



Australian
Human Rights
Commission

Mr AC
v Commonwealth
(Department
of Home Affairs)

[2020] AusHRC 136

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Affairs)

[2020] AusHRC 136

Report into arbitrary detention

Australian Human Rights Commission 2020



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**Australian
Human Rights
Commission**

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

Dear Attorney,

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr AC against the Commonwealth of Australia, specifically against the former Department of Immigration and Border Protection and now the Department of Home Affairs (Department).

Mr AC complains that his detention in an immigration detention facility is arbitrary. He complains that the actions of the Department amount to a breach of article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

I have found that the failure of the Department to ask the Australian Security Intelligence Organisation (ASIO) to assess Mr AC's suitability for community-based detention, is inconsistent with or contrary to article 9 of the ICCPR. I have also found that the Department's failure to assess on an individual basis whether Mr AC's circumstances indicated that he could be placed in a less restrictive form of detention, and to refer Mr AC's case to the Minister for Home Affairs to consider exercising his discretionary powers under s 197AB of the *Migration Act 1958* (Cth), has resulted in Mr AC's detention being arbitrary. As a result of this inquiry, I have found that Mr AC's detention, for a period of over six years, is arbitrary and inconsistent with his human rights, specifically his right to liberty under article 9 of the ICCPR.

Australian Human Rights Commission

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The Department provided its response to my findings and recommendations on 1 November 2019. The Minister provided his response to my findings and recommendations on 2 December 2019. I have set out these responses in Part 9 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
President
Australian Human Rights Commission

September 2020

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr AC against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of his human rights.
2. Mr AC is currently detained in Melbourne Immigration Transit Accommodation (MITA). Previously he was detained in Perth Immigration Detention Centre (IDC) and Villawood IDC. He was first detained on 19 June 2013 and has remained in an IDC for over six years.
3. Mr AC complains that the length of time that he has been held in closed immigration detention is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. As a result of this inquiry, I make the finding that the following two acts of the Commonwealth are inconsistent with Mr AC's rights under article 9(1) of the ICCPR:
 - a) the failure of the Department to ask the Australian Security Intelligence Organisation (ASIO) to assess Mr AC's suitability for community based detention
 - b) the failure of the Department to assess on an individual basis whether Mr AC's circumstances indicated that he could be placed in a less restrictive form of detention, and to refer Mr AC's case to the Minister for Home Affairs (Minister) to consider exercising his powers under s 197AB of the *Migration Act 1958* (Cth) (Migration Act), to allow Mr AC to reside outside a closed immigration detention centre.
6. Based on those findings I make the following recommendations:
 - a) The Minister for Home Affairs indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention because the department has received an adverse security assessment in relation to that person from ASIO, unless the department has taken appropriate steps to determine whether any risks the individual might pose could be mitigated (for instance, through the imposition of appropriate conditions).

- b) The Department refer Mr AC to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the *ASIO Act* relevant to the prescribed administrative action of making a residence determination under s 197AB of the Migration Act in favour of Mr AC, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.
- c) To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the Department ask ASIO to advise it of any measures that could be taken to allow Mr AC to be placed in a less restrictive form of detention consistent with the requirements of national security.
- d) The Department refer Mr AC's case to the Minister under s 197AB of the Migration Act. The submissions accompanying the referral should include the advice provided by ASIO in relation to Recommendation 2 and 3 and should include details of how any potential risk identified by ASIO can be mitigated.

2 Background

- 7. Mr AC is from Afghanistan and is of Hazara ethnicity.
- 8. On 20 October 2008, Mr AC was granted a Partner Provisional (subclass 309) visa and he arrived in Australia on 15 November 2008.
- 9. In or around 2012, the Australian Federal Police (AFP) began investigating Mr AC in relation to allegations of people smuggling. Mr AC was never charged in relation to these allegations, and I understand that the AFP's investigation has concluded.
- 10. On 17 June 2013, ASIO assessed Mr AC to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). On 19 June 2013, as a result of this adverse security assessment (ASA), the Department cancelled Mr AC's Partner visa under s 116(1)(g) of the Migration Act and sub-regulation 2.43(1)(b) of the Migration Act and he was detained and transferred to Villawood IDC.
- 11. On 21 June 2013, Mr AC sought merits review of his Partner visa cancellation with the Migration Review Tribunal. On 19 July 2013, the Migration Review Tribunal determined that it had no jurisdiction to hear Mr AC's case as he had not complied with the timeframe for payment of the prescribed application fee.
- 12. On 25 June 2013, Mr AC's application for a second stage Partner (subclass 100) visa was refused on the basis that he was no longer the holder of a first stage Partner (subclass 309) visa. On 1 July 2013, Mr AC sought merits review of this decision with the Migration Review Tribunal. On 26 August 2013, the Migration Review Tribunal affirmed the Department's decision.

13. On 1 July 2013, Mr AC applied for a Bridging E (subclass 050) visa (BVE). On the same day, the matter was referred to the Visa Application Character Consideration Unit (VACCU) on the basis that Mr AC may not pass the character test under s 501(6) of the Migration Act.
14. On 24 July 2013, the VACCU sent Mr AC a Notice of Intention to Consider Refusal of his visa application under s 501(1) of the Act and provided him an opportunity to comment. Mr AC provided further information in support of his BVE application.
15. On 25 September 2013, the then Minister for Immigration personally considered Mr AC's application and found that Mr AC did not pass the character test under s 501(6) of the Migration Act. The Minister exercised his discretion under s 501(1) of the Migration Act to refuse Mr AC a BVE on that basis.
16. On 10 October 2013, Mr AC commenced proceedings in the High Court seeking judicial review of the ASA made on 17 June 2013 and the decisions made under the Migration Act.
17. On 14 November 2013, the High Court remitted to the Federal Court those parts of the application which challenged the ASA and the BVE refusal decision made by the Minister and stood over in the High Court the remaining application challenging the Partner (subclass 309) visa cancellation, Partner (subclass 100) visa refusal and the Migration Review Tribunal affirmation of the Partner (subclass 100) visa refusal, pending the Federal Court outcome.
18. On 7 February 2014, the Federal Court determined that a full court of the Federal Court would hear the case. On 18 August 2014, the Federal Court dismissed Mr AC's challenge to the security assessment. On 15 September 2014, Mr AC filed a Special Leave application, challenging the whole of the Federal Court's decision and requesting it to be heard together with the balance of his High Court application. Ultimately, Mr AC was unsuccessful in the High Court.
19. On 1 May 2015, Mr AC applied for a protection visa which was refused by the Department on 15 June 2016. The Administrative Appeals Tribunal subsequently affirmed the Department's decision. On 27 October 2016, Mr AC applied to the Federal Circuit Court for judicial review. On 10 March 2017, the Court dismissed his matter. On 27 March 2017, Mr AC applied to the Federal Court for judicial review, and on 16 October 2018 the Court dismissed his matter.
20. On 19 January 2018, Mr AC's case was referred for assessment under the Minister's guidelines for intervention under s 197AB of the Migration Act. On 14 February 2019, the Department assessed Mr AC's case as not meeting the guidelines and his matter was not sent to the Minister for further consideration.

21. In February 2019, Mr AC's case was referred in a group submission to the former Assistant Minister to brief her on a number of long-term detention cases. On 28 February 2019, the former Assistant Minister indicated that Mr AC's case should not be referred for consideration under the Minister's personal intervention powers under s 195A and s 197AB of the Migration Act.
22. On 19 November 2018, Mr AC made a request for Ministerial Intervention under s 417 and s 48B of the Migration Act. The Department states that Mr AC's request for intervention under s 417 of the Act was determined to be 'inappropriate to consider' in line with the Minister's guidelines, as Mr AC was the subject of an ASA. The Department has said that it was considering Mr AC's s 48B request against the Minister's guidelines.
23. Mr AC has been in an IDC since he was detained on 19 June 2013. From 19 June 2013 to 1 June 2018 he was detained in Villawood IDC. On 1 June 2018 he was transferred to Perth IDC. In October 2018 he was transferred to MITA where he is currently detained.
24. Since being detained, his marriage has broken down. Mr AC and his (now former) wife divorced on 25 September 2015.
25. Mr AC has a history of mental health issues, and an ongoing health problem in relation to his back which requires medication and management. The International Health and Medical Services (IHMS) has advised that Mr AC has received treatment and continues to engage with the mental health team for the management of an adjustment disorder, anxiety, major depression and insomnia. IHMS has also advised that Mr AC has been referred for specialist psychological counselling and specialist treatment in early 2018 for an injury sustained in an assault that occurred while in detention.
26. Mr AC claims that the period of time he has been detained in an IDC, being over six years, is arbitrary and amounts to a breach of his human rights under article 9 of the ICCPR.

3 Conciliation

27. The Commonwealth indicated that it did not wish to participate in conciliation of this matter.

4 Procedural history of this inquiry

28. On 29 March 2019, I issued a preliminary view in this matter and gave both the complainant and the Department the opportunity to respond to my preliminary findings.
29. On 28 May 2019, the Department responded to my preliminary view and provided additional information regarding Mr AC's circumstances.
30. On 20 August 2019, I issued a notice in this matter and gave both the complainant and the Department the opportunity to respond to my findings and recommendations.
31. The Department provided its response to my findings and recommendations on 1 November 2019. The Minister provided his response to my findings and recommendations on 2 December 2019.

5 Legislative framework

5.1 Functions of the Commission

32. 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.
33. 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.
34. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

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

35. 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.
36. 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.

37. 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.²

5.3 What is a human right?

38. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
39. 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.

6 Arbitrary detention

40. Mr AC complains about his continuing detention in an IDC. This requires consideration to be given to whether his detention is arbitrary contrary to article 9(1) of the ICCPR.

6.1 Law on article 9 of the ICCPR

41. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- a) 'detention' includes immigration detention³
 - b) 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 system⁴
 - c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability⁵
 - d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶
42. 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.⁷

43. The UN HR Committee has held 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.⁸
44. 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.⁹ 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 ...¹⁰
45. 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.¹¹
46. 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.¹²
47. 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.¹³
48. 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.
49. It is therefore necessary to consider whether the detention of Mr AC 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.

7 Assessment

7.1 Act or practice of the Commonwealth?

50. On 19 July 2013, Mr AC's Partner visa was cancelled, and he was detained pursuant to s 189(1) of the Migration Act. He has remained in closed immigration detention since that date. When his Partner visa was cancelled, Mr AC became an 'unlawful non-citizen', and the Migration Act required that he be detained.
51. The ASA made by ASIO in relation to Mr AC on 17 June 2013 has remained in place over the course of the last six years. A letter dated 24 April 2018, provided by the Inspector-General of Intelligence and Security (IGIS) states that the IGIS has reviewed ASIO's handling of Mr AC's case. The letter states that ASIO has an internal review process for ASAs and, where appropriate, issues new assessments informed by updated information or changes in the security environment. The IGIS has written to the Director-General of Security regarding Mr AC's adverse security assessment.
52. The Department has not asked ASIO to assess Mr AC's suitability for community based detention. The Department has not asked ASIO to provide advice about any risk that Mr AC might pose to the Australian community which would preclude him from being placed in community detention, nor has the Department asked ASIO to consider whether any risk Mr AC might pose to the community can be mitigated.
53. It is my view that the failure of the Department to ask ASIO to assess Mr AC's suitability for community based detention is an 'act' within the definition of s 3 of the AHRC Act.
54. Further, while the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister can exercise to detain a person in a manner less restrictive than a closed immigration detention facility.
55. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a 'residence determination' to allow a person to reside in a specified place, instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. This is commonly referred to as 'community detention'. Section 197AB(2)(b) allows the Minister to specify the conditions to be complied with by the person or persons covered by the residence determination.

56. It is my view that the Department's failure to assess on an individual basis whether Mr AC's circumstances indicated that he could be placed in a less restrictive form of detention and, if his circumstances allowed, refer Mr AC's case to the Minister to consider exercising his discretionary powers under s 197AB of the Migration Act (if necessary with conditions to mitigate any risk), is an 'act' within the definition of s 3 of the AHRC Act.

7.2 Act 1: Failure by the Department to ask ASIO to assess the individual suitability of Mr AC for community based detention

57. ASIO has the function under s 37 of the ASIO Act of furnishing security assessments to Commonwealth agencies that are relevant to the functions and responsibilities of those agencies. A security assessment is relevantly defined in s 35 of the ASIO Act as a statement in writing furnished by ASIO to a Commonwealth agency expressing any recommendation, opinion or advice on whether it would be consistent with the requirements of security for a prescribed administrative action to be taken in respect of a person.
58. The Department may ask ASIO to carry out assessments for different purposes. In the past, ASIO has noted that the type of assessment that it carries out varies according to the purpose for which it has been asked to make an assessment. In particular, the assessment will relate to the particular administrative act that is proposed (for example, the act of granting a visa or the act of placing someone in community detention).¹⁴
59. Our understanding is that the Department can ask ASIO to provide security assessments in relation to the Minister exercising his powers to make residence determinations allowing persons in immigration detention to be placed in community detention (under s 197AB of the Migration Act) or to grant a bridging (or other) visa (under s 195A of the Migration Act). These assessments can frequently be completed within 24 hours.¹⁵
60. The security assessment process has been discussed in detail in previous Commission reports.¹⁶
61. On 14 January 2019, the Commission wrote to the Department and asked the following:

Since he was detained, has the Department sought advice from ASIO as to whether Mr AC was or is suitable for community based detention? Has the Department asked ASIO to provide advice about any risk that Mr AC poses to the Australian community which would preclude him from being placed in community detention? If yes, what was ASIO's advice/assessment?

62. On 1 February 2019, the Department provided a response as follows:

The Australian Security Intelligence Organisation (ASIO) does not provide advice to inform risk considerations related to placement of ASA holders, including community detention.

63. In my preliminary view, I noted that the Department has, in the past, sought such advice from ASIO, and ASIO has provided the requested advice.¹⁷ I noted that it is unclear why, in this case, the Department has not sought ASIO's advice. In my preliminary view, I welcomed any clarification on this point that the Department could provide.

64. The Department, in its response dated 28 May 2019, provided the following information:

The references cited by the AHRC in paragraphs 51-59 of the preliminary findings are historical (2011-2013) and are in relation to a cohort of individuals who arrived as illegal maritime arrivals. From late 2010, ASIO provided advice to the Department in the form of 'community detention' security assessments, which were limited in scope. These were interim measures pending completion of a full security assessment. These security assessments were undertaken on a limited basis by ASIO due to the security environment at the time, on the request of the Department, to enable community management of a large number of Illegal Maritime Arrivals (IMA). The Department notes that Mr AC is not an IMA, and therefore the above mentioned process does not apply in his case.

65. The operation of ASIO's function under s 37 of the ASIO Act is broader than that suggested by the Department in its response. Section 37 of the ASIO Act allows ASIO to advise the Department on whether there would be security concerns with the Department taking a prescribed administrative action in respect of a person—in this case, whether it would be consistent with the requirements of security for the Minister to exercise his power under s 197AB of the Migration Act to allow Mr AC to be placed in community detention. That Mr AC is not an IMA, does not prevent the Department from seeking ASIO's advice as to whether he was or is suitable for community based detention.

66. My view is that the failure of the Department to request that ASIO conduct a security assessment to assess the suitability of Mr AC for community based detention, is inconsistent with or contrary to article 9(1) of the ICCPR. A community detention security assessment could have been requested by the Department and conducted by ASIO and might have led to Mr AC being held in a less restrictive form of detention.¹⁸

67. As discussed above, detention for an extended period (in this case, over six years) without considering whether there was a less restrictive way of achieving the aims of the Commonwealth's immigration policy, is arbitrary within the meaning of article 9 of the ICCPR.

7.3 Act 2: The failure to assess on an individual basis whether the circumstances of Mr AC indicated that he could be placed in a less restrictive form of detention

68. As the Commission has discussed in relation to previous inquiries,¹⁹ the Minister at all relevant times had, and continues to have, the power to make a residence determination under s 197AB of the Migration Act, to allow individuals to be placed in community detention. The Minister also has the power to grant temporary visas under s 195A, or to approve some other less restrictive place of 'immigration detention' under s 5 of the Migration Act.
69. Since being detained in mid-2013, the Minister has only once (in September 2013) personally considered Mr AC's case. On that occasion, the Minister's consideration was in relation to whether Mr AC should be granted a BVE. The Minister decided that Mr AC did not pass the character test under s 501(6) of the Migration Act, and refused Mr AC a BVE on that basis. On 24 July 2013, Mr AC was issued with a Notice of Intention to Consider Refusal (NOICR) of his application for a BVE. The NOICR advised Mr AC of the grounds on which a decision to refuse his visa may be based and the matters that may be taken into account in making that decision. The NOICR specified the particular element of the character test considered relevant to Mr AC's case, specifically:

Subparagraph 501(6)(D)(v):

(6) For the purpose of this section, a person does not pass the character test if:

...

In the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

...

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

70. The NOICR stated that consideration was being given to the refusal of Mr AC's application for a BVE in light of the ASIO assessment dated 17 June 2013 that Mr AC was directly or indirectly a risk to security within the meaning of s 4 of the ASIO Act.
71. The Commission's understanding is that government policy dictates that those with ASAs are unable to pass the character test.
72. Mr AC was invited to comment on the NOICR, and he responded in a submission that was received on 19 August 2013 and a supplementary submission that was received on 21 August 2013.

73. On 30 August 2013, a further invitation to provide comment was sent by the Department to Mr AC. That letter advised that, in addition to the grounds specified in the NOICR, subparagraph 501(6)(b) may also be relied upon to assess whether Mr AC passed the character test. Subparagraph 501(6)(b) provides:

(6) For the purpose of this section, a person does not pass the character test if:

...

Subparagraph 501(6)(b): the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.

74. The letter of 30 August 2013 also indicated that, since the 24 July 2013 NOICR was issued, the Department had received further information which may be relied upon by the Minister or a delegate to assess whether Mr AC failed the character test and whether to exercise the discretion to refuse his visa application. According to the Department, this information consisted of a summary document issued by ASIO of which the Commission does not have a copy. It is not clear from the documents currently before the Commission whether this summary document issued by ASIO consisted of an assessment and advice from ASIO in relation to whether the Department should grant Mr AC a BVE. In my preliminary view, I sought any clarity the Department could provide regarding the content and purpose of this document. I note that no further information has been provided by the Department on this point.
75. On 25 September 2013, the then Minister refused to grant Mr AC a BVE on the basis that he had been found to fail the character test.
76. The Commission has asked the Department to advise whether alternative, less restrictive, detention options have been canvassed for Mr AC. In response, by letter dated 22 August 2016, the Department said that:

It is Government policy that generally individuals who have received an adverse security assessment from ASIO and have consequently been assessed to be directly or indirectly a risk to Australia's security, will remain in immigration detention until such time as a durable solution is found that is consistent with Australia's international obligations.

77. In the same letter, the Department also stated that:

Under the ASIO Act, ASIO is only required to provide a statement of grounds for an ASA furnished in connection with a matter under the Act, when the assessment relates to certain categories of persons. Mr AC does not come within any of those categories. Accordingly, the Department is not in a position to provide any further information in relation to the ASA issued to Mr AC.

Mr AC is detained because he does not hold a visa and is therefore an unlawful non-citizen. He is not being detained because of an assessment or allegations against him.

78. Further, in its response to my preliminary view, the Department stated that:

It is Government policy to manage individuals with an adverse security assessment issued by ASIO in immigration detention pending their removal from Australia, either in their country of origin or a third country, where it is safe to do so.

...

In line with this policy, the Minister's guidelines under section 195A and 197AB stipulate that generally, persons who are subject to an adverse security assessment by ASIO, or persons who present character issues that indicate they may fail the character test under section 501 of the Act, should not be referred to the Minister for consideration.

79. Despite the Department's statement that Mr AC is 'not being detained because of an assessment ... against him', it appears that, due to government policy, Mr AC's ASA means that he is not being considered by the Department and the Minister for alternative, less restrictive, detention options. The Commonwealth Ombudsman noted in its 2017 assessment of Mr AC's case, carried out under s 486O of the Migration Act, that 'without changes to current policy and practice relating to individuals who are the subject of adverse security assessments, Mr AC will remain in an immigration detention facility for an indefinite period'.

80. On 14 January 2019, the Commission wrote to the Department and asked the following:

Has the Department conducted any individualised assessment of whether any risk that Mr AC poses to the Australian community could be mitigated in a way that would allow him to reside in the community or some other less restrictive place of detention? Has the Department asked ASIO to consider whether any risk Mr AC poses to the community can be mitigated? If yes, what were the outcomes of any such assessments?

81. On 1 February 2019, the Department provided a response as follows:

The Department has not conducted an assessment of whether any risk Mr AC poses to the Australian community could be mitigated in a way that would allow him to reside in the community. Nor has the Department asked ASIO to comment or advise on mitigation strategies (please refer to the response to question two).

It is government policy that persons subject to adverse security assessment issued by ASIO, which states that the person is directly or indirectly a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*, are to remain in detention until such time as they can be removed from Australia. In line with this policy, the Minister's guidelines under section 195A and 197AB stipulate that generally, persons who are subject to adverse security assessments by ASIO, or persons who present character issues that indicate they may fail the character test under section 501 of the Act, should not be referred to the Minister for consideration.

82. Further, in response to my preliminary view, the Department stated as follows:

Given Government policy and the Minister's intervention guidelines, the Department maintains that there is no requirement to request ASIO conduct an assessment of whether any risk Mr AC poses to the Australian community could be mitigated in a way that would allow him to reside in the community.

83. The Department has not conducted any individualised assessment of whether any risk that Mr AC posed to the Australian community could be mitigated in a way that would allow him to reside in the community or some other less restrictive place of detention, in a manner consistent with national security. Nor has the Department asked ASIO to consider whether any risk Mr AC poses to the community could be mitigated.

84. It may well be that there are alternatives to prolonged detention in secure facilities which can appropriately address any risk posed by Mr AC. These alternative options may include less restrictive places of detention than immigration detention centres, as well as community detention, if necessary with conditions to mitigate any identified risks. As mentioned above, s 197AB(2)(b) of the Migration Act permits the Minister to specify the conditions to be complied with by the person covered by a residence determination. Conditions could include parole-like conditions such as a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

85. It is my view that in failing to consider whether any risks could and can be mitigated, the Department has failed to assess on an individual basis whether the circumstances of Mr AC indicate that he could be placed in a less restrictive form of detention. It is my view that this failure may be considered as inconsistent with the rights protected in article 9(1) of the ICCPR.

86. Since September 2013, Mr AC's matter has not been referred to the Minister by the Department.

87. In its response to my preliminary view, the Department provided the following information:

The Department notes that Mr AC's case was assessed against the Minister's section 197B guidelines in February 2018. That assessment found that while Mr AC had some mental health issues and had been detained for over four and a half years, his case fell into the categories of cases that the Minister has indicated should not be referred:

- where a person has had their asylum claims rejected at primary and review stages;
- where ASIO has issued an adverse security assessment; and
- where it is believed that a person presents character issues that indicate that they may fail the character test under section 501 of the Act.

On balance, there did not appear to be exceptional circumstances in Mr AC's case that would outweigh the above factors and his case was not referred for the Minister's consideration.

...

The Department wishes to advise the AHRC that in February 2019, Mr AC's case was referred on a group submission to the former Assistant Minister to brief her on a number of long term detention cases. The submission provided the former Assistant Minister an opportunity to indicate whether she was willing to consider the case on an individual basis.

88. On 28 February 2019, the former Assistant Minister indicated that Mr AC's case should not be referred for consideration under the Minister's proposed intervention powers under section 195A and 197AB of the Act.
89. Over the course of Mr AC's detention, there have been various guidelines in place for the exercise of the Minister's discretionary powers under s 197AB of the Migration Act. In accordance with these guidelines, generally the Department will not refer cases to the Minister where ASIO has issued an ASA or where the person presents character issues that indicate that they may fail the character test under s 501 of the Migration Act.
90. However, I note that cases can still be referred to the Minister where there are exceptional circumstances involved. When the 2013 guidelines came into effect, the (then) Minister the Hon Brendan O'Connor MP indicated that he would consider exercising his discretion in favour of single adults with 'diagnosed mental illness'. This was retained, although slightly modified, in the 2014, 2015 and most recent 2017 Guidelines which stated that the Minister would consider referrals of single adults if they had ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention, and cases where there are 'unique or exceptional circumstances'.²⁰
91. The phrase 'unique or exceptional circumstances' is not defined in the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.²¹ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
 - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
 - the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community
 - 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 irreparable harm and continuing hardship to the person.

92. Viewed cumulatively, I consider the following factors relevant to my view that Mr AC's case presents 'unique or exceptional' circumstances:
- a) He has now been detained in an immigration detention centre for over six years.
 - b) Given his lengthy detention, there are circumstances that bring Australia's obligations as a party to the ICCPR into consideration.
 - c) He has a history of mental health issues, and an ongoing health problem in relation to his back which requires medication and management. IHMS has advised that Mr AC has received treatment and continues to engage with the mental health team for the management of an adjustment disorder, anxiety, major depression and insomnia.
 - d) If the Department does not consider Mr AC's individual circumstances and assess whether there are any alternatives to prolonged detention in a secure facility, which can appropriately address any risk he poses, Mr AC will remain in prolonged indefinite detention.

8 Findings and Recommendations

93. Mr AC has been detained in a closed immigration detention centre for over six years.
94. Having considered the material before me, I cannot be satisfied that Mr AC's lengthy and continuing detention in an immigration detention centre is necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of its migration system.
95. I am not satisfied that the Department has provided sufficient reason for failing to ask ASIO to conduct a security assessment to assess the suitability of Mr AC for community detention or some other less restrictive form of detention.
96. I am also not satisfied that the Department has provided sufficient reason for failing to consider whether any risk that Mr AC might pose to the Australian community could be mitigated in a way that would allow him to reside in the community or some other less restrictive place of detention, in a manner consistent with national security. I note that the Department has not sought advice from ASIO on this matter.
97. A community detention security assessment conducted by ASIO, on the Department's request, might have led to Mr AC being held in a less restrictive form of detention and might have allowed the Department to better consider Mr AC's individual circumstances.

98. Consequently, I have formed the view that:

- a) the Department's failure to request such advice from ASIO, and
- b) the Department's failure to assess on an individual basis whether Mr AC's circumstances indicated that he could be placed in a less restrictive form of detention, and refer Mr AC's case to the Minister to consider exercising his discretionary powers under s 197AB of the Migration Act (if necessary with conditions to mitigate any identified risk),

has resulted in Mr AC's detention becoming arbitrary, contrary to article 9 of the ICCPR.

99. 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.²² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²³ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²⁴

8.1 Recommendation to the Minister

100. I have found that the detention of Mr AC is arbitrary. That was in part because the Migration Act bestows discretionary powers on the Minister which would have enabled him to allow Mr AC to reside in the community, either on a bridging visa or in community detention. Mr AC's case was not referred to the Minister for him to consider exercising these powers as a result of the government's policy that individuals who have been assessed by ASIO to be directly or indirectly a risk to security should remain in held detention, rather than the community, until such time as resettlement in a third country or removal is practicable.²⁵ Even if the Minister was to personally consider Mr AC's matter and decide that he is not appropriate for community based detention, his status should be resolved one way or another.

101. In these circumstances, I consider it is appropriate to make a recommendation to the Minister in the following terms.

Recommendation 1

The Minister for Home Affairs indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention because the department has received an adverse security assessment in relation to that person from ASIO, unless the department has taken appropriate steps to determine whether any risks the individual might pose could be mitigated (for instance, through the imposition of appropriate conditions).

8.2 Recommendations to the Department

Recommendation 2

The Department refer Mr AC to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the prescribed administrative action of making a residence determination under s 197AB of the Migration Act in favour of Mr AC, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the Department ask ASIO to advise it of any measures that could be taken to allow Mr AC to be placed in a less restrictive form of detention consistent with the requirements of national security.

Recommendation 4

The Department refer Mr AC's case to the Minister under s 197AB of the Migration Act. The submissions accompanying the referral should include the advice provided by ASIO in relation to Recommendation 2 and 3 and should include details of how any potential risk identified by ASIO can be mitigated.

9 Response to my findings and recommendations

102. On 20 August 2019, I provided the Minister and Department with separate notices of my findings and recommendations.
103. On 2 December 2019, the Minister provided the following response to my findings and recommendations:

Recommendation 1

The Minister for Home Affairs indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention because the department has received an adverse security assessment in relation to that person from ASIO, unless the department has taken appropriate steps to determine whether any risks the individual might pose could be mitigated (for instance, through the imposition of appropriate conditions).

Response to recommendation 1

I do not accept this recommendation.

It is Australian Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

Given the serious nature of the assessment by ASIO, and in light of Australian Government policy, I am not minded to exercise my Ministerial Intervention powers in respect of individuals with adverse security assessments.

Former Ministers for Immigration and Border Protection, the Hon Scott Morrison MP and the Hon Peter Dutton MP, also previously declined to accept this recommendation.

104. On 1 November 2019, the department provided the following response to my findings and recommendations:

Recommendation 2

The Department refer Mr AC to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the prescribed administrative action of making a residence determination under s 197AB of the Migration Act in favour of Mr AC, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.

Response to recommendation 2

ASIO security assessments are undertaken to identify individuals whose entry into, or continued stay in, Australia may be directly or indirectly a risk to national security, and inform visa and citizenship decision made by the Department. ASIO does not provide advice to the Department, in the form of a security assessment or otherwise, on the placement of individuals who do not hold a visa, or the risk associated with the placement of individuals who do not hold a visa.

There is no requirement for ASIO to undertake a further security assessment for Mr AC as he is currently subject to an ASA. Generally, this assessment remains in effect until such time as ASIO furnishes a subsequent security assessment, or a Court sets it aside. In this case, Mr AC's application for judicial review of the ASA was dismissed by the Full Court of the Federal Court of Australia on 18 August 2014.

Mr AC's visa was cancelled following the ASA. Mr AC has been held in immigration detention because he does not hold a visa. It is Australian Government policy that individuals who are subject to ASAs issued by ASIO, which state that the person is directly or indirectly a risk to security within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979, are to remain in detention until such time they can be removed from Australia. In line with this policy, the Minister's guidelines under section 195A and section 197AB stipulate that generally, persons who are subject to an ASA by ASIO, or persons who present character issues that indicate they may fail the character test under section 501 of the Act, should not be referred to the Minister for consideration.

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the Department ask ASIO to advise it of any measures that could be taken to allow Mr AC to be placed in a less restrictive form of detention consistent with the requirements of national security.

Response to recommendation 3

As outlined above, ASIO does not provide advice to the Department, in the form of a security assessment or otherwise, and due to current government policy the Department would not ask ASIO to provide advice regarding measures that could be implemented to allow a less restrictive form of detention.

Recommendation 4

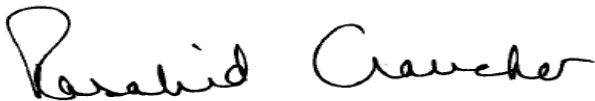
The Department refer Mr AC's case to the Minister under section 197AB of the Migration Act. The submissions accompanying the referral should include the advice provided by ASIO in relation to Recommendation 2 and 3 and should include details of how any potential risk identified by ASIO can be mitigated.

Response to recommendation 4

Mr AC's case was assessed and on 13 February 2018 was found not to meet the Ministerial guidelines for referral under section 197AB of the Act. His case was also referred to the Assistant Minister, who on 26 February 2019 indicated that Mr AC's case should not be referred for consideration under section 195A or section 197AB of the Act.

Should there be a change in Mr AC's circumstances, his case will be reassessed against the Ministerial guidelines and if found to fall within their scope, will be referred to the Minister for possible consideration.

105. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

9 September 2020

Endnotes

- 1 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 2 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.
- 3 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) [40]. See also Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'); Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communication No. 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*').
- 4 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) [18]; 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) [6].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65, 71 [40]–[42] (Hammond J). See also the views of the 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*'); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*').
- 6 Human Rights Committee, *General Comment No. 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) [6]; 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) [12]; Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*') (a generalised risk of the author absconding if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*').
- 7 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*').
- 8 Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*'); Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (20 July 2007) ('*Shams & Ors v Australia*'); Human Rights Committee, *Views: Communication No. 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) ('*Baban v Australia*'); 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*').
- 9 *Human Rights Council, Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2005/6 (1 December 2004) [77].
- 10 Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)* UN Doc HRI/GEN/1/Rev.9 (Vol.I) (30 June 1982) [4]. See also UN Commission on Human Rights Committee on the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, United Nations Doc E/CN.4/826/Rev.1 (5 January 1962) [783]–[787].
- 11 Human Rights Committee, *Communication No. 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (15 June 2004) ('*Mansour Ahani v Canada*') [10.2].
- 12 Human Rights Committee, *Communication No. 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (26 March 2002) ('*Jalloh v the Netherlands*'); Human Rights Committee, *Communication No. 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (6 August 2003) ('*Baban v Australia*').
- 13 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) [6]; Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*'); Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) ('*C v Australia*').
- 14 Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Estimates* (Transcript, 25 May 2011) 113.
- 15 Australian Security Intelligence Organisation, Submission No 153 to Joint Select Committee on Australia's Immigration Detention Network, *Australia's Immigration Detention Network Inquiry*, 2011 [23].
- 16 See for instance, Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration and Citizenship)* [2012] AusHRC 56 [48]–[70]; Australian Human Rights Commission, *Report into arbitrary detention and the best interests of the child* [2013] AusHRC 64 [33]–[43].
- 17 For instance, Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration and Citizenship)* [2012] AusHRC 56 [48]–[70]; Australian Human Rights Commission, *Report into arbitrary detention and the best interests of the child* [2013] AusHRC 64 [37]–[42].
- 18 Cf Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration and Citizenship)* [2012] AusHRC 56 [69]–[70]; Australian Human Rights Commission, *Report into arbitrary detention and the best interests of the child* [2013] AusHRC 64 [33]–[56].
- 19 Australian Human Rights Commission, *Sri Lankan refugees v Commonwealth of Australia (Department of Immigration and Citizenship)* [2012] AusHRC 56 [85]ff.
- 20 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.

- 21 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s351, s417 and s501J)*, 24 March 2012 (reissued on 10 October 2015), Part 12. The guidelines are incorporated into the Department's Procedures Advice Manual. See also Part 4 of the replacement guidelines issued by the Hon Peter Dutton, Minister for Immigration and Border Protection, *Minister's guidelines on ministerial powers (s351, s417 and s501J)* 11 March 2016, incorporated into the Department's Procedures Advice Manual.
- 22 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 23 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 24 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 25 This policy has previously been discussed in Commission Reports [2013] AusHRC 64 [58]; [2012] AusHRC 56 [71]-[83].

Further Information

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