



Australian
Human Rights
Commission

Mr CZ v Commonwealth of Australia

(Department of Home Affairs)

[2024] AusHRC 164

May 2024

ABN 47 996 232 602
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Info Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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

[2024] AusHRC 164

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 CZ, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr CZ is from Iran, having arrived in Australia by boat at Christmas Island in October 2010. In 2017, Mr CZ was transferred to Villawood Immigration Detention Centre whilst awaiting the outcome of a criminal charge. The criminal charge was dismissed without conviction, however Mr CZ would then remain in closed immigration detention facilities for five further years until his release in March 2023. Mr CZ's continued detention had a detrimental effect on his psychological wellbeing, compounding his grief over the deaths of his partner and his mother, in a short time period.

Mr CZ complained that his detention was 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 delay in referring Mr CZ'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), as well as the Minister's decision to decline to consider exercising his s 195A powers, were inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.

On 23 January 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 27 February 2024. That response can be found in Part 7 of this report.

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 style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

May 2024

Contents

1	Introduction to this inquiry	6
2	Summary of findings and recommendations	7
3	Background	8
4	Legislative framework	11
4.1	<i>Functions of the Commission</i>	11
4.2	<i>What is an ‘act’ or ‘practice’</i>	11
4.3	<i>What is a human right?</i>	12
5	Arbitrary detention	12
5.1	<i>Law on article 9 of the ICCPR</i>	12
5.2	<i>Act or practice of the Commonwealth?</i>	14
5.3	<i>Findings.....</i>	16
(a)	<i>Delay by the Department in referring Mr CZ’s case to the Minister for consideration under s 195A of the Migration Act.....</i>	17
(b)	<i>Minister’s decision not to consider intervening in Mr CZ’s case under s 195A of the Migration Act.....</i>	22
(c)	<i>Delay in referring Mr CZ’s case to the Minister again for consideration under s 195A of the Migration Act for over four years until February 2023.....</i>	23
(d)	<i>Failure by the Department to refer Mr CZ’s case to the Minister for intervention under s 197AB of the Migration Act.....</i>	27
6	Recommendations	29
6.1	<i>Alternatives to held detention.....</i>	29
6.2	<i>Guidelines for referrals to the Minister.....</i>	31
6.3	<i>Written apology</i>	33
7	The Department’s response to my findings and recommendations...34	

1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr CZ against the Commonwealth of Australia, Department of Home Affairs (Department), alleging a breach of his human rights. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr CZ has been detained in an immigration detention centre for more than five and a half years. He complains that his detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
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.²
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 report is issued pursuant to s 29(2) of the AHRC Act setting out my findings in relation to this complaint and my recommendations to the Commonwealth.
7. Given that Mr CZ was a person seeking asylum and raised protection claims against his home country, I have made a direction under s 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 acts of the Commonwealth are inconsistent with, or contrary to, article 9(1) of the ICCPR:

- the Department's delay in referring Mr CZ's case to the Minister for consideration under s 195A of the *Migration Act 1958* (Cth) (Migration Act) until October 2018
- the Minister's decision on 23 October 2018 to not exercise his power under s 195A of the Migration Act to grant Mr CZ a Bridging Visa E (BVE)
- the Department's delay in referring Mr CZ's case to the Minister again for consideration under s 195A of the Migration Act for over four years until February 2023
- the Department's failure to refer Mr CZ's case to the Minister for consideration under s 197AB of the Migration Act.

9. I make the following recommendations:

Recommendation 1

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

Recommendation 2

The Commission recommends that the Department brief the Minister about amendments to the Minister's ss 195A and 197AB guidelines, and

include in that briefing the Commission's proposal that the guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period
- where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.

Recommendation 3

The Commonwealth provide a written apology to Mr CZ for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.

3 Background

10. Mr CZ is from Iran, and he arrived at Christmas Island as an unauthorised maritime arrival (UMA) on 11 October 2010. He was detained pursuant to s 189(3) of the Migration Act at North West Point Immigration Detention Centre. He remained on Christmas Island for just over a year before being transferred to the mainland and detained, first at Darwin Airport Lodge (from 5 November 2011) and then at Northern Immigration Detention Centre (from 23 February 2012), under s 189(1) of the Migration Act.
11. On 10 December 2010, the Department commenced a Refugee Status Assessment (RSA), a non-statutory refugee determination process for UMAs. On 6 May 2011, it was found that Mr CZ did not engage Australia's protection obligations under the Refugee Convention. On 7 June 2011, Mr CZ requested Independent Merits Review (IMR) of the negative RSA decision. On 11 November 2011, the IMR found that Mr CZ did not engage Australia's protection obligations under the Refugee Convention.
12. On 6 December 2011, Mr CZ sought judicial review of the IMR decision in the then Federal Magistrates Court (FMC). The FMC dismissed his application on 21 September 2012.
13. In the meantime, the Department commenced a Ministerial Intervention process and assessed Mr CZ's case against the s 195A Ministerial Intervention Guidelines (s 195A Guidelines). Mr CZ was included in a bulk

submission referred to the Minister on 27 March 2012 for consideration for the grant of a Bridging Visa E (BVE) under s 195A of the Migration Act. On 12 April 2012, the then Minister for Immigration and Citizenship decided to intervene and exercise their powers under s 195A of the Migration Act to grant Mr CZ a BVE for 6 months. Mr CZ was released from immigration detention into the community.

14. On 12 October 2012, Mr CZ's BVE expired. From this date until 9 January 2015, the Minister intervened a further 4 times under s 195A of the Migration Act to grant Mr CZ 3-month BVEs. Between each intervention, there was a window in which Mr CZ would become an unlawful non-citizen (on one occasion he was unlawful for over a year), before being administratively detained under s 189(1) of the Migration Act so as to enliven the Minister's powers under s 195A.
15. On 9 January 2015, Mr CZ's last BVE expired and he became an unlawful non-citizen. He remained living in the community as an unlawful non-citizen from this date until 5 August 2017.
16. On 5 August 2017, Mr CZ was arrested and charged with criminal offences relating to possession of a firearm. He was released on bail and was detained under s 189(1) and transferred to Villawood IDC.
17. By 13 April 2018, Mr CZ's criminal matters were finalised. The three charges relating to firearms were dismissed on the basis that he was not guilty after trial. He was instead found guilty of the charge 'have in custody a laser pointer in public place' and the matter was dismissed without conviction.
18. Shortly after the outcome of his criminal trial, on 16 April 2018, the Department commenced a Ministerial Intervention process for Mr CZ's case to be assessed against the s 195A Guidelines for the grant of a BVE. Mr CZ was found to meet the guidelines and on 11 October 2018, the Department referred his case to the Minister for consideration of the exercise of his discretion under s 195A of the Migration Act (2018 s 195A Ministerial submission). On 23 October 2018, the Minister indicated that he would not consider intervening under s 195A in Mr CZ's case.
19. On 7 August 2019, ten months after the Minister's decision not to intervene, the Department commenced a Ministerial Intervention process for Mr CZ's case to be assessed under s 46A of the Migration Act to consider lifting the bar to allow Mr CZ to lodge a valid visa application (s 46A Ministerial submission). This was in response to the Full Federal Court

decision *Minister for Immigration and Citizenship v SZQRB*³ (SZQRB) (see [66] to [71] below). Seven months later, on 26 March 2020, the Minister decided to intervene under s 46A of the Migration Act and lift the bar to allow Mr CZ to lodge either a valid Temporary Protection Visa (TPV) or Safe Haven Enterprise Visa (SHEV) application.

20. On 30 April 2020, Mr CZ lodged a valid SHEV application. The associated BVE application was determined to be invalid. On 18 August 2020, the Department refused Mr CZ's SHEV application on the basis that he was not found to have engaged Australia's protection obligations under the Migration Act. On 20 August 2020, Mr CZ sought merits review in the Administrative Appeals Tribunal (AAT) and on 11 December 2020, the AAT affirmed the Department's decision to refuse the SHEV application. Mr CZ has not sought judicial review in relation to this decision.
21. In November 2019, a few months after the Department commenced the s 46A Ministerial submission, the Department initiated a s 195A Ministerial intervention process. On 27 February 2020, the Department assessed that Mr CZ's case met the s 195A Guidelines (2020 s 195A Ministerial assessment). Relevant to the assessment was the pending s 46A Ministerial submission. In its response to my preliminary view, the Department has clarified that even though Mr CZ met the Guidelines at this stage, a submission was not referred to the Minister. The Department advises that:

from March 2020, the Department focused its efforts on the Government's COVID-19 response and diverted resources to critical functions. Ministerial Intervention functions slowed during this period and returned to normal activity from August 2020 onwards.
22. The Department says that the COVID-19 pandemic created significant processing delays and the 2020 s 195A Ministerial assessment was never referred to the Minister. Due to the delays, the Department reassessed Mr CZ's case and on 16 July 2021, decided that his case no longer met the s 195A Guidelines. By this time, Mr CZ's SHEV application was finally determined, he had no ongoing immigration matters and IHMS advised his health conditions could be managed in the current detention environment. The 2020 s 195A Ministerial assessment was finalised as 'not referred'.
23. On 15 March 2021, the Department commenced another Ministerial Intervention process for Mr CZ's case, which was assessed against both the s 195A Guidelines and s 197AB Ministerial Intervention Guidelines (s 197AB Guidelines). On 2 March 2022, the Department found that Mr CZ did not meet either of the guidelines and decided not to refer Mr CZ's case to the Minister.

24. On 11 June 2022, the Department commenced another Ministerial Intervention process for Mr CZ's case to be assessed against both the ss 195A and 197AB Guidelines. However, on 29 June 2022, the Department again decided that Mr CZ did not meet either of the guidelines and did not refer his case to the Minister.
25. On 22 July 2022, the Department commenced a final s 195A Ministerial Intervention process for Mr CZ's case. On 4 February 2023, the Department decided to refer the case to the Minister for consideration of the exercise of his discretion under s 195A of the Migration Act in a first stage submission. The Minister indicated that he wished to consider intervening in this case and therefore, on 16 March 2023, the Department referred Mr CZ's case in a second stage submission to the Minister.
26. On 20 March 2023, the Minister intervened in Mr CZ's case under s 195A of the Migration Act to grant Mr CZ a BVE that was valid until 20 September 2023. The Minister also intervened to indefinitely lift the s 46A bar to allow Mr CZ to apply for subsequent BVEs. Mr CZ was therefore released from immigration detention and is now living in the community on a valid BVE.

4 Legislative framework

4.1 Functions of the Commission

27. 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.
28. 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.
29. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

4.2 What is an 'act' or 'practice'

30. 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.

31. 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.
32. 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.⁴

4.3 What is a human right?

33. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
34. 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.

5 Arbitrary detention

35. Mr CZ complains that his detention in immigration detention facilities in Australia from 5 August 2017 until 20 March 2023 for a total of 5 years and 7 months was 'arbitrary', contrary to article 9(1) of the ICCPR.

5.1 Law on article 9 of the ICCPR

36. 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 detention⁵
 - lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁶
 - '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 predictability⁷
 - detention should not continue beyond the period for which a State party can provide appropriate justification.⁸

37. 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.⁹
38. 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
39. 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.¹¹
40. 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

41. 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
42. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.¹⁵
43. 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'.¹⁶
44. 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.
45. It is therefore necessary to consider whether the detention of Mr CZ 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 of the ICCPR.

5.2 Act or practice of the Commonwealth?

46. As Mr CZ arrived in Australia by boat without a valid visa, he was an 'unlawful non-citizen' and therefore the Migration Act required that he be detained pursuant to s 189(1) of the Migration Act. He was initially detained in immigration detention for 18 months between 11 October 2010 (date of arrival) and 12 April 2012 before being released from

immigration detention on a BVE. This is not the period of detention that is the subject of Mr CZ's complaint to the Commission.

47. The period of detention that the Commission is considering under this complaint is Mr CZ's subsequent detention of over five and half years from 5 August 2017 until 20 March 2023. During this period, Mr CZ was prevented from making a valid bridging visa application himself due to a legislative bar in place pursuant to s 46A of the Migration Act.
48. There are a number of powers that the Minister could have exercised to place Mr CZ in a less restrictive environment than a closed immigration detention facility.
49. Under s 197AB of the Migration Act, the Minister may, if they think it is in the public interest to do so, make a residence determination to allow a person to reside at a specified place instead of being detained in held immigration detention. The residence determination may be made subject to other conditions such as reporting requirements. The Department did not refer Mr CZ's case to the Minister for consideration under s 197AB so that the Minister did not at any time have the opportunity to consider Mr CZ for a residence determination.
50. Under s 195A of the Migration Act, the Minister may, if they think it is in the public interest to do so, grant a visa to a person detained under s 189 of the Migration Act, subject to any conditions necessary to take into account their specific circumstances. This is a discretionary non-compellable power of the Minister. The Department did not refer Mr CZ's case to the Minister for consideration under s 195A until October 2018. The Minister did not intervene in Mr CZ's case to grant a bridging visa until 20 March 2023.
51. I find that the following acts of the Commonwealth are relevant to this inquiry:
 - the Department's delay in referring Mr CZ's case to the Minister for consideration under s 195A of the Migration Act until October 2018
 - the Minister's decision on 23 October 2018 to not exercise his power under s 195A of the Migration Act to grant Mr CZ a BVE
 - the Department's delay in referring Mr CZ's case to the Minister again for consideration under s 195A of the Migration Act for over four years until February 2023

- the Department's failure to refer Mr CZ's case to the Minister for consideration under s 197AB of the Migration Act.

5.3 Findings

52. 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.
53. The Minister has discretionary powers under ss 195A and 197AB of the Migration Act that would have allowed Mr CZ to be granted a visa or be held in a less restrictive form of detention.

Section 197AB Guidelines

54. On 29 March 2015, the Hon Peter Dutton MP, then Minister for Home Affairs, published guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act.¹⁷ On 21 October 2017, Minister Dutton re-issued these guidelines which are currently in use by the Department.¹⁸
55. The s 197AB Guidelines provide that the Minister would consider exercising this power for single adults who had 'ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention'. However, they provided that the Minister would not expect cases to be referred to him where 'a person has been charged with an offence but is awaiting the outcome of the charges'.
56. The guidelines also stated that the Minister would consider cases where there were 'unique or exceptional circumstances'.
57. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.¹⁹ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- compassionate circumstances regarding the age and/or health and/or psychological state of the person, such that a failure to

recognise them would result in serious, ongoing and irreversible harm and continuing hardship to the person

- the Department has determined that the person cannot be returned to their country/countries of citizenship or usual residence due to circumstances outside the person's control.

Section 195A Guidelines

58. Similarly, guidelines have been published in relation to the exercise of the power under s 195A of the Migration Act to grant a visa to a person in immigration detention. Minister Dutton published guidelines on s 195A in April 2016, which are the current guidelines in use by the Department.
59. These guidelines provide that the Minister will consider the exercise of this power where a person meets certain criteria, including where:
- a person has individual needs that cannot properly be cared for in a secured immigration detention facility, as confirmed by a treating professional
 - a person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable for reasons that may include, but are not limited to, cases where the person's country of origin refuses to accept their return or to issue a travel document to facilitate their return or it is not possible to return the person to their country of origin because of policy regarding involuntary removals.
60. The guidelines also provide that the Minister does not expect referral of 'people with no outstanding immigration matters who are not cooperating with efforts to effect their departure from Australia'. Although there is no exception for unique and exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines, the Minister will consider cases where there are compelling or compassionate circumstances.

(a) *Delay by the Department in referring Mr CZ's case to the Minister for consideration under s 195A of the Migration Act*

61. Mr CZ was taken into immigration detention on 5 August 2017 and remained in immigration detention for 5 years and 7 months until 20 March 2023. He was detained following his arrest and release on bail because he was an unlawful non-citizen at the time of his arrest. His

criminal matters took 8 months to finalise and on 13 April 2018, all his criminal charges were finalised. He was found guilty of one charge of 'have in custody a laser pointer in public place' with no conviction recorded. Prior to those criminal matters being brought, Mr CZ had had a series of bridging visas interspersed with short periods where he held no visa, and he therefore remained in Australia unlawfully but with no action being taken by the Department to seek to detain him.

62. The first time the Department assessed Mr CZ's case against the s 195A Guidelines was after it commenced the 2018 s 195A Ministerial submission on 16 April 2018. It appears that the Department may have waited until Mr CZ's criminal matters were finalised before initiating the 2018 s 195A Ministerial submission. According to the Community Protection Assessment Tool (CPAT) dated 31 August 2017, the Minister would not consider release onto a BVE until finalisation of criminal court matters. The 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.²⁰

63. The Department's response to my preliminary view notes the following:

In the 31 August 2017 CPAT, the placement recommendation was Tier 1 – Bridging visa with conditions and was substituted for Tier 3 – Held Detention. It was documented that the reason for substitution was due to '*Outstanding Criminal charges, [the] Minister will not consider until court finalisation*'. The Department notes substitution is based on community risk and not Ministerial Intervention guidelines.

The CPAT does not determine whether a case should be referred for Ministerial Intervention. The CPAT is a decision support tool to assist the Department in assessing the most appropriate placement for a person while status resolution processes are being undertaken.

64. On 11 October 2018, the Department decided to refer Mr CZ's case to the Minister for consideration under s 195A of the Migration Act, but on 23 October 2018, the Minister indicated that he would not consider Mr CZ's case. The Minister gave no reasons for this decision, nor is he required to.

65. According to the Department's first submission to the Minister for possible ministerial intervention under s 195A of the Migration Act, key issues were:

- Mr CZ's unwillingness to depart Australia voluntarily and the Department's inability to progress involuntary removal to Iran
- Mr CZ's CPAT recommendation for a Tier 1 – Bridging visa placement

- Mr CZ's cumulative period of detention of almost 3 years, which presumably includes his initial 18-month period of detention between 2010 and 2012
 - that the Department are in the process of assessing Mr CZ's protection claims as a result of being affected by the decision of the Full Court of the Federal Court in *SZQRB*.
66. *SZQRB* was a case that had a significant impact on UMAs, like Mr CZ, who arrived in Australia prior to 24 March 2012, which is the date on which the complementary protection provisions in the Migration Act came into effect. Mr CZ's RSA and subsequent IMR decisions were made prior to 24 March 2012, and so the assessment of his protection claims did not include an assessment of whether he was owed complementary protection. It is stated in the Department's '195A Guidelines Assessment for a Person in s189 Detention' dated 27 February 2020, that following the introduction of the complementary protection provisions to the Migration Act, the Department assessed Mr CZ's protection claims against the *Guidelines for the Consideration of Post Review Protection Claims* (PRPC Guidelines).
67. The PRPC Guidelines, along with another non-statutory departmental process called the International Treaty Obligations Assessment (ITOA), were designed to assist the Department to assess whether a person who was not found to meet the definition of a refugee under the Migration Act was still owed non-refoulement obligations under the ICCPR, the *Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment*, or the *Convention on the Rights of the Child*.
68. According to the Department's '195A Guidelines Assessment for a Person in s189 Detention', dated 27 February 2020, Mr CZ's PRPC Guidelines assessment concluded on 30 May 2012 that his removal to Iran would not be in breach of Australia's non-refoulement obligations. However, he was already living in the community on a BVE valid until 12 October 2012. Given the 'anticipated protracted removal processing', Mr CZ was subsequently granted consecutive BVEs on 17 October 2012, 21 January 2013, 24 April 2013 and 9 October 2014.
69. In March 2013, the Full Court of the Federal Court handed down its judgment in *SZQRB*. *SZQRB* found that an ITOA conducted by the Department was a flawed process, applied the wrong legal test, and did not accord procedural fairness.²¹ The Court granted an injunction

restraining the Minister from removing *SZQRB* from Australia until his claims for protection had been assessed according to the law.

70. By 15 September 2014, the Department formed the view that Mr CZ's PRPC assessment was affected by *SZQRB* and an ITOA was commenced to reassess Mr CZ's protection claims to determine whether he engaged Australia's protection obligations. This ITOA was suspended when Mr CZ was arrested on 4 August 2017 and then never finalised.
71. It is apparent, however, that at the time of Mr CZ's arrest and subsequent detention on 5 August 2017, the Department was aware that because of *SZQRB*, they could not remove Mr CZ from Australia without reassessing his protection claims according to law.
72. By the Minister's s 195A Guidelines, a person with no outstanding primary or merits review processes, but for whom removal was not reasonably practicable, may be referred to the Minister. Reasons for why removal may not be reasonably practicable include, but are not limited to, the person's country of origin refusing to issue a travel document and/or it is not possible to return the person to their country of origin because of a policy regarding involuntary removals.
73. When Mr CZ was detained, he did not have any ongoing primary or merits review processes, but his removal was not reasonably practicable because the Department was still required to re-assess his protection claims following *SZQRB*. Furthermore, Iran was refusing to issue a travel document because Mr CZ was not voluntarily returning, and Iran had a policy not to accept involuntary removals. Mr CZ therefore clearly met the criteria for referral to the Minister, given his removal was not reasonably practicable for the reasons stated above.
74. On the other hand, the Guidelines state that the Minister would not expect a person with no outstanding immigration matters, but who is not cooperating with efforts to effect their departure, to be referred for consideration of the Minister's power under s 195A of the Migration Act. I note that this direction in the Guidelines conflicts with the direction in the same document, that cases can be referred to the Minister where 'it is not possible to return the person to their country of origin because of ... policy regarding involuntary removals' (referred to above). In any event, regardless of whether Mr CZ was willing or unwilling to voluntarily depart from Australia, he still had an outstanding immigration matter as a result of *SZQRB* and could not be removed from Australia. He therefore was not captured by this exclusion from referral to the Minister.
75. Finally, Mr CZ's criminal matters were also not a barrier to referral as the s 195A Guidelines do not explicitly exclude from referral a person with

ongoing criminal matters. It only expects the Department to consider any criminal charges in assessing cases for referral.

76. There does not appear to be adequate justification from the Department on why they delayed assessing Mr CZ's case against the s 195A Guidelines until after his criminal matters were finalised. Despite the existence of criminal charges, he had been granted bail and was entitled to the legal presumption of being considered innocent until proven guilty. The CPAT completed within a month of his detention on 31 August 2017 recommended his release on a bridging visa with conditions.
77. The Department's response to my preliminary view notes that 'the CPAT does not determine the placement of the client' and that if, for example, the CPAT recommends held detention, other options are considered. The Department states further that the 31 August 2017 CPAT placement recommendation of Tier 1 – Bridging visa with conditions was substituted to Tier 3 – Held Detention. Despite the Department's response that the substitution is based on community risk and not the Ministerial Guidelines, the documented reason for the substitution makes clear the Minister's position that they would not consider Mr CZ's case until his criminal matters were finalised. The Department also notes in its response that Mr CZ's case was assessed as not meeting the guidelines 'due to his outstanding criminal matter'. There is nothing in the material before me to suggest that there was any other reason for the delay in initiating a Ministerial Intervention process.
78. The Department's response to my preliminary view also notes that:
- Ministerial Intervention does not provide for automatic referral of cases under Ministerial Intervention powers for persons in detention. Ministerial Intervention is not an extension of the visa process and the relevant powers are non-delegable and non-compellable. It is for the Minister to determine what is in the public interest.
- Mr CZ was lawfully detained an unlawful non-citizen under section 189 of the Act.
79. As I stated above, arbitrariness is not to be equated with 'against the law' and that lawful detention can be arbitrary when it becomes unjust, unreasonable or disproportionate to its legitimate aim. Furthermore, the High Court of Australia has found that, in some circumstances, a decision by the Department not to refer a case to the Minister for Ministerial Intervention is in excess of the executive power of the Commonwealth.²²

80. Applying the test of whether the Commonwealth has demonstrated that Mr CZ's placement in held detention was reasonable, necessary and proportionate, I find that it has not. The explanations provided by the Department do not justify the delay by the Department in referring Mr CZ's case to the Minister for consideration under s 195A of the Migration Act until 11 October 2018, over a year after he was initially detained. Consequently, I find that Mr CZ's detention up until that date was arbitrary for the purpose of article 9(1) of the ICCPR.

(b) *Minister's decision not to consider intervening in Mr CZ's case under s 195A of the Migration Act*

81. As mentioned above, the Department commenced the 2018 s 195A Ministerial submission shortly after Mr CZ's criminal matters were resolved. The Department referred Mr CZ's case to the Minister for consideration on 11 October 2018. I refer to the key issues outlined in the Department's first submission to the Minister summarised above (see [56]).

82. On 23 October 2018, the Minister declined to consider intervening in Mr CZ's case. The Minister communicated his decision by circling 'not consider' on the prepared first submission that requested the Minister indicate whether he was inclined to consider intervening under s 195A of the Migration Act to grant Mr CZ a final departure BVE valid for six months. No reasons for the Minister's decision were given.

83. Although the Minister was not required to give reasons, without written reasons it is difficult to understand the factors that the Minister considered weighed against considering Mr CZ's case. Significantly, in its first submission, the Department informed the Minister that it had not identified any security concerns or threats to the community in releasing Mr CZ into the community on a BVE. If the Minister had any such concerns, he could have asked the Department to conduct a risk assessment further to the CPAT to consider whether any risks could be mitigated. It does not appear that he did so.

84. The Minister was also made aware of the key issues that would affect Mr CZ's ability to be removed from Australia, in particular the fact that his protection claims were still to be assessed as a result of being affected by SZQRB, and the Department's inability to progress involuntary removal to Iran.

85. In light of the available alternatives to closed detention within the Minister's powers, and Mr CZ's circumstances, I find that the Minister's decision not to consider exercising his power under s 195A of the

Migration Act contributed to the continued detention of Mr CZ without proper justification in the particular circumstances of his case. I find that that Mr CZ's continued detention was not reasonable, necessary or proportionate and accordingly, may be considered 'arbitrary' for the purposes of article 9(1) of the ICCPR.

(c) *Delay in referring Mr CZ's case to the Minister again for consideration under s 195A of the Migration Act for over four years until February 2023*

86. As a result of the impact of *SZQRB* on Mr CZ's protection claims, the Department commenced the s 46A Ministerial submission with the intention that once the Minister intervened and lifted the s 46A bar, Mr CZ would be able to lodge a TPV or SHEV and have his protection claims assessed through the statutory process.
87. The Department then commenced the 2020 s 195A Ministerial assessment and on 27 February 2020, assessed that Mr CZ's case did meet the s 195A Guidelines for referral to the Minister. The basis of this assessment as set out in the '195A Guidelines Assessment for a Person in s189 Detention' dated 2 December 2019 was that Mr CZ had an ongoing s 46A Ministerial submission, his criminal charges were all dismissed, he had already spent extended time in detention, had no significant or violent incidents while in detention, and his CPAT was recommending a Tier 1 – Bridging visa with conditions.
88. In my preliminary view, I stated that on 27 February 2020, the Department referred Mr CZ's case to the Minister for his consideration under s 195A of the Migration Act. The Department has since clarified that the 2020 s 195A Ministerial assessment was never referred to the Minister.
89. According to the 'Assessment Against the s195A and s197AB Ministerial Guidelines For a Person in s189 Held Detention' dated 15 March 2021, the 2020 s 195A Ministerial assessment was put on hold due to 'Covid-19 pandemic processing delays'. In the meantime, the Minister intervened under s 46A of the Migration Act and allowed Mr CZ to lodge a TPV or SHEV. Mr CZ lodged a SHEV application and was unsuccessful. Merits review at the AAT affirmed the departmental decision to refuse his SHEV application.
90. By 16 July 2021, the 2020 s 195A Ministerial assessment had still not been referred to the Minister. The Department reassessed Mr CZ's case and

found that he no longer met the s 195A Guidelines. The Ministerial assessment was then finalised as 'not referred'.

91. Following this, the Department commenced two further ministerial intervention processes to assess Mr CZ's case against both the s 195A and s 197AB Guidelines, one on 15 March 2021 and one on 11 June 2022. For both assessments, the Department assessed that Mr CZ did not meet the guidelines and the 'Assessment Against the s195A and s197AB Ministerial Guidelines For a Person in s189 Held Detention' dated 2 March 2022 and 29 June 2022, state that Mr CZ should not be referred to the Minister for the following reasons:
 - Mr CZ has no outstanding immigration matter and is not cooperating with efforts to effect his departure from Australia
 - he has been previously considered by the Minister or has previously been found not to meet any guidelines, and there have been no significant changes to his circumstances.
92. It is apparent that, were it not for the processing delays caused by the COVID-19 pandemic, the Minister would have considered the 2020 s 195A Ministerial assessment sometime after 27 February 2020. It is unclear, however, on the material before me, why COVID-19 caused such significant processing delays. The Department's response states only that 'the Department focused its efforts on the Government's COVID-19 response and diverted resources to critical functions'.
93. In this regard, I wish to highlight the Commission's June 2021 report, *Management of COVID-19 risks in immigration detention*, which noted that under international law, Australia is obliged to adopt measures that address risks associated with COVID-19 in ways that minimise any negative human rights impacts.²³ The pandemic should have been a basis to consider an alternative to held detention for Mr CZ, and refer him to the Minister for consideration of the grant of a visa, rather than a reason for the failure to progress his case. I note that according to the 'IHMS Special Needs Health Assessment' dated 24 November 2022, Mr CZ tested positive for COVID-19 on 25 June 2022 while in detention and had to be placed in isolation. He reported only mild symptoms.
94. It is also apparent from the IHMS documents that Mr CZ's mental health deteriorated throughout this prolonged period of detention. When Mr CZ was first detained in August 2017, he disclosed a history of substance abuse and was on the opioid treatment program while detained. In his first two years of immigration detention, while he was dealing with several physical health issues, little is noted within the IHMS Clinical Records

about his mental health apart from his frustration with being in detention and stress about his legal situation.

95. However, around March 2020, his partner in Australia died and it is noted in the IHMS Clinic Records dated 2 April 2020 that she was someone he depended on for moral support and the only person who visited him. Shortly after, around 13 April 2020, his mother died in Iran from a heart attack. According to the IHMS Clinical Record dated 15 April 2020, he said 'he doesn't know what he has done to deserve that and feels like God is punishing him'.
96. Following the death of his partner and mother, Mr CZ's mental health deteriorated and IHMS referred him to the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) for his mental state to be evaluated. The STARTTS Psychological Assessment Report dated 13 August 2020 describes Mr CZ as 'de-motivated and at times, sad', and experiencing anxiety features and depressive symptoms that are 'further intensified by his visa and protection application complications'.
97. For the remainder of Mr CZ's detention, IHMS records refer to his detention fatigue and frustration with his immigration situation, as well as his sadness and grief. Multiple IHMS Clinical Records describe the adverse impact of prolonged detention on Mr CZ's mental health including stress, anxiety, depression and feelings of helplessness. In January 2021, an IHMS psychiatrist diagnosed him with adjustment disorder with depressed mood. Mr CZ describes, as noted in IHMS Clinical Record dated 18 March 2021, 'the unknown timeframe of awaiting a positive visa outcome' as 'worse than death'.
98. Between August 2020 and his release from detention, Mr CZ regularly saw a counsellor through STARTTS. STARTTS reports frequently detail the significant negative impact being in detention has had on Mr CZ's psychological wellbeing, including a sense of hopelessness, despondency and dejection, and his feelings of his wasted years and the arbitrariness of his detention. At his last session with STARTTS before his release in March 2023, Mr CZ was hopeful for life outside of detention, but acknowledged that he had suffered in detention and was changed by the experience.
99. Despite the numerous IHMS and STARTTS records that disclose Mr CZ's deteriorating mental health, all the assessments carried out by the Department against either s 195A or s 197AB Guidelines assess that Mr CZ did not have any health or mental health conditions that could not be

cared for in detention nor were likely to be exacerbated by remaining in a detention centre environment. This was also the assessment of Mr CZ's mental health in the Department's Case Reviews.

100. The Department waited almost 18 months between the Minister declining to consider the 2018 s 195A Ministerial submission on 23 October 2018 and finding that Mr CZ met the guidelines in the 2020 s 195A Ministerial assessment on 27 February 2020. The Department then failed to progress Mr CZ's case so that it was another almost 18 months before the Department reassessed the case and withdrew it. The Department did not again refer Mr CZ's case to the Minister for consideration under s 195A of the Migration Act until 24 February 2023, which led to his release from immigration detention through the grant of a BVE on 20 March 2023. Prior to this, there were two ministerial intervention processes initiated to assess Mr CZ's case against both the s 195A and s 197AB Guidelines that were found not to meet the guidelines and therefore not referred to the Minister in March 2022 and June 2022.
101. The Department's response to my preliminary view notes that in 2022, the Department 'explored a less restrictive form of detention and considered Mr CZ's individual circumstances, including that protection obligations were not engaged, he was able to voluntarily return to Iran, has no family in Australia, and no health issues that couldn't be managed in detention at that time'.
102. Proper assessment of Mr CZ's deteriorating mental health as described by IHMS and STARTTS, particularly after the death of his partner and mother in quick succession, should have brought on more prompt decisions by the Department to refer Mr CZ's case to the Minister. This is especially so, given there did not appear to be any character or security concerns throughout his detention, and the period of Mr CZ's detention was prolonged. Apart from 3 CPAT reports between August 2018 and March 2019, all the CPAT reports assessed Mr CZ as a low risk of harm to the community and recommended a Tier 1 – Bridging Visa with conditions. That Mr CZ was not willing to voluntarily depart, which, given Iran's policy regarding involuntary returns meant that his removal from Australia was not practicable, was not sufficient reason to make his prolonged detention necessary, proportionate, or reasonable.
103. The Department's response to my preliminary view also notes that there are potential implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 (*Davis*). This is particularly relevant to Mr CZ's case given the number of times the Department assessed his situation and made a decision not to refer his case to the Minister. In light of the High Court's

decision in *Davis*, there must now be real doubt about whether those decisions not to refer Mr CZ's case to the Minister were lawful.

104. I also note that from December 2020, the Department considered that Mr CZ had no ongoing immigration processes and his Case Reviews suggest an objective of involuntary removal, which was not practical because of Iran's policy regarding involuntary returns. Detention in circumstances where removal from Australia is not practicable in the reasonably foreseeable future may in some circumstances be unlawful,²⁴ although I express no views as to whether Mr CZ's detention was at any stage unlawful.
105. I find that the delay in progressing Mr CZ's case once he was assessed to meet the s 195A Guidelines on 27 February 2020 contributed to the detention of Mr CZ without consideration of whether that detention was justified in the particular circumstances of his case.
106. I find that, after the 2020 s 195A Ministerial assessment was finalised without referral in July 2021, the failure of the Department to refer Mr CZ's case to the Minister again under s 195A of the Migration Act until 24 February 2023 also contributed to the continued detention of Mr CZ without consideration of whether that detention was justified in the particular circumstances of his case.
107. I find that Mr CZ's detention was not reasonable, necessary or proportionate in the context of his particular circumstances and, as a result, his detention during the periods identified above was arbitrary for the purposes of article 9(1) of the ICCPR.

(d) *Failure by the Department to refer Mr CZ's case to the Minister for intervention under s 197AB of the Migration Act*

108. As an alternative to s 195A of the Migration Act, the Department could have referred Mr CZ's case to the Minister for consideration under s 197AB of the Migration Act for the making of a residence determination to allow Mr CZ to reside in community detention. The Department failed to do this.
109. On 15 March 2021, the Department commenced an assessment of Mr CZ's case against both s 195A and s 197AB Guidelines, but on 2 March 2022, found that Mr CZ's case did not meet either set of guidelines for referral to the Minister.
110. On 11 June 2022, the Department again initiated a ministerial intervention process to assess Mr CZ's case against both s 195A and s 197AB

Guidelines, but again on 29 June 2022, the Department decided that Mr CZ's case did not meet either set of guidelines and he was not referred.

111. After Mr CZ was detained in August 2017, the Department waited over three and a half years before assessing Mr CZ's case against the s 197AB Guidelines in March 2021.
112. By the Minister's guidelines, between 5 August 2017 and 13 April 2018, Mr CZ's criminal matters were still pending, which mean that the Minister would not expect Mr CZ's case to be referred to him for consideration of his power under s 197AB of the Migration Act, unless there were 'exceptional reasons'. However, by 13 April 2018, it was clear that Mr CZ's criminal matters were resolved and that there was no indication that he might fail the character test under s 501 of the Migration Act.
113. By the time the Department eventually initiated a ministerial intervention process under s 197AB, the Minister had already intervened under s 46A of the Migration Act to lift the bar and allow Mr CZ to lodge a valid TPV or SHEV. He had done so and had his protection claims assessed by the Department and the AAT in merits review. He was ultimately found not to engage Australia's protection obligations. He therefore had no outstanding immigration process preventing his removal from Australia. The s 197AB Guidelines provide that a person who has had their protection claims rejected at primary and review stages should not be referred to the Minister.
114. In both the Department's 'Assessment Against the s195A and s197AB Ministerial Guidelines For a Person in s189 Held Detention' documents, the following were considered when determining that Mr CZ did not meet the guidelines for referral under ss 195A or 197AB of the Migration Act:
 - that Mr CZ has an ongoing illness, including mental health illness, requiring ongoing medical intervention
 - IHMS reports he does not have any diagnosed condition that cannot be properly cared for in current situation
 - there are no unique or exceptional circumstances
 - under the s 197AB guidelines, this case should not be referred for Ministerial consideration because his protection visa application has been finally determined.
115. Consequently, the Department decided not to refer Mr CZ to the Minister for consideration under s 197AB of the Migration Act.

116. It is uncertain why the Department found that there were no unique or exceptional circumstances in Mr CZ's case. The above assessment does not provide any further detail on this point. I noted above that 'unique or exceptional circumstances' is also not defined in the s 197AB Guidelines but referred to other definitions in similar Ministerial guidelines under the Migration Act. Given Mr CZ's length of time in immigration detention, the significant barriers to his removal from Australia given Iran's policy regarding involuntary returns, and his mental health issues, it appears that Mr CZ may have met the criteria for 'unique or exceptional circumstances', particularly in reference to Australia's obligations as a party to the ICCPR.
117. As noted above, the Department's decision not to refer Mr CZ's case to the Minister under s 197AB of the Migration Act may also have been a decision made in excess of the executive power of the Commonwealth.²⁵
118. Consequently, I find that the failure of the Department to refer Mr CZ's case to the Minister, to consider exercising his discretion under s 197AB of the Migration Act, contributed to the detention of Mr CZ without consideration of whether that detention was justified in the particular circumstances of his case. I find that Mr CZ's detention from 13 April 2018 was not reasonable, necessary or proportionate in the context of his particular circumstances and, as a result, was arbitrary for the purposes of article 9(1) of the ICCPR.

6 Recommendations

119. 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.²⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.²⁷ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²⁸

6.1 Alternatives to held detention

120. As previously highlighted by the Commission, the detention review process currently conducted by the Department considers whether there are circumstances that indicate that a detainee cannot be appropriately managed within a detention centre environment. They do not consider whether detention is reasonable, necessary or proportionate on the basis

of particular reasons specific to the individual, and in light of the available alternatives to closed detention. The Commission has expressed concern that this process does not adequately safeguard against arbitrary detention.²⁹

121. In August 2022, the Department conducted a stakeholder briefing about its Alternatives to Held Detention program. It subsequently published a briefing note and slide deck in relation to that briefing.³⁰ These documents described a range of important initiatives that were being explored by the Department, including:
- **Risk assessment tools:** reviewing current tools and developing a revised risk assessment framework and tools that enable a dynamic and nuanced assessment of risk across the status resolution continuum
 - **An ‘independent panel’:** establishing a qualified independent panel of experts to conduct a more nuanced assessment of a detainee’s risk, including risks related to their physical and mental health, and provide advice about community-based placement for detainees with complex circumstances and residual risk
 - **Increasing community based placements:** in particular, by focusing on detainees who pose a low to medium risk to the community, and managing residual risk through the imposition of bail-like conditions and the provision of post-release support services
 - **A ‘step-down’ model:** considering transfer from held detention to a residence determination as part of a transition to living in the community.
122. Those initiatives were prompted by two reviews:
- the Independent Detention Case Review conducted for the Department in March 2020 by Robert Cornall AO³¹
 - the Commission’s report to the Attorney-General, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958* (Cth) [2021] AusHRC 141 in February 2021.
123. The Commission welcomes these initiatives, which reflect and build on recommendations it has made in a number of previous reports – including the one identified above. Implementation of these initiatives would increase the prospect that decisions to administratively detain an individual are limited to circumstances where detention is reasonable, necessary and proportionate on the basis of particular reasons specific to the individual, and in light of the available alternatives to closed detention.

124. The Department's response to my preliminary view describes processes in place for quality assurance of the CPATs. According to the Department, each month 5% of CPATs completed in the previous month are subject to quality assurance reviews with detailed feedback provided, and where critical errors are found, the CPAT is reviewed as a matter of priority. The Department has also implemented a mandatory CPAT e-learning course. While the Commission welcomes these improvements, the Commission understands from conversations with the Department that progress in implementing the Alternatives to Held Detention program has slowed following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.
125. The Commission encourages further work to be undertaken by the Department in each of the areas identified in the Alternatives to Held Detention program.

Recommendation 1

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated
- the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement
- increasing community-based placements for low and medium risk detainees, through necessary conditions and support services
- utilising residence determinations as part of a step-down model of reintegration into the community.

6.2 Guidelines for referrals to the Minister

126. Following the High Court's judgment in *Davis*, there will need to be amendments made to the guidelines issued by the Minister to the Department about the exercise of ministerial intervention powers, including under s 195A and s 197AB. In particular, it is no longer open to the Minister to give the Department the ability *not* to refer cases on the basis that the Department has formed the view that the cases do not have 'unique or exceptional circumstances' or that it is otherwise not in the

public interest for the Minister to exercise these powers. While *Davis* focused on referrals made under s 351 of the Migration Act, the Federal Court has indicated that it is reasonably arguable that similar principles will apply to referrals under s 195A,³² and the Commission considers that this is likely to apply equally to referrals under s 197AB.

127. The Commission understands that the Minister is currently considering potential amendments to the guidelines for referral in relation to ss 351, 417 and 501J of the Migration Act, and that the Department will then consider any amendments required in relation to the guidelines for referral in relation to ss 195A and 197AB.
128. Any revised guidelines issued by the Minister should contain clear, objective criteria for referral.³³ It also appears from the documents published by the Department as part of the Alternatives to Held Detention program, identified above, that some intractable cases will only be able to be resolved by the Minister. As a result, there is a real need to ensure that these cases are brought to the Minister's attention so that decisions can be made by the Minister about the potential exercise of their personal intervention powers.
129. The Department's response to my preliminary view refers to a *Detention Status Resolution Review* that was conducted from November 2022 that saw the referral of long-term detainees with complex removal barriers to the Minister for possible Ministerial intervention under ss 195A or 197AB of the Migration Act. The Commission also understands that the cohorts of people identified in submission MS22-002407 dated 31 October 2022, released through freedom of information laws, as being referred to the Minister for intervention are:
 - detainees assessed as low risk of harm to the community through the Community Protection Assessment Tool
 - detainees in respect of whom a protection finding has been made, have no ongoing immigration matters and where it is currently not reasonably practicable to effect their removal to third countries
 - detainees who are confirmed to be stateless and have no identified right to reside in another country
 - detainees in Tier 4 health related specialised held detention placements and/or with complex care needs
 - detainees who have been in immigration detention for five years or more (where not already included in any of the above cohorts)

- detainees who are the subject of a Residence Determination (for more than 6 months).

130. The Commission welcomes these steps, which it understands has led to the exercise of intervention powers in a significant number of cases. While it is hoped that these interventions will have a positive impact on the number of people subject to prolonged, and potentially arbitrary, detention, the Commission reiterates previous recommendations it has made for amendment of the guidelines for referral to the Minister³⁴ to ensure that the cases of all detainees whose detention has become protracted or may continue for a significant period are referred to the Minister for consideration given the temporary nature of this measure.

Recommendation 2

The Commission recommends that the Department brief the Minister about amendments to the Minister's ss 195A and 197AB guidelines, and include in that briefing the Commission's proposal that the guidelines should be amended to provide that:

- all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period
- where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.

6.3 Written apology

131. Mr CZ was detained and placed in immigration detention on 5 August 2017 after he was arrested and charged with firearm-related offences while living in the community without a valid visa. As he held no visa, he was in Australia unlawfully for over two years and it is unclear why the Department had not sought to legalise his status before this.
132. Mr CZ's criminal matters were resolved with all firearm-related charges dismissed within 8 months, yet he remained in closed immigration detention for five years and seven months. The Department initiated multiple ministerial intervention processes during this time and, apart

from one early referral to the Minister which the Minister declined to consider, the Department assessed each time that Mr CZ did not meet the guidelines for referral. In light of *Davis*, these assessments may have been made unlawfully.

133. I consider that the treatment of Mr CZ warrants an apology from the Commonwealth for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances and the significant impact prolonged and unnecessary immigration detention had on his health and mental health. I recommend such an apology be made.

Recommendation 3

The Commonwealth provide a written apology to Mr CZ for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.

7 The Department's response to my findings and recommendations

134. On 23 January 2024, I provided the Department with a notice of my findings and recommendations.
135. On 27 February 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.

The Department does not accept the Commission's finding that the detention of Mr CZ was arbitrary, contrary to Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). Mr CZ was lawfully detained as an unlawful non-citizen under section 189 of the *Migration Act 1958* (the Act).

The Department does not accept the Commission's finding that the below listed acts are inconsistent with, or contrary to, Article 9(1) of the ICCPR:

- *the Department's delay in referring Mr CZ's case to the Minister for consideration under section 195A of the Migration Act 1958 (Cth) (the Migration Act) until October 2018*
- *the Minister's decision on 23 October 2018 to not exercise his power under section 195A of the Migration Act to grant Mr CZ a Bridging Visa E (BVE)*

- *the Department's delay in referring Mr CZ's case to the Minister again for consideration under section 195A of the Migration Act for over four years until February 2023*
- *the Department's failure to refer Mr CZ's case to the Minister for consideration under section 197AB of the Migration Act.*

The Department undertakes regular reviews, escalations and referrals for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department maintains that its review mechanisms regularly consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

Home Affairs Portfolio Ministers' have personal intervention powers under the Act that allow them to grant a visa to a person in immigration detention or to make a residence determination, if they think it is in the public interest to do so. The powers are non-compellable, that is, the Ministers are not required to exercise, or consider exercising their power. Further, what is in the public interest is a matter for the Minister to determine. The Department cannot comment on how the then Minister formulated their decision.

It is not a legal requirement that a detention case be considered for Ministerial Intervention, or be referred to the Minister for consideration of their powers. There are no requirements that a case should be referred to the Minister within a certain timeframe or at regular intervals.

In November 2022, the Minister for Immigration, Citizenship and Multicultural Affairs agreed to the Department conducting a *Detention Status Resolution Review*. This review involves a streamlined referral of submissions for possible Ministerial intervention under sections 195A and 197AB of the Act for long-term detainees in held detention and those who will likely be subject to protracted detention due to complex removal barriers; such as where there are protection obligations engaged or significant health issues, or due to confirmed statelessness of the individual.

Consistent with this review, in February 2023 the Department referred Mr CZ's case to the Minister under section 195A of the Act, with the Minister agreeing to consider the case. On 16 March 2023, the Department referred Mr CZ's case to the Minister for consideration under section 195A of the Act. On 20 March 2023, the Minister intervened in Mr CZ's case under section 195A of the Act.

Recommendation 1 – Partially Agree

The Commission recommends that the Department progress each of the elements of the Alternatives to Held Detention program, including:

- *the development of a more nuanced, dynamic risk assessment tool to assess the degree of risk posed by a detainee to the community and how such risk could be mitigated*
- *the establishment of an independent panel of experts to assess the risk posed by a detainee and provide advice about community-based placement*
- *increasing community-based placements for low and medium risk detainees, through necessary conditions and support services*
- *utilising residence determinations as part of a step-down model of reintegration into the community.*

The Department continues to progress the Alternatives to Held Detention (ATHD) program, though the ATHD model is being considered in light of the High Court judgment in NZYQ.

Under the ATHD program the Department was considering an Independent Assessment Capability (IAC), to advise on risk mitigation (including support needs) for detainees being considered for community placement. Planning for the IAC has paused while the Department considers the implications of the High Court decision on the direction and priorities of ATHD. The Department continues to actively review processes and assess individual cases as appropriate.

Wherever possible, the proposed ATHD model would rely on Criminal Justice System (CJS) processes to inform alternate placements to held detention, as individuals enter the status resolution system.

Increased engagement with the CJS will focus on the operational impacts that processes and decisions have on our respective frameworks and will aim to:

- enhance information sharing arrangements to better leverage existing information (including risk assessments) and inform community placement decisions
- inform treatment of community protection risks, including recommended support services to enable individuals to successfully transition from prison and/or held detention into the community
- explore jurisdictional consistency relating to parole arrangements (including provision of support) for unlawful non-citizens.

The Department continues to consider the impact of the High Court decision in NZYQ on the future direction of the ATHD program. Development of longer-term options for ATHD may require changes to legislative and policy settings. Options for ATHD remain under development and will be subject to policy authority from Government.

Recommendation 2 – Agree

The Commission recommends that the Department brief the Minister about amendments to the Minister's s 195A and s 197AB guidelines, and include in that briefing the Commission's proposal that the guidelines should be amended to provide that:

- *all people in closed immigration detention are eligible for referral under ss 195A and 197AB where their detention has been protracted, and/or where it appears likely that their detention will continue for any significant period*
- *where the Minister has previously decided not to consider exercising the powers under either s 195A or s 197AB in relation to a person, or has considered exercising those powers and declined to do so, the Department may nevertheless re-refer that person to the Minister if the person has remained in closed detention for a further protracted period.*

The Department is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 on ministerial intervention processes. Further information about the Department's approach will be made available in due course.

The Department will provide the Commission's recommendations to the Minister's office and will attach them for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention guidelines. It is a matter for the Minister what criteria should be included in Ministerial Intervention instructions.

Recommendation 3 - Disagree

The Commonwealth provide a written apology to Mr CZ for the delay in releasing him from closed detention in view of the clear evidence of his compelling circumstances.

While the Department acknowledges the circumstances raised in the complaint, the Department does not consider it appropriate to issue an apology at this time.

Table 1 - Summary of Department's response to recommendations

Recommendation number	Department's response
1	Partially Agree
2	Agree
3	Disagree

136. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

May 2024

Endnotes

- ¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ² *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- ³ [2013] FCAFC 33.
- 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 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 (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*).
- 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) 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].
- ⁷ *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*).
- ⁸ 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*).
- ⁹ 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*).
- ¹⁰ 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*).

-
- ¹¹ 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.
- 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, *Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) ('Jalloh v the Netherlands'); Baban v Australia, UN Doc CCPR/C/78/D/1014/2001.
- ¹⁶ 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').
- ¹⁷ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁸ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁹ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501J)*, 11 March 2016. The guidelines are incorporated into the Department's Procedures Advice Manual.
- ²⁰ Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, (Report, August 2016) 52.
- ²¹ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [247]–[248] and [262]–[263].
- ²² *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.
- ²³ Australian Human Rights Commission, *Management of COVID-19 risks in immigration detention: review* (Report, June 2021) 15 – 18.
- ²⁴ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.
- ²⁵ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.
- ²⁶ AHRC Act, s 29(2)(a).
- ²⁷ AHRC Act, s 29(2)(b).
- ²⁸ AHRC Act, s 29(2)(c).
- ²⁹ Australian Human Rights Commission, *Ms RC v Commonwealth (Department of Home Affairs)* [2022] AusHRC 144, at [104].
- ³⁰ Department of Home Affairs, *Alternatives to Held Detention Program, stakeholder meeting – briefing notes and presentation*, 8 August 2022, at <https://www.homeaffairs.gov.au/foi/files/2022/fa-220901228-document-released.PDF>.

- ³¹ Department of Home Affairs, *Independent Detention Case Review* (Report, 27 March 2020) at <https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>.
- ³² *MZAPC v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 989 at [13] and [46].
- ³³ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 at [17] (Kiefel CJ, Gageler and Gleeson JJ) and [99] (Gordon J), cf [219] (Steward J).
- ³⁴ *AZ v Commonwealth (Department of Home Affairs)* [2018] AusHRC 122, [58]; *QA v Commonwealth (Department of Home Affairs)* [2021] AusHRC 140, [189]; *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, [576]–[578].