 21 May 2016 to 28 August 2017 when brought from PNG for medical treatment. That detention ended upon intervention by the Minister.

77. He was then detained for 2 further periods – from 23 July 2019 to 14 November 2019; and from 10 March 2020 to 22 June 2023. His complaint was lodged on 20 May 2022. Accordingly, this inquiry has focused on the latest of these periods only.

78. At the time of his detention, Mr MH was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.

79. As a transitory person, it was not possible for Mr MH to apply for any kind of visa to resolve his status. He was, throughout his detention in Australia, reliant on the Minister to intervene on his behalf.

80. There are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.

81. Section 197AB of the Migration Act permits the Minister, where the Minister 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. The residence determination may be made subject to other conditions such as reporting requirements.

82. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.

83. I consider 2 acts of the Commonwealth as relevant to this inquiry:

- the failure of the Department to refer Mr MH's case to the Minister in order to consider whether to exercise their discretionary powers under section 197AB or 195A of the Migration Act prior to 11 August 2021
- the failure of the Department to refer Mr MH's case to the Minister again until 17 June 2023.

## 5.4 Consideration

84. A ministerial instruction has been issued with respect to each of the discretionary powers available to the Minister. At the time of Mr MH's detention, the relevant instructions or guidelines were as follows:

- 'Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958)' as signed in November 2016 (the s 195A Guidelines)
- 'Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958' as signed on 10 October 2017 (the s 197AB Guidelines).

85. The s 195A Guidelines include as criteria for referral to the Minister:

- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
- there are 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 (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.
- the person has no outstanding primary or merits review processes in

> relation to their claims to remain in Australia but removal is not reasonably practicable
>
> …
>
> - there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

86. The s 197AB Guidelines state:

> priority cases that are to be referred to me are detainees who arrived in Australia before 1 January 2014 and to whom the following circumstances apply:
>
> - unaccompanied minors
>
> I will also consider families and single adults if they have any of the following circumstances:
>
> - disabilities or congenital illnesses requiring ongoing intervention;
> - diagnosed Tuberculosis where supervision of medication dispensing is required;
> - ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; and
> - elderly detainees requiring ongoing intervention.
>
> I will also consider cases where:
>
> - there are unique or exceptional circumstances; …

87. Following Mr MH's release from criminal custody on 10 March 2020, it was open to the Department to consider him immediately thereafter for a referral to the Minister.

88. In the Department's response to Mr MH's complaint, it explained that a section 197AB referral had been initiated on 16 April 2020 but not progressed because of Mr MH's pending US resettlement process.

89. It is difficult to understand why this fact prevented Mr MH from being considered for referral to the Minister. The duration of that process was unknown to the Department, and without referral, Mr MH's detention was at risk of becoming arbitrary.

90. The Department did not commence a further consideration of Mr MH for

referral until 5 August 2021. On this occasion, the Department did make a referral to the Minister on 11 August 2021, but the Minister refused to intervene on 19 August 2021.

91. The third time that Mr MH was considered by the Department was on 29 November 2021. The result of this consideration was that on 4 March 2022, the Department decided not to refer Mr MH on the basis that he did not meet the guidelines for referral.

92. In the guidelines assessment prepared on that occasion, the Department does not record Mr MH as being in a relationship. It is unclear from the materials before me when the Department became aware of the relationship between Mr MH and his wife. This is particularly important in light of the assessment by the officer conducting the guidelines assessment that Mr MH should not be released because of the threat that he posed to his 'former spouse'.

93. The Department's response to the Commission's preliminary view acknowledged that the March 2022 guidelines assessment did not record a relationship with Mr MH's wife, but considered that the final outcome of the assessment would not have been any different, had his marriage been referred to. The Department also pointed out that the assessment considered that Mr MH

> represented an unacceptable risk of harm to the Australian community, not just to his former spouse. The Department cannot speculate whether the threat Mr [MH] posed to his former spouse would have diminished because of his relationship with his current wife.

94. This assessment by the Department of Mr MH's risk to the community was made without the full picture of his criminal history ('not yet confirmed through penal records'), and immediately prior to his appeal against the convictions. In light of the fact that significant weight appears to have been given to the criminal convictions in the guidelines assessment, I consider it may have been reasonable for the decision maker to either wait to find out the outcome of the appeal, or to conduct a reassessment once the results of that appeal were known. Two weeks later, on 17 March 2022, a significant number of the convictions against Mr MH were set aside and no further custodial sentence was imposed. Rather, the Court was content to release Mr MH on a good behaviour bond.

95. The Department disputes the classification of 'significant' weight being given to Mr MH's criminal convictions, and instead submits that the guidelines assessment shows that all relevant factors were considered 'in a holistic manner'. However, the Department then outlines those offences for which Mr MH was convicted, including by reference to the offences which were not proceeded with following Mr MH's appeal. It was put by Mr MH's representative that Mr MH is entitled to a presumption of

innocence with respect to the offences not proceeded with, and no speculation as to whether he was or was not guilty should be engaged in. However, I am of the view that the Department is entitled to take factual material of this nature into consideration. I do not read their assessment as assuming the guilt of Mr MH of those additional charges, but rather as engaging in an administrative decision-making process which necessarily involved weighing all factors which could be relevant to Mr MH's risk to the Australian community.

96. I am concerned that the officer completing the guidelines assessment did not consider the likely potential duration of Mr MH's detention when considering the possibility of his removal from Australia. The recommendation not to refer his case to the Minister states in this respect:

> I have also considered that Mr [MH] has been found to be a refugee by the Government of PNG, and that due to this finding he is actively exploring resettlement options in the US. For these reasons, I find that removal is reasonably practicable for Mr [MH] if he cooperates with the Department.

97. The decision maker weighs this factor against referral without acknowledging that the timeframe for US resettlement was both unknown, and outside of Mr MH's control. This is particularly concerning when Mr MH's detention was already prolonged. Detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may in some circumstances be unlawful,[18] although I express no views as to whether Mr MH's detention was at any stage unlawful.

98. In its response to my preliminary view, the Department accepted that decisions not to refer requests to the Minister for intervention were 'made in excess of the executive power of the Commonwealth' for the reasons outlined by the High Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs.*[19] The Department informed the Commission that

> The Minister is currently considering the implications of *Davis* on requests for him to exercise his personal intervention powers, including in relation to requests that have already been made. Further information about the Department's approach will be made available in due course.

99. A further submission was not made to the Minister again until 17 June 2023 – one year and 3 months after this guidelines assessment. In my view, this was an unacceptable amount of time to delay such an assessment, especially given the outcome of his appeal on 17 March 2022. This alone should have been enough to trigger a reassessment of

his risk to the community.

100. While it is unclear exactly when the Department became aware of Mr MH's relationship with an Australian citizen, they were certainly aware of his marriage to her on 14 April 2022. In response to the Commission's preliminary view, the Department identified that Mr MH's migration agent notified the Department of his marriage on 27 September 2022, but did not state whether this was the first time the Department was made aware of the event. I note that case reviews provided by the Department from March 2022 show Mr MH's marital status as married (updated from divorced), and that his marriage took place at the MITA.

101. The hardship of a person's ongoing detention on an Australian citizen is a factor relevant to the section 195A guidelines. His wife's pregnancy and then the birth of his daughter on 23 March 2023 were also compassionate and compelling circumstances that should have warranted further consideration.

102. It was after this time (June 2022) that the CPATs used by the Department to consider Mr MH's placement were manually reduced from tier 3 to tier 1 – demonstrating that the Department recognised that held detention was no longer warranted for him. The Department also recognised that behavioural incidents occurring in the detention environment may have stemmed from his frustration at being detained.

103. In addition, there were other factors that in my view brought Mr MH's case within the guidelines for referral to the Minister. In my view, Mr MH's serious and ongoing mental health issues and his serious physical health diagnosis in June 2022 should have triggered a reassessment of his suitability for referral to the Minister. Mr MH required surgery to both hands – he was given a carer in detention – and was admitted to hospital for investigation into Addison's disease. Each of these were relevant to both the section 195A and section 197AB guidelines.

104. The Department's response to my preliminary view states:

> The Department maintains that Mr [MH]'s medical conditions were closely monitored and appropriately managed by the Detention Health Service Provider (DHSP) while detained in the Immigration Detention Network (IDN). It further seeks to clarify that no diagnosis of Addison's disease was made. At all times whilst accommodated in the IDN, Mr [MH]'s health and welfare needs (as clinically indicated) were met. The DHSP did not provide the Department with any advice that Mr [MH]'s needs could not be adequately met in an immigration detention facility, and as such his placement remained suitable. Placement decisions are made as part of a collaborative decision making process with relevant stakeholders, including Status Resolution and detention services providers, in line with detention operational policy and procedures.

105. Finally, the AAT's findings on 17 December 2022 should have been given serious consideration by the Department, even though the passing of time had caused the decision to become redundant. The fact that the AAT held the view that Mr MH was not a risk to the community suggested that the Department's own risk assessments may not have been accurate and required further consideration.

106. The Department does not agree that Mr MH's detention became arbitrary at any time considered in this inquiry. The Department reminded the Commission that Mr MH was lawfully detained as an unlawful non-citizen under section 189 of the Migration Act, and considers that his detention was necessary, reasonable and proportionate in his individual circumstances. The Department referred to the regular case reviews conducted by status resolution officers into Mr MH's detention, and identified ministerial intervention as a possible mechanism by which the Department may refer a detainee for consideration of an alternative to held detention. The Department disagreed that any 'delays' had occurred, stating that Mr MH's case was progressed consistent with 'internal processes and caseload management priorities within the available resources at any point in time'.

107. However, I am not persuaded by the Department's submissions. Mr MH remained in detention for more than four years – despite all of the factors outlined above, each indicating that a placement in held detention could not be justified as reasonable or proportionate to any risk that he may have posed.

108. I find that the following acts contributed to Mr MH's detention becoming arbitrary, contrary to article 9(1) of the ICCPR:

- the failure of the Department to refer Mr MH's case to the Minister in order to consider whether to exercise their discretionary powers under section 197AB or 195A of the Migration Act prior to 11 August 2021
- the failure of the Department to refer Mr MH's case to the Minister again until 17 June 2023.

# 6 Recommendations

109. 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.[20] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[21] The

Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.[22]

## 6.1 Accurate recording of relationship and family status

110. The Commission in the report concerning *Mr OA v Commonwealth of Australia (Department of Home Affairs)*[23] raised the issue of records not being updated in a timely manner to show changes to relationship status. A similar issue has arisen in this inquiry, which led to Mr MH's marriage not being considered in a guidelines assessment. While it may be correct that the marriage would not have altered the decision made, there should also have been consideration given to the impact of Mr MH's ongoing detention on his wife's children. The Commission repeats the recommendation provided in its prior report.

**Recommendation 1**

The Commission recommends that the Department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.

## 6.2 Reconsideration of referrals to Minister after change to criminal convictions

111. At paragraph 99, I expressed the view that the outcome of Mr MH's criminal appeal should have triggered a reconsideration of the appropriateness of making a referral to the Minister, given the reduction in the number of offences he was convicted of, and to the sentence imposed.

**Recommendation 2**

The Commission recommends that status resolution officers be required to stay abreast of a detainee's criminal proceedings, and ensure that if there is any outcome which alters the number or severity of their convictions, or reduces their sentence, immediate consideration is given to referring them to the Minister for possible intervention. Relevant policy documents and training materials should be updated to reflect this requirement.

# 7 The Department's response to my findings and recommendations

112. On 4 March 2024, I provided the Department with a notice of my findings

and recommendations.

113. On 26 April 2024, the Department provided the following response to my findings and recommendations:

> The Department of Home Affairs (the department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.
>
> ***Recommendation 1 - Accepts and has already addressed***
>
> *The Commission recommends that the department ensure that detainees' personal information is checked regularly and that any updated information regarding relationship and/or familial status is recorded appropriately and promptly.*
>
> The department is committed to ensuring detainee records are kept up to date and in line with good record keeping practices. The *Status Resolution Officer Procedural Instruction (VM-6363)* outlines the requirement for Status Resolution Officers (SROs) to use every opportunity to collect and confirm information about a person's identity and citizenship. This also includes gathering as much information as possible regarding a detainee's circumstances, such as relationship status and their family details, and ensuring this information is recorded appropriately and promptly.
>
> It is also a mandatory requirement that all departmental staff, including SROs, complete the *Record Essentials* e-learning training every 12 months to understand their record management and record keeping responsibilities.
>
> ***Recommendation 2 - Accepts and has already addressed***
>
> *The Commission recommends that status resolution officers be required to stay abreast of a detainee's criminal proceedings, and ensure that if there is any outcome which alters the number or severity of their convictions, or reduces their sentence, immediate consideration is given to referring them to the Minister for possible intervention. Relevant policy documents and training materials should be updated to reflect this requirement.*
>
> SROs conduct an initial interview within two business days of a detainee arriving at a detention facility (and no later than five days in exceptional circumstances). The *Status Resolution Officer Procedural Instruction (VM-6363)* outlines the requirement for SROs to consider any possible criminal history when preparing for this interview.

The department conducts formal monthly reviews of each detention case to ensure that:

- detention remains lawful and reasonable.
- the location of the individual in held detention is appropriate to their individual circumstances and that consideration is undertaken as to whether the person is able to effectively resolve their immigration status from the community.
- their case is progressing towards a timely and appropriate status resolution outcome and addressing barriers.

Through these reviews, if it is identified that detention is no longer appropriate (including but not limited to a change in the individual's circumstances), their case may be referred for Ministerial Intervention consideration. It is not a legal requirement that a case be referred for Ministerial Intervention consideration, however, the review mechanisms above (note - these form part of the Status Resolution System Control Framework) ensure that the option for a Ministerial Intervention referral is considered by the allocated SRO. In addition to department-initiated Ministerial Intervention requests, it is open for detainees to directly, or through their legal representative, initiate a request for Ministerial Intervention.

The Community Protection Assessment Tool (CPAT) user guide outlines the timing requirement for CPAT reviews. The CPAT is completed and reviewed at regular intervals, including every six months for detainees who have had a section 501 cancellation and three months for all other detainees, or when there is a change in an individual's circumstances or significant immigration milestone. Officers are specifically guided that *'if a significant event is scheduled (such as a court date) prior to the three months period, a [CPAT] review date should be set to coincide with that event* as *well* as *detailed information* as *to why you have chosen the review date'*.

The CPAT user guide also provides information using sample cases where the SRO may need to stay across criminal matters. In particular, SROs stay abreast of detainee's criminal proceedings through liaison with State and Territory law enforcement authorities. They also note any outcomes, such as the reduction of convictions or reduced sentences. This is to ensure that if the detainee's criminal matter resulted in a relatively minor sentence, the SRO may consider re-evaluating the detainee's placement recommendation to reflect the court outcome and obtain a more accurate assessment of the detainee's risk to the community.

114. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM FAAL
**President**
Australian Human Rights Commission
May 2024

## Endnotes

[1] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (2023) 97 ALJR 1005.

[2] Department of Immigration and Border Protection, *Detention Capability Review: Final Report* (Final Report, August 2016) 52.

[3] For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 34-41.

[4] 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 pp 212–3 and 214–5.

[5] UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) ('*A v Australia*'); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) ('*C v Australia*'); UN Human Rights Committee, Communication No 1014/2001, 78th sess, CCPR/C/78/D/1014/2001 (2003) ('*Baban v Australia*').

[6] UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014) [18]; UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

[7] *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988,* 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) ('*Van Alphen v The Netherlands*'); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995,* 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) ('*Spakmo v Norway*').

[8] UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (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); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

[9] *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.

[10] *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) ('*Shams & Ors v Australia*'); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, Communication No 1050/2002, 87th sess, CCPR/C/87/D/1050/2002 (2006) ('*D and E and their two children v Australia*').

[11] Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].

[12] Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].

[13] UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons),* 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].

[14] UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) ('Mansour Ahani v Canada') [10.2].

[15] UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

[16] *Ms BK, Ms CO and Mr DE v Commonwealth of Australia (Department of Home Affairs)* [2018] AusHRC 128, p 10.

[17] *Plaintiff S195/2016 v Minister for Immigration and Border Protection* (2017) 261 CLR 622, [3].

[18] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (2023) 97 ALJR 1005.

[19] [2023] HCA 10.

[20] Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a) ('*AHRC Act*').

[21] AHRC Act s 29(2)(b).

[22] AHRC Act s 29(2)(c).

[23] Mr OA, Miss OB and Master OC v Commonwealth of Australia (Department of Home Affairs) [2024] AusHRC 161.