



Australian
Human Rights
Commission

CW v

**Commonwealth of
Australia (Department
of Home Affairs)**

[2018] AusHRC 126

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Affairs)**

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Report into arbitrary detention

Australian Human Rights Commission 2018



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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 of arbitrary detention made by Mr CW against the Commonwealth of Australia — specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (the department).

Mr CW complains that his detention in an immigration detention facility from 23 March 2015 until 7 October 2016 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the failure of the department to refer Mr CW's case to the Minister for Immigration and Border Protection to consider exercising his discretions under s 195A and s 197AB of the *Migration Act 1958* (Cth) was inconsistent with or contrary to article 9(1) of the ICCPR.

The department provided a response to my findings and recommendations on 10 May 2018. 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".

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

July 2018

Australian Human Rights Commission

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1. Introduction

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr CW against the Commonwealth of Australia — specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department) alleging a breach of his human rights.
2. Mr CW was detained in an immigration detention centre for over 18 months. He complains that this detention was ‘arbitrary’, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. This notice is issued pursuant to s 29(2) of the AHRC Act and sets out the findings and recommendations of the Commission in relation to Mr CW’s complaint.
5. Mr CW has requested that his name not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect his human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and will refer to him by the pseudonym ‘CW’ in the Commission’s report to the Minister.

2. Summary of findings and recommendations

6. As a result of conducting this inquiry, I find that the department’s failure to refer Mr CW’s case to the Minister for the consideration of the exercise of his discretionary powers from 23 March 2015 to 25 July 2016 led to his detention being arbitrary and inconsistent with article 9(1) of the ICCPR.
7. In light of these findings, I recommend that:
 - The Commonwealth provide a letter or other document that would assist Mr CW to explain and correct potential misunderstandings arising from the ‘inoperative’ stamp in his passport, and the use of the term irregular / illegal air arrival in departmental documentation
 - The department review its information and record management systems and policies to ensure that information related to immigration detainees is accurate, comprehensive and presented in an impartial and objective manner. The Commission recommends that the department carefully consider whether policy terms, such as irregular / illegal air arrival, accurately reflect a detainee’s individual circumstances, or whether some further explanation is required, and
 - The Commonwealth consider what other remedies it could offer Mr CW to give full and meaningful effect to the Full Court of the Federal Court decision quashing the department’s decision to cancel his tourist visa and prohibiting the Minister from acting upon or giving effect to the decision.

3. Background

8. Mr CW is a Chinese national who arrived in Australia on 27 January 2011. Mr CW's tourist visa was cancelled on arrival and he was refused immigration clearance. Australian immigration authorities stamped 'Label Inoperative' across the visa in Mr CW's passport at this time. Considered as an 'Irregular Air Arrival' (IAA) and an unlawful non-citizen, Mr CW was detained under s 189 of the *Migration Act 1958* (Cth). He was transferred to Villawood Immigration Detention Centre (IDC) on 28 January 2011.
9. On 31 January 2011, Mr CW lodged an application for a protection visa. The application was refused and Mr CW sought review of that decision. The High Court ultimately made a decision upholding the refusal of a protection visa on 5 March 2015.
10. On 4 February 2011, Mr CW sought review of the department's decision to cancel his tourist visa. On 20 August 2013, after a number of reviews and appeals, the Full Court of the Federal Court quashed the department's decision to cancel his tourist visa and prohibited the Minister from acting upon or giving effect to the decision. The department has not provided Mr CW with a notation or explanatory letter to reflect this and the 'inoperative' stamp remains in his passport. The department continued to refer to Mr CW as an IAA in their internal records and in submissions to the Minister following the Court's decision.
11. In early January 2012, Mr CW was admitted to hospital for treatment for his mental health, on the basis of a report prepared by the International Health and Medical Services (IHMS). He was discharged on 20 January 2012.
12. In a report dated 10 April 2012, IHMS reported to the department that Mr CW suffers from physical and mental health issues and stated that management outside the detention centre environment would be preferable.
13. On 11 May 2012, the department referred Mr CW's case for possible Ministerial Intervention under ss 197AB or 195A of the Migration Act. The department referred to a number of factors that needed to be balanced to determine whether intervention was appropriate in this case, including:
 - The length of time Mr CW has already been in detention
 - The deterioration of Mr CW's mental health while in detention and IHMS' recommendation for placement in community detention
 - Mr CW's physical health conditions, and
 - There being no character or security concerns.
14. In its submissions recommending that the Minister intervene, the department also referred to the fact that Mr CW's mother had serious health problems requiring daily care and assistance, and that his recently separated sister was finding it difficult to do so while working and taking care of her young son. Mr CW's sister and nephew are Australian citizens and his elderly mother was granted a Contributory Parent visa in 2010.

15. On 17 May 2012, Mr CW was granted a Bridging Visa E (BVE) as a result of Ministerial Intervention and was released into the community. He was subsequently granted a number of further BVEs (5 June 2013 for three months, 5 September 2013 for six months, and 18 September 2014 for six months). During this time, Mr CW continued to advise the department that he suffered from physical and mental health issues.
16. On 30 January 2014, a psychiatrist wrote to the department and advised that she had been treating Mr CW for post-traumatic stress disorder, anxiety and depression.
17. Mr CW's last BVE expired on 18 March 2015 and his avenues of judicial review were exhausted. Although the decision to cancel his tourist visa had been reversed by the Full Court of the Federal Court, the visa had expired in the meantime, and Mr CW was considered an unlawful non-citizen. On 23 March 2015, he was detained and transferred to Villawood IDC.
18. On 24 March 2015, the United Nations Committee Against Torture (UNCAT) issued a UN Complaint and Interim Measures Request (IMR) requesting that Mr CW not be removed from Australia. While his case is being considered by the United Nations, the department has stated that Mr CW 'is prevented from being removed from Australia to China'. The department indicates in its case reviews that removal plans will commence should the IMR be retracted.
19. On 25 May 2016, Mr CW's case was assessed by the department as meeting the s 195A guidelines for referral to the Minister. On 25 July 2016, the department referred Mr CW's case to the Minister for the consideration of the exercise of his discretionary powers under s 195A of the Migration Act to grant a Visitor visa (subclass 600) or a BVE (subclass 050).
20. On 6 October 2016, Mr CW's representative wrote to the department requesting that the Minister act in good faith to declare Mr CW an 'eligible non-citizen', as defined in s 72 of the Migration Act, in light of the fact that he had legally entered Australia with a valid visa. In this letter, Mr CW's representative also requested that the department remove references to Mr CW being an IAA from the department's records, remove the 'inoperative' stamp from his passport, and make a notation in his passport that he entered Australia legally. Mr CW's representative sent another letter to the department on 18 October 2016 stating that Chinese Embassy staff told Mr CW that they would cancel his passport because he was an IAA and that he was considered to be a fugitive from China. Mr CW's representative again asked for Mr CW to be declared an eligible non-citizen.
21. It is clear that the 'inoperative' stamp on his visa, and how this might impact the way that his departure from Australia, and any eventual return to China, is viewed by the Government of the People's Republic of China, is of considerable concern to Mr CW. The department sent a letter to Mr CW's representative on 4 April 2017 stating that Mr CW did not meet the requirements to be declared an eligible non-citizen under s 72 of the Migration Act. The department did not respond to the other requests contained in the letter dated 6 October 2016.
22. On 7 October 2016, Mr CW was granted a visitor visa and he was released from Villawood IDC.
23. Mr CW claims that the period of immigration detention from March 2015 to October 2016 is 'arbitrary' and amounts to a breach of his human rights under article 9 of the ICCPR.

4. Legislative Framework

4.1 Functions of the Commission

24. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, s 11(1)(f) gives the Commission the following functions:

to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

- (i) where the Commission considers it appropriate to do so — to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement — to report to the Minister in relation to the inquiry.

25. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.

4.2 What is an ‘act’ or ‘practice’?

26. 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.

27. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

28. 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,² that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4.3 What is a ‘human right’?

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

30. 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.

4.4 Article 9 of the ICCPR

31. 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 in the particular circumstances⁴
 - (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
32. In *Van Alphen v The Netherlands*, the UN Human Rights Committee (UNHRC) 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
33. The UNHRC 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 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
34. Relevant jurisprudence of the UNHRC 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.⁹
35. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty — in this case, 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'.¹⁰

36. It is therefore necessary to consider whether the detention of Mr CW 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.

4.5 Alternatives to detention

37. 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'.
38. Section 195A of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to grant a visa to a person detained under s 189 of the Migration Act.

(a) Discretionary power to make a residence determination under s 197AB

39. On 29 March 2015, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, issued guidelines to the department in relation to the Minister's discretionary power under s 197AB of the Migration Act to make a residence determination for a person in immigration detention (2015 Guidelines).¹¹ The relevant parts of the 2015 Guidelines provide as follows:

8. Cases to be referred for my consideration under s 197AB

... For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 1 January 2014 and to whom the following circumstances apply:

- unaccompanied minors.

I will also consider ... single adults if they have any of the following circumstances:

- ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; ...

I will also consider cases where:

- there are unique or exceptional circumstances; or
- I personally request a specified detainee's case or cohort of people be referred to me to consider exercising my public interest power.

...

10. Cases generally not to be referred for my consideration under s 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 1 January 2014;
- where a person was transferred from an offshore processing centre to Australia for medical treatment or any other reason;
- where a person has had their asylum claims rejected at primary and review stages ('finally determined');
- where ASIO has issued an adverse security assessment which states that "ASIO assesses [the person] to be directly or indirectly a risk to security ...";
- where the continued presence of the person presents character issues that indicate that they may fail the character test under section 501 of the Act;
- where a person has been charged with an offence but is awaiting the outcome of the charges or is under active investigation by an agency responsible for law enforcement in Australia;
- where a person knowingly fails to provide information, or provide misleading information, about their identity (such as age, nationality, citizenship or ethnicity);
- where there is a real chance the person may not comply with the conditions specified in the determination (such as not residing at the specified address) or cause harm to the Australian community;
- where a person is in held detention and their removal is considered imminent (within three months from the time of consideration); and/or
- where a person is in held detention and a visa grant is considered imminent.

40. Since the decision to refuse Mr CW's application for a protection visa had been 'finally determined' on 5 March 2015, he falls within one of the cases 'not to be referred for my consideration' detailed in Part 10 of the 2015 Guidelines. However, under Part 8 of the 2015 Guidelines, the Minister stated that he will consider single adults with ongoing illnesses, including mental health illnesses, and cases where 'there are unique or exceptional circumstances'.

41. The phrase 'unique or exceptional circumstances' is not defined in the 2015 Guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.¹² 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.

(b) Discretionary power to grant a visa under s 195A

42. In March 2015 the guidelines that applied to the department in relation to the Minister’s discretionary power under s 195A were those issued by the then Minister for Immigration and Citizenship, the Hon Chris Bowen MP, on 24 March 2012 (2012 Guidelines).¹³ The relevant part of the 2012 Guidelines provided as follows:

4.1.1 Cases are to be referred to me for consideration of my detention intervention power where a person is in immigration detention under s189 of the Act and meets one or more of the criteria below:

- The person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department
- There are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident)
- The person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable ...
- There are unique and exceptional circumstances which justify the consideration of the use my public interest powers [*sic*] and there is no other intervention power available to grant a visa to the person.

43. The 2012 Guidelines do not outline any criteria or cases that should not be referred to the Minister.

44. On 29 April 2016, the Minister issued replacement s 195A Guidelines (2016 Guidelines).¹⁴ The relevant parts of the 2016 Guidelines provide as follows:

3. Guidelines for referral of cases

Cases may be referred to me for consideration of my detention intervention power where a person is in immigration detention under section 189 of the Act and meets one or more of the criteria below:

- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
- there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australia citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), ...
- the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable ...
- there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

4. Cases that should not be brought to my attention

I would generally not expect to have the following types of cases referred to me for my consideration of my detention intervention power:

- people in relation to whom ASIO has issued an assessment that “ASIO assesses [the person] to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*”.
- people whose visa has been refused or cancelled under section 501 of the Act.
- transitory persons, as defined under section 5(1) of the Act, who have been brought to Australia for temporary processes, including but not limited to medical treatment, legal proceedings or transit through Australia to a third country.
- people with no outstanding immigration matters who are not cooperating with efforts to effect their departure from Australia.
- people whom I have previously considered under any of my Ministerial intervention powers, or have previously found not to meet any of my Ministerial intervention guidelines, and who have had no significant changes to their circumstances.
- any other cohorts of people as directed by me.

45. None of the cases that should not be brought to the Minister’s attention appear to apply to Mr CW.

5. Findings

5.1 Act or practice of the Commonwealth

46. Mr CW was detained by the Commonwealth from 23 March 2015 until 7 October 2016, pursuant to s 189(1) of the Migration Act, which requires the detention of unlawful non-citizens.
47. However, there were a number of discretionary powers that the Minister could have exercised in order to detain Mr CW in a manner less restrictive than in an immigration detention centre. Alternatively, the Minister could have exercised his discretionary powers to grant Mr CW a visa.
48. The department assessed Mr CW's case as meeting the s 195A guidelines on 25 May 2016, and provided a submission to the Minister for the consideration of the exercise of his discretionary powers on 25 July 2016. The department did not refer Mr CW's case to the Minister for consideration of a residence determination under s 197AB of the Migration Act at any time during this period of detention.
49. I find that the failure by the department to refer Mr CW's case to the Minister for consideration of the exercise of his discretionary powers from 23 March 2015 until 25 July 2016 constitutes an 'act' within the definition of s 3 of the AHRC Act.

5.2 Inconsistent with or contrary to human rights

50. When the Commission asked the department whether alternative, less restrictive detention options had been canvassed for Mr CW, the department responded on 3 November 2015 that:

Mr CW's last BVE expired on 18 March 2015. As an unlawful non-citizen, Mr CW was detained under section 189 of the Act on 23 March 2015. The Department notes that since Mr CW was re-detained, his case has not been referred for consideration under section 195A or 197AB of the Act.
51. Mr CW was detained in an immigration detention centre for more than 18 months, from 23 March 2015 until 7 October 2016. Having considered the material before me, I am not satisfied that Mr CW's detention in an immigration detention centre has been justified by the department. It has provided no particular reasons for his detention specific to Mr CW such as an individualised risk of absconding or risk of crimes against others.
52. During the period of Mr CW's detention in Australia, the following guidelines for the exercise of the Minister's discretionary powers were in operation:
 - (a) s197AB: 2015 Guidelines
 - (b) s195A: 2012 Guidelines (covering 23 March 2015 to 29 April 2016)
 - (c) s195A: 2016 Guidelines (covering 30 April 2016 to 7 October 2016)

53. The 2015 Guidelines permitted the cases of single adults with ongoing illnesses to be referred to the Minister. Mr CW was admitted to hospital as a psychiatric inpatient in January 2012. He was released from detention into the community in 2012 following an IHMS report that referred to ‘his history of mental health issues’ and recommended that he be managed outside the detention centre environment. In its submission to the Minister dated 11 May 2012, the department noted that ‘Mr CW suffers from diabetes, requiring ongoing monitoring, medical review and management ... He also takes medication for ... a blood condition.’ On 30 January 2014, a psychologist wrote to the department to advise that she had been treating Mr CW for post-traumatic stress disorder, anxiety and depression. Following his re-detention in March 2015, the department consistently referred to and acknowledged that Mr CW suffered from ongoing physical and mental health issues in its case reviews. On this basis it appears that his case fell within the ambit for referral under the 2015 Guidelines.
54. The 2012 Guidelines and the 2016 Guidelines permitted cases to be referred to the Minister where the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable. In light of the IMR that had been issued on 24 March 2015 and prevented Mr CW’s removal from Australia, it appears that his case fell within the ambit for referral under the 2012 Guidelines and the 2016 Guidelines.
55. The 2015 Guidelines and the 2012 Guidelines also permitted cases to be referred to the Minister where there are ‘unique or exceptional circumstances’, and the 2016 Guidelines permitted cases where there are ‘other compelling or compassionate circumstances’. In my view, the following factors are relevant to an assessment as to whether Mr CW’s case presents ‘unique or exceptional circumstances’ and/or ‘compelling or compassionate circumstances’:
- he has been present in Australia for over 4 years
 - he was compliant throughout his immigration processes and lived in the community without incident and in compliance with his BVE conditions for close to 3 years
 - he has a history of mental health issues, and has been diagnosed as having diabetes, high cholesterol and liver problems requiring ongoing monitoring, medication and management
 - in April 2012, IHMS recommended that management outside the detention centre environment would be preferable given Mr CW’s history of mental health issues
 - he has family members who are Australian citizens and permanent residents
 - the IMR remains a barrier to his removal for the foreseeable future.
56. In its submission for possible Ministerial Intervention under s 195A of the Migration Act dated 25 July 2016, the department stated that ‘Mr CW’s case is being referred ... due to the IMR issued by UNCAT, his mental health and his Australian family links’. All of these factors were present when Mr CW was detained and transferred to Villawood IDC some 15 months prior.

57. The department has stated that it reviewed Mr CW's case monthly from March 2015 and 'concluded that his circumstances, including his health and welfare, did not warrant referral for assessment against the section 195A or section 197AB guidelines'.

58. In its response to my preliminary view, the department also stated:

On 19 April 2016, Mr CW's case was referred to the Department for consideration against the section 195A guidelines, following representations from his family in the community and advocates. Mr CW's Australian citizen sister requested Mr CW be considered for release to assist with the care of their elderly permanent resident mother, who was diagnosed with mental health issues. On 25 May 2016, Mr CW's case was assessed as meeting the section 195A guidelines for referral to the Minister and was referred to the Minister for consideration on 25 July 2016.

The Department maintains that there was no unjustified delay in referring Mr CW's case to the Minister and that his detention was appropriate, reasonable and justified in the individual circumstances of his case and therefore not arbitrary within the meaning of article 9 of the ICCPR.

59. Health concerns relating to Mr CW's mother, and the difficulties of his sister in caring for her, were known to the department in 2012. A submission from the department to the Minister for possible Ministerial Intervention dated 15 May 2012 refers to a report 'advising that Mr CW's mother has serious health problems and requires daily care and assistance. Mr CW advises that his sister is finding it very difficult to care for her mother'. As noted above, it is my view that this and other factors assessed by the department as justifying referral to the Minister existed and were known to the department throughout the period of Mr CW's detention.

60. In light of this, I find that the department's failure to refer Mr CW's case to the Minister for consideration of the exercise of his discretionary powers between 23 March 2015 and 25 July 2016 resulted in Mr CW's detention being arbitrary, contrary to article 9 of the ICCPR.

6. Recommendations

61. For the reasons above, I find that Mr CW's detention, for a period of more than 18 months, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

62. 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.¹⁵ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁶ The Commission may also recommend other action to remedy or reduce loss or damage suffered by a person.¹⁷

63. Although Mr CW has been recently issued with a new passport, he remains concerned that the 'inoperative' stamp in his previous passport, and references to him as an irregular / illegal air arrival in departmental documentation, may be problematic particularly if he returned to China.

64. The department continued to describe Mr CW as an IAA in its documents and in submissions to the Minister after the Full Court of the Federal Court made its decision quashing the department's decision to cancel his tourist visa and prohibiting the Minister from acting upon or giving effect to the decision. In a letter to Mr CW's representative dated 2 March 2015, the department stated that although the Court quashed the visa cancellation decision, 'Mr CW remains a person who was refused immigration clearance' and 'IAA is a policy term, used for persons who have arrived in Australia by air and who have not been immigration cleared'.
65. While that may be so, the reason Mr CW was refused immigration clearance was because of the cancellation of his visa, a decision that has since been quashed and a decision the Minister is prohibited from relying upon. I am concerned that the blanket use of the term 'IAA', without further explanation and without consideration of a person's particular circumstances, may impede decision making processes and affect the department's and the Minister's assessment of individual cases.
66. I make the following recommendations:

Recommendation one

67. The Commission recommends that the Commonwealth provide a letter or other document that would assist Mr CW to explain and correct potential misunderstandings arising from the 'inoperative' stamp in his passport, and the use of the term irregular / illegal air arrival in departmental documentation.

Recommendation two

68. The Commission recommends that the department review its information and record management systems and policies to ensure that information related to immigration detainees is accurate, comprehensive and presented in an impartial and objective manner. The Commission recommends that the department carefully consider whether policy terms, such as irregular/ illegal air arrival, accurately reflect a detainee's individual circumstances, or whether some further explanation is required.

Recommendation three

69. The Commission recommends that the Commonwealth consider what other remedies it could offer Mr CW to give full and meaningful effect to the Full Court of the Federal Court decision quashing the department's decision to cancel his tourist visa and prohibiting the Minister from acting upon or giving effect to the decision.

7. The department's response to my findings and recommendations

70. On 12 March 2018, I provided the department with a notice of my findings and recommendations in respect of Mr CW's complaint.
71. On 10 May 2018, the department provided the following response to my findings and recommendations:

The Department notes the findings of the AHRC in this case.

The Department takes its obligations under the *International Covenant on Civil and Political Rights* (ICCPR) seriously. The Department maintains that Mr CW's placement in a detention centre was appropriate, reasonable and justified, in the individual circumstances of his case.

The Minister has issued the Department with guidelines, outlining which cases should be referred to him for consideration of the exercise of his discretionary intervention powers and which cases should not be referred. Mr CW's case was reviewed by the Department regularly and his detention was determined appropriate. As such his case was not referred for assessment against Ministerial intervention guidelines.

Detention Review Committees are held monthly to review all cases in held detention to ensure the ongoing lawfulness and reasonableness of the decision to detain a person, by taking into account all the circumstances of the case, including adherence to legal obligations. This periodic review takes into account any changes in the client's circumstances that may affect immigration pathways including returns and removal, and ensures that alternative placement options have been duly considered. Between 23 March 2015 and 25 July 2016, Mr CW's case was reviewed by the Detention Review Committee on 24 occasions, and these reviews determined that Mr CW's placement in immigration detention was appropriate.

On 7 October 2016, the Minister exercised his power under section 195A of the Act and released Mr CW into the community on a Visitor visa (subclass 600).

Response to Recommendation 1

The Department notes the recommendation of the AHRC. The Department will not be providing Mr CW with a letter or other document. The Department is satisfied that the term irregular/illegal air arrival (IAA) is an accurate policy term, used to describe persons who have arrived in Australia by air and who have not been immigration cleared and that no further clarification will be provided.


Response to Recommendation 2

The Department notes the recommendation of the AHRC. The Department continuously reviews detainee's circumstances [sic] through case reviews, to ensure all information related to a detainee is recorded appropriately and accurately. Departmental information and record management systems are updated as new information becomes available or individual circumstances change to ensure accuracy. The Department has considered and is satisfied that the term irregular/illegal air arrival (IAA) is an accurate term in these circumstances, used to describe persons who have arrived in Australia by air and who have not been immigration cleared and no further clarification is required.

Response to Recommendation 3

The Department notes the recommendation of the AHRC. The Commonwealth has given full effect to the Full Court of the Federal Court's decision quashing the Department's decision to cancel Mr CW's Tourist visa (subclass 676), and prohibiting the Minister from acting upon or giving effect to the decision. Following the decision, Departmental systems were updated to reverse the cancellation decision. However, as the visa had already ceased by the date of the Court's decision, this did not have the effect of reinstating the visa. The Department also complied with the cost orders made in respect of the Court proceedings.

72. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM

President

Australian Human Rights Commission

July 2018

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 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 3 UN Human Rights Committee, General Comment No. 35 (2014) *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 4 UN Human Rights Committee, General Comment No. 35 (2014) *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 [18]; UN Human Rights Committee, General Comment No. 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 6 UN Human Rights Committee, General Comment 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6]; UN Human Rights Committee, General Comment 35 (2014) *Article 9 (Liberty and security of person)*; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 7 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 8 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 9 United Nations Human Rights Committee, General Comment No. 35 (2014), *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 [18], footnotes omitted.
- 10 UN Human Rights Committee, General Comment 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6]; *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 11 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.
- 12 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.
- 13 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Guidelines on Minister's Detention Intervention Power (s195A of the Migration Act 1958)*, 24 March 2012. The guidelines are incorporated into the department's Procedures Advice Manual.
- 14 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Guidelines on Minister's detention intervention power – s 195A of the Migration Act 1958*, 29 April 2016. The guidelines are incorporated into the department's Procedures Advice Manual.
- 15 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 16 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 17 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).

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