



Australian  
Human Rights  
Commission

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AI v

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Commonwealth of

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Australia (DIBP)

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[2015] AusHRC 101

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**AI v Commonwealth of  
Australia (Department of  
Immigration and Border  
Protection)**

[2015] AusHRC 101

Report into arbitrary detention and  
arbitrary interference with family

Australian Human Rights Commission 2015



Australian  
Human Rights  
Commission

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**Australian  
Human Rights  
Commission**

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December 2015

Senator the Hon. George Brandis QC  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr AJ and Mr AK on behalf of their father, Mr AI against the Commonwealth of Australia – Department of Immigration and Border Protection (the department).

I have found that failure to refer Mr AI's case to the then Minister for Immigration and Citizenship around October 2012 for the Minister to consider his public interest powers resulted in Mr AI's detention being arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). For the same reason, I have found that there was an arbitrary interference with Mr AI's family, contrary to articles 17(1) and 23(1) of the ICCPR.

In light of my findings, I recommended that the department promptly put a submission to the Minister for consideration of a residence determination in favour of Mr AI, subject to such reporting requirements or other conditions as may be necessary.

By letter dated 30 September 2015 the department provided a response to my findings and recommendations. The department accepted my recommendation to refer Mr AI's case to the Minister for consideration of the exercise of his public interest powers. I have set out the department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gillian Triggs  
**President**  
Australian Human Rights Commission

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# 1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr AJ and Mr AK on behalf of their father Mr AI. Mr AI is 58 years old and has lived in Australia for the past 27 years. His wife, Ms AL, and one of his sons, Mr AJ, are Australian citizens. His other son, Mr AK is a permanent resident.
2. Mr AI and his family have asked that they not be referred to by name in this report. I consider that the preservation of the anonymity of Mr AI and his family is necessary to protect their privacy. Accordingly, I have given a direction pursuant to section 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and have referred to him throughout as Mr AI, his two sons as Mr AJ and Mr AK and his wife as Ms AL.
3. Mr AI is currently detained in Villawood Immigration Detention Centre (VIDC). The key complaint by Mr AI's sons is that Mr AI should be released into community detention pending the outcome of his current legal proceedings seeking review of a decision to refuse him a protection visa.
4. This inquiry has been undertaken pursuant to section 11(1)(f) of the AHRC Act. The complaint raises issues under articles 9, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR) dealing with arbitrary detention and arbitrary or unlawful interference with family.
5. During the time that Mr AI has been in Australia, he has been convicted of four offences which the Department of Immigration and Border Protection (the department) describes as 'relatively minor'. He was also refused two visas on character grounds. Three of Mr AI's offences resulted in him having to pay a fine. One of the offences (being in possession of jewellery suspected of being stolen) resulted in a custodial sentence of 5 months and 15 days. By contrast, Mr AI has been held in immigration detention for a cumulative period of more than 4 years. Most of this period of detention was later found to be unlawful as result of the failure by the department to properly notify Mr AI about adverse decisions on his visa applications and his right to review these decisions. He has been provided with compensation for part of this period of unlawful detention.
6. The department first considered whether to refer Mr AI's case to the Minister for Immigration and Border Protection for consideration of a community detention placement in June 2014. By this time, Mr AI had already been in immigration detention for more than two years. The department decided not to refer Mr AI's case to the Minister. The department's internal assessment as to whether Mr AI's case should be referred to the Minister properly took into account his criminal history and prior visa refusals on character grounds. The mitigation of risks to the Australian community was a legitimate aim on behalf of the Commonwealth.
7. However, there was material before the department which could have led to the conclusion that the risk to the Australian community either was low or could have been mitigated by conditions placed on community detention. This material included the department's own view that Mr AI's previous convictions were 'relatively minor', the fact that he has not been convicted of any offence for more than 10 years, and its view from the time when Mr AI was living in the community that Mr AI was compliant with the department and therefore unlikely to be a flight risk. These factors did not form part of the department's internal assessment.

8. Further, the department's internal assessment failed to properly take into account the fact that from at least October 2012 Mr AI had outstanding legal applications which would take a significant amount of time to resolve. There was no prospect of his imminent removal from Australia. As a result, there was a significant risk that his continued detention while the assessment of his claims for protection were finally determined would be protracted and could become arbitrary.
9. In the circumstances, the failure to refer Mr AI's case to the Minister in order for the Minister to assess whether to exercise his public interest powers in light of all of the facts was not proportionate to the aim of either facilitating his removal from Australia or mitigating risks to the Australian community.
10. The department should have made a referral in or around October 2012 for the Minister to consider exercising his public interest powers. That referral should have contained a risk assessment of Mr AI balancing relevant factors in his case, along with a consideration of whether any risks could be mitigated in a community detention placement.
11. There was no reasonable justification for the delay of more than a year and a half in making a decision on the question of referral.
12. I find that the failure to refer Mr AI's case to the Minister in or around October 2012 for the Minister to consider exercising his public interest powers resulted in Mr AI's detention being arbitrary, contrary to article 9(1) of the ICCPR. For the same reason, I find that there was an arbitrary interference with Mr AI's family, contrary to articles 17(1) and 23(1) of the ICCPR.
13. I recommend that the department promptly put a submission to the Minister for consideration of a residence determination in favour of Mr AI, subject to such reporting requirements or other conditions as may be necessary.

## 2 Legal framework

### 2.1 Functions of the Commission

14. 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.
15. 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 is inconsistent with or contrary to any human right.



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

## 2.2 Scope of ‘act’ and ‘practice’

17. 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.
18. 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.
19. 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;<sup>1</sup> that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

## 2.3 Arbitrary detention

20. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.<sup>2</sup>
21. 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.
22. 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 detention;<sup>3</sup>
  - (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 system;<sup>4</sup>
  - (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 predictability;<sup>5</sup> and
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>6</sup>
23. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee found detention for a period of 2 months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>7</sup> Similarly, the Human Rights Committee considered that detention during the processing of asylum claims for periods of 3 months in Switzerland was ‘considerably in excess of what is necessary’.<sup>8</sup>
24. The Human Rights Committee has held in several cases 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.<sup>9</sup>

25. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:<sup>10</sup>

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.

26. It will be necessary to consider whether the detention of Mr AI in closed detention facilities could 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.

## 2.4 Interference with family

27. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.<sup>11</sup> The applicant claims that the Commonwealth has engaged in acts which are inconsistent with or contrary to his rights under articles 17 and 23 of the ICCPR.

28. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

29. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

30. Professor Manfred Nowak has noted that:<sup>12</sup>

[T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.

31. For the reasons set out in the Australian Human Rights Commission report *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]-[88], the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

## 3 Background

### 3.1 Arrival in Australia

32. Mr AI is a 58 year old man originally from the People's Republic of China (PRC). He has spent almost half of his life in Australia. He first arrived in Australia on 5 August 1988 at the age of 31, holding a student visa.
33. Mr AI was in Australia during the Tiananmen Square protests that took place in Beijing between April and June 1989. He was subsequently granted two temporary visas made available specifically for Chinese nationals. The department says that these visas 'appear to be granted on humanitarian grounds, for PRC citizens who were in Australia during the Tiananmen Square protests'. The second of these visas purportedly expired in October 1996, however the department acknowledged in September 2014 that, as a result of deficiencies in the department's processes for notifying visa applicants of decisions, Mr AI was still the holder of this permit. The permit finally ceased in March 2015. This issue is considered in more detail below.
34. In July 1992, Mr AI went back to China for seven days and returned to Australia with his wife Ms AL and their son Mr AJ (then three years old). Ms AL returned to China along with AJ to give birth to their second son, AK in April 1993. Ms AL and AJ returned to Australia while AK remained in China with Ms AL's parents.
35. Ms AL and Mr AJ were granted permanent entry permits in January 1995. Mr AI's application for a permanent entry permit was refused on character grounds. Ms AL and Mr AJ acquired Australian citizenship in April 1999. Mr AK arrived in Australia in October 2000 as the holder of a child visa, sponsored by his mother, and was granted permanent residence.

### 3.2 Immigration history and criminal record

36. Over the past 27 years, Mr AI has been convicted of four offences. Three of them resulted in him being required to pay a fine and one resulted in a sentence of imprisonment. The offences were as follows:
  - (a) In 1991, he was convicted of being 'found in a gaming house' and was fined \$150.
  - (b) In 1994, he was convicted of possessing a falsified passport of a foreign government and attempting to depart Australia with more than the permissible amount of money. He was fined \$500 and \$200 for the respective offences.
  - (c) In 2004, he was convicted of having possession of jewellery worth \$137,400 that was suspected of being stolen. He received a sentence of imprisonment of 5 months and 15 days (being the time that he had already spent in detention pending the hearing) and was immediately released.
37. Mr AI has also spent more than 4 years in immigration detention. The department has acknowledged that most of this period of detention was unlawful because Mr AI had a valid visa. Mr AI has received compensation for one period of unlawful detention but it is not clear whether he has received compensation for all periods of unlawful detention.

### 3 Background

38. The background to Mr AI's offences and his immigration history are discussed in more detail below.
39. On 7 February 1993, Mr AI was held in immigration detention as he could not establish his identity and status in Australia. He was released on 29 March 1993 once his identity was established.
40. In January 1994, Mr AI was apprehended at Perth airport attempting to depart Australia using a Singaporean passport in another name. He was held in immigration detention for 10 weeks. The department says that Mr AI first identified himself using a third name and that he had stowed away on a ship from China and arrived in Australia in February 1993. While the department was seeking a travel document from the Chinese authorities to attempt to deport him, it says that Mr AI then identified himself using a fourth name and that he had escaped from China while serving a prison sentence for accepting bribes. Before Mr AI could be deported, the department was advised by the New South Wales police that they had an outstanding arrest warrant for Mr AI.
41. Fingerprint checks revealed Mr AI's identity, that he was the holder of a temporary entry permit and that there was an outstanding warrant for his arrest in New South Wales. He was released from immigration detention into police custody and then extradited to New South Wales on 29 March 1994 to face charges of conspiring to supply a commercial quantity of heroin. He was held in criminal custody for a further four months before being released. The prosecution was unable to offer evidence against Mr AI on the charges against him and his case was dismissed. According to the Australian Federal Police, the person they had identified as the principle witness refused to give evidence.
42. In August 1994, Mr AI was charged and convicted for possessing a falsified passport of a foreign government and attempting to depart Australia with more than the permissible amount of money. He was fined \$500 and \$200 for the respective offences.
43. Mr AI lodged an application for a permanent entry permit in June 1994 while he was detained by police in New South Wales. This application was ultimately refused in October 1996 on character grounds under section 501 of the *Migration Act 1958* (Cth) (Migration Act). The delegate took into account Mr AI's convictions in 1991 and 1994 which he described as 'relatively minor'. He also considered a pattern of deceptive conduct by Mr AI over a number of years and Mr AI's association with persons or groups which, on the balance of probabilities, were involved in criminal conduct. The delegate considered, on the balance of the evidence, that Mr AI would be likely to engage in criminal conduct if he were allowed to remain in Australia and that this would represent a danger to the Australian community. As noted further below, the department acknowledged in 2014 that Mr AI was not properly notified of the review period for this decision and that as a result his temporary entry permit continued in effect.
44. In November 1996, Mr AI sought review in the Administrative Appeals Tribunal (AAT) of the decision to refuse him a permanent entry permit. However, he did not attend the hearing and his application was dismissed in November 1997 without the Tribunal proceeding to a review.

45. As noted above, Mr AI's second temporary entry permit purportedly expired in October 1996 and an associated bridging visa ceased in December 1996. The department considered (incorrectly) that Mr AI was an unlawful non-citizen until he applied for a combined resolution of status visa in March 1998. He was granted a bridging visa in association with his application. The department refused his application for the substantive visa in May 1999, however, it failed to properly notify him of this visa refusal decision.<sup>13</sup>
46. In December 2001, Mr AI was arrested by New South Wales police after being found in possession of jewellery worth \$137,400 and \$769,300 in cash that was suspected of being stolen. He was detained in immigration detention at VIDC for just over four and a half months and then released into police custody for a further 18 days before being issued a criminal justice stay certificate and associated visa while charges against him were pursued. In April 2004, he was convicted of having possession of jewellery worth \$137,400 that was suspected of being stolen. The charges in relation to the cash located at Mr AI's residence were withdrawn. He received a sentence of imprisonment of 5 months and 15 days (being the time that he had already spent in immigration detention and police custody) and was released.
47. In January 2003, Mr AI applied to the AAT for an extension of time to allow him to seek a review of the 1996 decision to refuse him a permanent entry permit, but this was refused. By the time of the second AAT judgment in July 2004, Mr AI had been convicted of the possession of stolen jewellery charge. In reaching the decision not to allow an extension of time the Tribunal weighed a number of factors including the protection of the Australian community. On this point, it said:
- A consideration of the protection of the Australian community requires reference to the seriousness of the offences, whether there is a risk of repetition and the deterrent effect of the refusal of the visa. It is likely that Mr AI's criminal history would be regarded as relatively serious, and there is a suggestion of continuity in the repetition of his offending. Refusal of a visa in such circumstances could have a deterrent effect. Secondly, in the Tribunal's view it is likely that the Australian community would expect that a person who does not respect Australia's law should be refused a visa.
48. Appeals against this AAT decision were unsuccessful.
49. In May 2003, Ms AL was convicted of possession of 520 ecstasy tablets and sentenced to six months imprisonment. It is not clear whether Ms AL and Mr AI were living together at the time.
50. In November 2004, Mr AI was charged with domestic assault in relation to Mr AL. Documents from the department describe them as being estranged as this time. The charges were later withdrawn.
51. On 19 December 2004, Mr AI was located by the New South Wales police on the basis that he was suspected of being an unlawful non-citizen. Mr AI applied for a protection visa on 21 December 2004 and an associated bridging visa. The department found that the application for the bridging visa was invalid on the same day and refused the protection visa application on 8 February 2005. Mr AI sought review of the protection visa decision in the Refugee Review Tribunal. While that review was pending, he was detained at VIDC from 22 March 2005 until 6 May 2005 on the basis that it was believed that he was an unlawful non-citizen. However, because he had not been properly notified about the visa refusal decision in May 1999, this period of detention was unlawful. Mr AI was subsequently compensated by the Commonwealth for this period of detention.

52. From May 2005 until July 2011, Mr AI was granted a series of bridging visas while he sought merits review and judicial review of the decision to refuse him a protection visa and the 1999 decision to refuse him a combined resolution of status visa (after he was properly notified of this decision). Mr AI's review applications were unsuccessful.
53. In December 2011, Mr AI was charged with possession and supply of a prohibited drug and was remanded in custody. He was granted bail on 29 February 2012 and released from custody. On the same day, he was detained under section 189 of the Migration Act and transferred to VIDC. The supply prohibited drug offence was withdrawn by the police and Burwood Local Court discharged Mr AI with no penalty.
54. Mr AI was detained in VIDC from 29 February 2012 until 26 September 2014. This period of detention lasted 2 years and 7 months before the department acknowledged that it was unlawful. On 26 September 2014, following a High Court application filed in August 2014, the department determined that the notification of the department's decision in 1996 to refuse Mr AI a permanent entry permit was not legally effective because it did not correctly inform Mr AI of the time he had to apply for a review of the refusal decision. As a result, the department determined that Mr AI was still the holder of a PRC temporary entry permit. The department released Mr AI from detention on 26 September 2014 and Mr AI then consented to orders dismissing his High Court proceedings on the basis that he had already been released. It is not clear whether the Commonwealth has compensated Mr AI for this latest period of unlawful detention.
55. On 4 October 2012, Mr AI made a second application for a protection visa. This application was initially refused as a result of the bar under section 48A of the Migration Act on making a second application for a protection visa once an initial application has been refused. However, he sought judicial review of this decision which was ultimately successful following the decision in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71. That case held that s 48A did not bar a second application for a protection visa made on complementary protection grounds (for example because there was a real risk that if the person were removed from Australia the person would be arbitrarily killed or suffer torture or cruel, inhuman or degrading treatment or punishment) where the first application was refused prior to those grounds being inserted into the Migration Act. Mr AI's second protection visa application was refused and the decision was affirmed by the Refugee Review Tribunal. Mr AI is currently seeking judicial review of this decision.
56. On 3 December 2014, the department purported to re-notify Mr AI of its decision to refuse him a permanent entry permit on character related grounds. His PRC temporary entry permit was taken to cease on that day and he was detained again in VIDC.
57. On 6 March 2015, the department realised that its re-notification of its decision to refuse him a permanent entry permit was also defective, because it incorrectly informed him that he only had nine days to seek merits review. As a result, it re-notified him (again) of this decision. It appears that the period of Mr AI's detention from 3 December 2014 until 6 March 2015 was also unlawful.

58. Mr AI continues to be detained at VIDC. The period from 6 March 2015 is the first time that Mr AI has not held a valid visa since November 1991. He has outstanding court cases in relation to his second protection visa application (currently before the Federal Circuit Court) and in relation to the most recent attempts to notify him of the decision to refuse him a permanent entry permit.
59. The total period he has been in immigration detention in Australia is more than 4 years. In April 2015, the department provided its 48 month review to the Commonwealth Ombudsman in relation to Mr AI's detention. It appears that the majority of this period of detention has been unlawful.

### 3.3 Ministerial consideration of Mr AI's status and attempts to remove him from Australia

60. Mr AI's case was first referred to the then Minister for Immigration and Citizenship, the Hon Chris Bowen MP, on 11 July 2011 (while Mr AI was living in the community) to consider whether to grant Mr AI a bridging visa under s 195A of the Migration Act pending the outcome of his judicial review applications. The department noted that the previous decisions to issue bridging visas to Mr AI were invalid as result of the decision to refuse him a permanent entry permit in 1996 on character grounds. At this stage, the department was unaware that the 1996 refusal decision was not legally effective. If it was effective, then, under s 501E of the Migration Act, Mr AI would not have been allowed to apply for another visa (other than a protection visa). However, the Minister has the discretion under s 195A to grant a visa to a person in detention whether or not the person has applied for the visa and whether or not the person satisfies the criteria for the grant of the visa.
61. The department said in its submission that Mr AI was 'pursuing an appropriate visa pathway' in seeking judicial review of decisions that affected him. It noted that Mr AI was compliant with the department and was attending scheduled meetings with the department. It said:

As the Department has compounded the issues regarding Mr AI's lawfulness it is not considered appropriate to detain him while his case is resolved. As such, the Department proposes that the most appropriate management of Mr AI through this process would be on a BVE for a time frame specified by you. The Department is recommending a period of six (6) months to ensure thorough consideration of the issues can be conducted and that appropriate options can be referred for your consideration. The Department also considers it appropriate to grant the BVE with work rights.
62. The Minister did not agree to intervene under s 195A to grant a bridging visa and sought more information from the department about the character concerns that gave rise to the original decision under s 501 of the Migration Act. Mr AI's case was not referred back to Mr Bowen under s 195A.
63. A second submission to the Minister for consideration of the exercise of his discretionary powers was referred to Mr Bowen on 12 June 2012 (around three and a half months after Mr AI was detained). This submission dealt with the potential for the Minister to exercise his powers under ss 351 or 417 of the Migration Act to grant a permanent visa to Mr AI. The department recommended against the grant of a permanent visa, saying:

The Department considers that intervention under section 351 or section 417 may not be appropriate in this case.

The Department acknowledges that Mr AI's convictions in 1994 and 2004 were relatively minor. He was not convicted of drug charges because the witness declined to give evidence and the prosecution failed to provide evidence against him.

However, reports from the AFP, the NSW Crime Commission and the NSW Drug Enforcement Agency indicate that he was charged for possessing a large quantity of heroin, conspiring to supply a commercial quantity of heroin and for associating with persons or gangs involved in criminal conduct.

Moreover, Mr AI has exhibited repetitive offending over a prolonged period of time since 1991 and was last charged as recently as 10/12/2011 with possession and supply of a prohibited drug. The Department considers that if permitted to remain in Australia, Mr AI would represent a threat to the Australian community. The risk of recidivism appears to be high. There is nothing to indicate that if given a chance he will be an improved person or that he will not repeat his past behaviour.

The Department acknowledges that his wife and children are Australian citizens/permanent residents. However, his wife has served previous sentences for possession of prohibited drugs. The Department has information that Mr AI was charged with domestic assault and malicious damage in relation to Ms AL and has no current evidence that Mr AI is in an ongoing relationship with his wife. His children are adults and Mr AI has lived away from his children for significant periods of time.

The Department considers that Mr AI's criminal history and disrespect for the law far outweigh the humanitarian considerations operating in his case.

64. The Minister accepted the recommendation of his department and on 17 June 2012 decided not to exercise his powers under ss 351 or 417 of the Migration Act to grant Mr AI a permanent visa.
65. Following this decision, as Mr AI did not have any ongoing legal proceedings, the department began making arrangements to remove him from Australia. At this time, the department was unaware that Mr AI still held a valid visa because the notification of the department's decision in 1996 to refuse Mr AI as permanent entry permit was not legally effective. As a result, his removal from Australia would not have been lawful. Removal was scheduled for 27 July 2012. Mr AI was advised about the removal on 19 July 2012. On 20 July 2012, he commenced proceedings in the High Court seeking review of the Minister's decision to refuse him a permanent visa. Mr AI's case officer recorded that 'Mr AI's lawyer has ... filed an appeal with the High Court against MI. Therefore, Mr AI will remain in detention until this matter is finalised'.
66. As noted in [55] above, Mr AI made a second application for a protection visa on 4 October 2012 which was deemed to be invalid under s 48A of the Migration Act. On 10 October 2012, he sought judicial review of this decision. The department noted that Mr AI was one of around 170 people claiming that s 48A did not prevent a second application for a protection visa on complementary protection grounds where the first application was refused prior to those grounds being inserted into the Migration Act.
67. A second removal was scheduled for 7 November 2012, but this was also cancelled because of Mr AI's outstanding judicial review proceedings.



## 4 Release from immigration detention pending outcome of judicial proceedings

68. The key complaint by Mr AJ and Mr AK is that Mr AI should be released into community detention pending the outcome of his legal proceedings.

### 4.1 Power to make residence determination and applicable guidelines

69. Mr AI's sons claim that it was open to the Minister for Immigration to permit Mr AI to live in the community subject to a 'residence determination'. 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. The residence determination may be made subject to other conditions such as reporting requirements.
70. On 1 September 2009, the then Minister published guidelines to explain the circumstances in which he may wish to consider exercising his powers under s 197AB to make a residence determination (guidelines).<sup>14</sup> These guidelines were in operation when Mr AI was detained on 29 February 2012.
71. The guidelines provided that the making of a residence determination is a decision about an immigration detention placement while the immigration status of a person is resolved.<sup>15</sup> The guidelines provided that priority for community detention will be given to certain categories of cases including those that will take a considerable period to substantively resolve and other cases with unique or exceptional circumstances.<sup>16</sup> Priority cases were to be assessed and a submission with a residence determination recommendation was to be provided to the Minister as soon as practicable.<sup>17</sup> The recommendation should contain a risk assessment balancing a number of factors including character, identity and security issues, age and family composition, cooperation with immigration processes and the likelihood of compliance with residence determination conditions, and other unique or exceptional characteristics.<sup>18</sup>
72. In assessing whether a person's case will take a considerable period to substantively resolve, it is relevant that the guidelines indicated that the Minister would not usually consider granting a residence determination if removal is likely to occur within 3 months or where a visa is likely to be granted within 2 months.<sup>19</sup> In the latter case, a bridging visa would be more appropriate.
73. New guidelines were issued by the Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, on 30 May 2013.<sup>20</sup> Further guidelines were issued by the Hon Scott Morrison MP, Minister for Immigration and Border Protection, on 18 February 2014.<sup>21</sup> The department has provided the Commission with an unsigned copy of guidelines apparently made by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, on 29 March 2015.<sup>22</sup> Each of these new sets of guidelines provided that the Minister would not expect referral of cases where a person does not meet the character test under s 501 of the Migration Act, unless there were exceptional circumstances.

74. The phrase 'exceptional circumstances' is not defined in the guidelines, but the similar phrase 'unique or exceptional circumstances' is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>23</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- (i) circumstances that may bring Australia's obligations as a party to the ICCPR into consideration; and
  - (b) the length of time the person has been present in Australia (including time spent in detention).
75. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.

## 4.2 Consideration of residence determination

76. It was clear from at least October 2012 that Mr AI had outstanding legal applications which would take a significant amount of time to resolve. There was no prospect of his imminent removal from Australia. As a result, it was appropriate for the department to consider whether it was necessary to keep Mr AI in immigration detention pending the outcome of these proceedings.
77. In response to my preliminary view in this matter, the department said:
- Mr AI's case was reviewed by his departmental case manager on a monthly basis. Monthly reviews conducted between July and December 2012 concluded that Mr AI's placement in held immigration detention was appropriate, given the circumstances of his case. Mr AI had a criminal history and no reported mental or physical health issues. As such, Mr AI's case was not referred by his departmental manager for assessment against the s 195A or 197AB guidelines.
78. At the same time, the department also said that there was no request from Mr AI or on Mr AI's behalf for his case to be assessed against the s 195A or 197AB guidelines until July 2013. However, the department is not restricted in making a submission to the Minister by whether or not a request for such a submission is made by or on behalf of a person in detention.
79. As noted above, prior to Mr AI's detention in February 2012, the department's view was that it was appropriate for Mr AI to be granted a bridging visa and for him to live in the community with work rights pending the resolution of his immigration status. It described Mr AI's legal proceedings as him 'pursuing an appropriate visa pathway'. Mr AI was compliant with the department and was attending scheduled meetings.
80. After the unsuccessful attempts to remove Mr AI from Australia, there was a significant delay of more than a year and a half until a decision was made about whether to refer Mr AI's case to the Minister for consideration of a community detention placement. This included almost a year from when Mr AI's sons were first informed that an assessment was underway.

81. The department informed Mr AI's sons on 21 June 2013 that it was assessing Mr AI's case for possible referral to the Minister under s 195A of the Act. That assessment was not completed until 4 June 2014. It appears that the assessment considered whether to refer Mr AI's case to the Minister either under s 195A (for the grant of a visa, presumably a bridging visa) or under s 197AB (for a community detention placement). The decision of the Assistant Director of the Complex Case Resolution Section on 4 June 2014 was not to refer Mr AI's case to the Minister for consideration of either a bridging visa or community detention on the basis that Mr AI had 'serious character issues'.
82. In assessing whether to refer Mr AI for a community detention placement, the departmental officer listed a range of factors. Three of those factors are considered in more detail below.

**(a) Criminal history**

83. One of the key factors weighing against referral appears to have been Mr AI's criminal history. In the referral decision, this was described in the following way:
- Mr AI has an extensive criminal history, for which he has spent over two years (cumulative) in criminal custody.
84. The first thing to note about this description is that Mr AI has only been convicted of one offence that carried a custodial sentence and this was for a period of 5 months and 15 days. While he has been convicted of four offences since first arriving in Australia in 1988, at least three of those were properly described by the department as 'relatively minor' and attracted fines of \$500 or less.
85. The second thing to note is that his last conviction was in 2004, more than a decade ago.
86. The third thing to note is that in other contexts the department has suggested that the offence for which he received a custodial sentence was not a serious offence. In the June 2012 submission to the Minister, this offence was also described by the department as 'relatively minor'. Further, in refusing to grant Mr AI a protection visa on complementary protection grounds in June 2014, another officer of the department considered the risk of Mr AI being persecuted in China on the basis of his criminal record. That officer described Mr AI's offence in the following way:
- In the current case, the applicant was not convicted of a drugs offence. He was convicted of harbouring stolen goods, which is highly improbable to [be] seen as a serious crime in China. ... Even if his case was reported in China, then it would be apparent to anyone reading the article that he was convicted of the much lesser charge of concealing stolen goods.
87. Similar comments were made by the Refugee Review Tribunal in August 2014 in reviewing the decision to refuse Mr AI a protection visa. The Tribunal reviewed all of Mr AI's convictions and found that they were 'relatively low level convictions' and crimes of a 'minor nature'.

**(b) Character assessment**

88. A second key factor in assessing whether to refer Mr AI for a community detention placement was that he has had two visa applications refused on character grounds.
89. These visa refusals occurred in 1996 and 1999. The basis for these visa refusals was in part the criminal convictions described by the department as 'relatively minor' and in part untested allegations about Mr AI's associates.
90. In the circumstances, particularly in light of the considerable period of time that Mr AI could anticipate being detained, these visa refusals should not have prevented a referral being made to the Minister so that the Minister could make an assessment in light of all of the facts.

**(c) Visa application status**

91. A third key factor in assessing whether to refer Mr AI for a community detention placement was that 'Mr AI has been found not to be owed protection by the Department, and this decision has been affirmed by the RRT and courts however, he refuses to depart voluntarily'.
92. At first glance, this statement may suggest that Mr AI's application for a protection visa has been finally determined. However, as acknowledged later in the assessment, this is not the case. Mr AI has sought review of the decision to refuse him a protection visa on complementary protection grounds and that case is currently before the Federal Circuit Court.

**(d) Conclusion**

93. In response to my preliminary view in this matter, the department submitted that:
- Mr AI's current detention is lawful and proportionate to the legitimate aim of protecting the Australian community given Mr AI's criminal convictions, but also other character concerns such as the suggestion of continuity in the repetition of his offending (as noted by the Administrative Appeals Tribunal (AAT)) and a pattern of deception in Mr AI's conduct in his dealings with the Department involving the use of multiple aliases during his stay in Australia and attempted use of fraudulent passports.
94. The department's internal assessment as to whether Mr AI should be referred to the Minister for consideration of a community detention placement properly took into account his criminal history and prior visa refusals on character grounds. The mitigation of risks to the Australian community was a legitimate aim on behalf of the Commonwealth.
95. However, there was material before the department which could have led to the conclusion that the risk to the Australian community either was low or could have been mitigated by conditions placed on community detention. This material included the department's own view that Mr AI's previous convictions were 'relatively minor', the fact that he has not been convicted of any offence for more than 10 years, and its view from the time when Mr AI was living in the community that Mr AI was compliant with the department and therefore unlikely to be a flight risk. These factors did not form part of the department's internal assessment.
96. Further, the department's internal assessment failed to properly take into account the fact that from at least October 2012 Mr AI had outstanding legal applications which would take a significant amount of time to resolve. There was no prospect of his imminent removal

from Australia. As a result, there was a significant risk that his continued detention while the assessment of his claims for protection were finally determined would be protracted and could become arbitrary.

97. In the circumstances, I consider that the failure to refer Mr AI's case to the Minister in order for the Minister to assess whether to exercise his public interest powers in light of all of the facts, was not proportionate to the aim of either facilitating his removal from Australia or mitigating risks to the Australian community.
98. The department should have made a referral in or around October 2012 for the Minister to consider exercising his public interest powers. That referral should have contained a risk assessment of Mr AI balancing relevant factors in his case, along with a consideration of whether any risks could be mitigated in a community detention placement.
99. There was no reasonable justification for the delay of more than a year and a half in making a decision on the question of referral.
100. I find that the failure to refer Mr AI's case to the Minister in or around October 2012 for the Minister to consider exercising his public interest powers resulted in Mr AI's detention being arbitrary, contrary to article 9(1) of the ICCPR.

## 5 Interference with family

101. Mr AJ and Mr AK claim that Mr AI's detention and the potential for him to be removed from Australia results in an arbitrary interference with family.
102. As Mr AI still has a judicial review proceeding on foot relating to the decision to refuse his second protection visa application, I consider that it is premature to make any findings about his potential removal from Australia.
103. Mr AI's immediate family in Australia comprises his wife, Ms AL and his adult sons Mr AJ and Mr AK. The material before me suggests that Mr AI may be estranged from his wife.
104. The complaint has been made by his sons. It does not appear that Mr AI lives with his sons, but the fact that they have made an application to the Commission on his behalf indicates that they have a close connection to him. The submission said that one of the sons had self-harmed after considering the prospect that his father would be removed from Australia.
105. In response to my preliminary view in this matter, the department noted that Mr AI's sons have regularly visited him in detention and have requested ministerial intervention on his behalf which supports a view that they currently have a close connection.
106. The detention of Mr AI clearly amounts to an interference with his family. The department submitted that 'the interference with his family which flows as a result from Mr AI's detention is reasonable in the circumstances'. This submission is based on the department's submission that Mr AI's detention is not arbitrary. As noted above, I have reached a different view about the nature of his detention given the failure by the department to make a submission to the Minister for the consideration by him of his public interest powers.
107. As I have found that Mr AI's detention was arbitrary, I find that the interference with his family was also arbitrary, contrary to articles 17(1) and 23(1) of the ICCPR.

## 6 Findings and recommendations

108. As noted above, the department first considered whether to refer Mr AI's case to the Minister for consideration of a community detention placement in June 2014. By this time, Mr AI had already been in immigration detention for more than two years. The department decided not to refer Mr AI's case to the Minister. The department's internal assessment as to whether Mr AI's case should be referred to the Minister properly took into account his criminal history and prior visa refusals on character grounds. The mitigation of risks to the Australian community was a legitimate aim on behalf of the Commonwealth.
109. However, there was material before the department which could have led to the conclusion that the risk to the Australian community either was low or could have been mitigated by conditions placed on community detention. This material included the department's own view that Mr AI's previous convictions were 'relatively minor', the fact that he has not been convicted of any offence for more than 10 years, and its view from the time when Mr AI was living in the community that Mr AI was compliant with the department and therefore unlikely to be a flight risk. These factors did not form part of the department's internal assessment.
110. Further, the department's internal assessment failed to properly take into account the fact that from at least October 2012 Mr AI had outstanding legal applications which would take a significant amount of time to resolve. There was no prospect of his imminent removal from Australia. As a result, there was a significant risk that his continued detention while the assessment of his claims for protection were finally determined would be protracted and could become arbitrary.
111. In the circumstances, the failure to refer Mr AI's case to the Minister in order for the Minister to assess whether to exercise his public interest powers in light of all of the facts was not proportionate to the aim of either facilitating his removal from Australia or mitigating risks to the Australian community.
112. The department should have made a referral in or around October 2012 for the Minister to consider exercising his public interest powers. That referral should have contained a risk assessment of Mr AI balancing relevant factors in his case, along with a consideration of whether any risks could be mitigated in a community detention placement.
113. There was no reasonable justification for the delay of more than a year and a half in making a decision on the question of referral.
114. I find that the failure to refer Mr AI's case to the Minister in or around October 2012 for the Minister to consider exercising his public interest powers resulted in Mr AI's detention being arbitrary, contrary to article 9(1) of the ICCPR. For the same reason, I find that there was an arbitrary interference with Mr AI's family, contrary to articles 17(1) and 23(1) of the ICCPR.
115. 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.<sup>24</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>25</sup>

116. I recommend that the department promptly put a submission to the Minister for consideration of a residence determination in favour of Mr AI, subject to such reporting requirements or other conditions as may be necessary.

## 7 Department's response

117. By letter dated 30 September 2015, the department provided a response to my findings and recommendations. The response was in the following terms:

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

The Department maintains that [Mr AI]'s placement in a detention centre was appropriate, reasonable and justified in the individual circumstances of his case and therefore not arbitrary within the meaning of article 9(1) of the ICCPR.

The Department maintains that [Mr AI]'s immigration detention was lawful and carried out in accordance with applicable statutory procedure prescribed under the *Migration Act 1958*. The Department also upholds that its interference with [Mr AI]'s family unity was not arbitrary given this lawfulness and that it was proportionate to the legitimate aim of protecting the Australian community in view of [Mr AI]'s criminal convictions and other character concerns. As the Department's position is that interference with family unity is permissible where it is not arbitrary and where it is lawful at domestic law, the department upholds that the interference with [Mr AI]'s family is not a breach of Article 17(1) or 23(1) of the ICCPR.

On 15 September 2015, [Mr AI] was found not to meet the guidelines for referral to the Minister under section 195A and 197AB. However, given the recommendation made by the AHRC, the Department is preparing a submission to the Minister for his consideration under sections 195A and 197AB of the Act.

118. I report accordingly to the Attorney-General.



Gillian Triggs  
**President**  
Australian Human Rights Commission  
December 2015

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 2 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 3 United Nations Human Rights Committee, General Comment 8 (1982), *Right to liberty and security of persons (Article 9)*. See also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003).
- 4 United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the United Nations Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 6 United Nations Human Rights Committee, *A v Australia*, Communication No. 900/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community was not a sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 7 United Nations Human Rights Committee, *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990).
- 8 United Nations Human Rights Committee, Concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
- 9 United Nations Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002); *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007); *Baban v Australia*, Communication No. 1014/2001, CCPR/C/78/D/1014/2001 (2003); *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006).
- 10 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- 11 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 12 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
- 13 This issue was considered by the Federal Court in *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308. The case held that a Migration regulation that specified when a notice from the department was deemed to have been received by a person was invalid. As a result, notices relying on that regulation for their effectiveness were legally ineffective. The Commonwealth Ombudsman inquired into 247 cases of people affected by this decision and produced a report in June 2007.
- 14 The Hon Chris Evans MP, Minister for Immigration and Citizenship, *Minister's Residence Determination under s 197AB and s 197AD of the Migration Act 1958, Guidelines*, 1 September 2009. The guidelines are incorporated into the department's Procedures Advice Manual.
- 15 Guidelines at [2.3.1].
- 16 Guidelines at [4.1.4].
- 17 Guidelines at [4.1.5].
- 18 Guidelines at [3.1.2] and [4.1.2].
- 19 Guidelines at [5.2.2] and [5.2.3].
- 20 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *Minister's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 30 May 2013. The guidelines are incorporated into the department's Procedures Advice Manual.
- 21 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the department's Procedures Advice Manual.
- 22 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the department's procedures Advice Manual.
- 23 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s 345, s 351, s 417 and s 501J)*, 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the department's Procedures Advice Manual.
- 24 AHRC Act s 29(2)(a).
- 25 AHRC Act s 29(2)(b).







## Further Information

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