



Australian  
Human Rights  
Commission

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

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**[2020] AusHRC 139**

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15 December 2020

# **LF v Commonwealth (Department of Home Affairs)**

[2020] AusHRC 139

*Report into arbitrary detention*

Australian Human Rights Commission 2020

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) (AHRC Act) into the human rights complaint of Mr LF, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr LF was detained in an immigration detention centre in Australia between 12 February 2018 and 12 October 2018. He complains that his detention was arbitrary, contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that the Department's decision not to invite the Minister to consider exercising his discretion under s 195A and s 197AB of the *Migration Act 1958* (Cth) for the periods of Mr LF's detention from 12 February 2018 to 16 May 2018 and 27 June 2018 to 7 September 2018 contributed to the continued detention of Mr LF, without consideration of whether that detention was justified in the particular circumstances of Mr LF's case, and was inconsistent with or contrary to article 9(1) of the ICCPR.

On 13 October 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 13 November 2020. That response can be found in Part 9 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission  
December 2020

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# 1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr LF against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights.
2. This is a complaint of arbitrary detention contrary to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution or in other legislation. The High Court has upheld the legality of indefinite detention under the *Migration Act 1958* (Cth).<sup>2</sup> As a result, there are limited avenues for an individual to challenge their detention.
3. The Commission's ability to inquire into human rights complaints, including arbitrary detention, is narrow in scope, being limited to a discretionary 'act' or 'practice' of the Commonwealth that is alleged to breach a person's human rights.
4. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than closed detention to achieve the ends of the immigration policy, for example the imposition of reporting obligations, sureties or other conditions, in order to avoid the conclusion that detention was 'arbitrary'.
5. The approach under current Government policy is contrary to what is required under human rights obligations Australia has committed to by ratifying the ICCPR. The Department conducts monthly case reviews that consider if a person's placement in detention is justified. However, these reviews focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual for reasons specific to them, such as a risk of absconding or a threat to national security.
6. In this case, Mr LF arrived in Australia on a student visa on 19 February 2017. In November 2017, he was charged with a number of offences. As a result of those charges, Mr LF's student visa was cancelled under s 116(1)(e)(i) of the *Migration Act 1958* (Cth) on 17 January 2018.

7. Mr LF applied to the Administrative Appeals Tribunal (AAT) for review of the decision to cancel his student visa and was granted a Bridging Visa E (BVE).
8. On 12 February 2018, Mr LF's BVE was cancelled and he was detained under s 189(1) of the *Migration Act*.
9. On 23 July 2018, the AAT affirmed the Minister's decision to cancel Mr LF's student visa and, on 30 August 2018, Mr LF applied to the Federal Circuit Court for judicial review of the AAT's decision.
10. On 12 October 2018, Mr LF was granted a BVE without application and released from immigration detention.
11. On 21 December 2018, the Federal Circuit Court remitted the matter back to the AAT for merits review.
12. On 31 July 2019, the AAT set aside the Minister's decision to cancel Mr LF's student visa and substituted a decision not to cancel the visa.
13. Mr LF complains that his detention between 12 February 2018 and 12 October 2018 was arbitrary, and therefore inconsistent with or contrary to article 9(1) of the ICCPR.<sup>3</sup>
14. This inquiry is being undertaken pursuant to s 11(1)(f) of the AHRC Act.
15. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Mr LF's complaint.
16. Mr LF 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 refer to the complainant as Mr 'LF' in this document.

## **2 Summary of findings and recommendations**

17. As a result of this inquiry, I find that the decision of the Department not to invite the Minister to consider exercising his discretion under s 195A and s 197AB for the periods of Mr LF's detention from 12 February 2018 to 16 May 2018 and 27 June 2018 to 7 September 2018 contributed to the continued detention of Mr LF, without consideration of whether that detention was justified in the particular circumstances of Mr LF's case, and was inconsistent with or contrary to article 9(1) of the ICCPR.

18. I make the following recommendation:

### **Recommendation**

The Department should regularly conduct open periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and, if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be considered.

## **3 Background**

19. Mr LF is a national of Bangladesh. He arrived in Australia on 19 February 2017 on a student visa.
20. On 16 November 2017, Mr LF was charged with four counts of 'assault with act of indecency', one count of common assault and three counts of 'behave in an offensive manner in/near a public place/school'. Because of those charges, Mr LF's student visa was cancelled on 17 January 2018 under s 116(1)(e)(i) of the *Migration Act 1958* (Cth).
21. On 20 January 2018, Mr LF applied to the AAT for merits review of the decision to cancel his student visa. On 23 January 2018, Mr LF was granted a BVE and he remained in the community.
22. On 12 February 2018, Mr LF's BVE was cancelled under s 116(1)(g) of the *Migration Act* and r 2.43(1)(p)(ii) of the *Migration Regulations 1994* (Cth), which provides for cancellation of a visa where the holder has been charged with an offence. As a result, Mr LF was detained and transferred to Villawood Immigration Detention Facility (VIDF).
23. On 14 February 2018, Mr LF lodged an application for a BVE. However, the application was deemed invalid for failing to meet Item 1305(3)(g) of Schedule 1 of the *Migration Regulations*, a requirement that the applicant has not previously held a visa which was cancelled on a ground specified in r 2.43(1)(p). As set out in paragraph 22 above, Mr LF's BVE had been cancelled pursuant to r 2.43(1)(p)(ii) of the *Migration Regulations*.
24. On 16 May 2018, Mr LF was convicted of three counts of 'assault with act of indecency' and acquitted of the charge of common assault, with the remaining charges being withdrawn. He was sentenced to 12 months' imprisonment with a non-parole period of nine months and transferred to criminal custody.

25. On 27 June 2018, Mr LF was released from criminal custody on bail pending the outcome of his appeal against his criminal convictions and was detained under s 189(1) of the *Migration Act* and transferred to VIDF.
26. On 23 July 2018, the AAT affirmed the Minister's decision to cancel Mr LF's student visa after refusing to grant an adjournment pending the outcome of Mr LF's appeal against his criminal convictions.
27. On 30 August 2018, Mr LF applied to the Federal Circuit Court for review of the AAT's decision to affirm the Minister's decision to cancel his student visa while the appeal against his convictions remained unresolved.
28. On 7 September 2018, Mr LF's appeal against his criminal convictions was successful and his criminal charges were dismissed.
29. On 10 September 2018, Mr LF lodged a request for Ministerial Intervention pursuant to s 351 of the *Migration Act*, which allows the Minister to substitute a more favourable decision for the decision of the Tribunal in relation to the cancellation of his student visa.
30. On 20 September 2018, Mr LF lodged two applications for a BVE, one of which was deemed invalid under Item 1305(3)(a) of Schedule 1 of the *Migration Regulations* on the same day. That provision requires the visa application to be made in an approved form, in a specified way and at a specified place. The second application was deemed invalid on the following day pursuant to Item 1305(3)(g) of Schedule 1 of the *Migration Regulations*. As set out above in paragraph 23, this provision requires that the applicant has not previously held a visa which was cancelled on a ground specified in r 2.43(1)(p).
31. On 25 September 2018, Mr LF's request for Ministerial Intervention pursuant to s 351 of the *Migration Act* was found not to have met the guidelines for referral to the Minister.
32. On 10 October 2018, Mr LF requested Ministerial intervention pursuant to s 195A of the *Migration Act*, which allows the Minister to exercise his discretion to grant a visa to a person in immigration detention, subject to any conditions necessary to take into account their specific circumstances.
33. On 12 October 2018, Mr LF was granted a BVE without application pursuant to r 2.25 of the *Migration Regulations* and was released from detention.
34. On 19 December 2018, the Minister withdrew from the Federal Circuit Court judicial review proceedings, accepting that the decision of the AAT was affected by jurisdictional error as a result of its decision to refuse to



grant an adjournment pending the outcome of Mr LF's appeal against his criminal convictions.

35. On 21 December 2018, the Federal Circuit Court remitted the matter back to the AAT for merits review.
36. On 31 July 2019, the AAT set aside the Minister's decision to cancel Mr LF's student visa and substituted a decision not to cancel the visa.

## **4 Conciliation**

37. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

## **5 Procedural history of this inquiry**

38. On 4 June 2020, I issued a preliminary view in this matter and gave Mr LF and the Department an opportunity to respond to my preliminary findings.
39. On 4, 8, 10 and 13 June, 29 July, 3 and 19 August 2020, Mr LF provided responses to my preliminary view.
40. On 30 July 2020, the Department responded to my preliminary view.

## **6 Legislative framework**

### **6.1 Functions of the Commission**

41. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
42. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
43. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

### **6.2 What is an 'act' or 'practice'?**

44. 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.

45. 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.
46. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.<sup>4</sup>

### **6.3 What is a human right?**

47. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
48. 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.

## **7 Arbitrary detention**

49. Mr LF complains about his detention in an immigration detention centre. This requires consideration to be given to whether his detention was 'arbitrary', contrary to article 9(1) of the ICCPR.

### **7.1 Law on article 9 of the ICCPR**

50. 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>5</sup>
  - (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable, or disproportionate in the particular circumstances<sup>6</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>7</sup>
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>8</sup>

51. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be 'arbitrary' because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>9</sup>
52. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than 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>10</sup>
53. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>11</sup>
54. Under international law, the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing 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'.<sup>12</sup>
55. It is therefore necessary to consider whether the detention of Mr LF 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.

## 7.2 Act or practice of the Commonwealth

56. Mr LF was an unlawful non-citizen, meaning the *Migration Act* required that he be detained.
57. However, there are a number of powers that the Minister could have exercised either to grant a visa, or to allow detention in a less restrictive manner, than in a closed immigration detention centre.
58. Section 197AB of the *Migration Act* permits the Minister, where the Minister considers 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.
59. 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 of the *Migration Act* to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
60. I consider the following act of the Commonwealth as relevant to this inquiry:
  - The decision of the Department not to refer the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under s 195A or s 197AB of the *Migration Act*.

## 7.3 Findings

61. Mr LF was held in immigration detention for a period of 200 days between 12 February 2018 and 12 October 2018.
62. On 21 October 2017, the Hon Peter Dutton MP, Minister for Home Affairs, re-issued guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the *Migration Act*.<sup>13</sup>
63. These guidelines provide 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.

64. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
65. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>14</sup> 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.
66. Similarly, guidelines have been published in relation to the exercise of the Minister's power under s 195A of the *Migration Act* to grant a visa to a person in immigration detention.
67. In April 2016, Minister Dutton re-issued s 195A guidelines, which are the current guidelines in use by the Department. These guidelines provide 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*. Although there is no exception for unique or exceptional circumstances—unlike the other ministerial intervention guidelines referred to above—under these guidelines the Minister will consider cases where there are compelling or compassionate circumstances.
68. In response to the Commission's question regarding whether alternative, less restrictive detention options had been considered, on 30 January 2020 the Department advised that:
- Mr [LF] did not present with any significant health or welfare issues or vulnerabilities. Furthermore, no issues were identified through the Detention Review Committee. Given the Department's cancellation decision under section 116 of the Act, and as the evidence before the Department indicated Mr [LF] could be appropriately managed in a detention centre environment, Mr [LF]'s case was not considered as one that should be referred for Ministerial Intervention consideration under either section 195A or 197AB.

69. In response to my preliminary view, on 30 July 2020 the Department further stated that:

The Department conducts formal monthly reviews of efforts to resolve the status of detainees in held immigration detention. The purpose of these reviews is to ensure that:

- Where a person is managed in a held detention environment, that the detention remains lawful and reasonable.
- The location of the person remains appropriate to the person's situation and conducive to status resolution.
- Regardless of which location a person is being managed in, their case is progressing and departmental activity is underway to reach an outcome.
- That appropriate services are being provided in an effective and cost efficient manner.

The Department conducted monthly reviews of Mr [LF]'s case during the periods of his immigration detention and the reviews did not identify any vulnerabilities or other reasons to consider community placement.

70. In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary, and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'.
71. To comply with these obligations the Department would need to conduct an individualised risk assessment to determine whether any risks an individual may pose to the community could be mitigated, and ongoing reviews to determine whether detention continues to be necessary.

**(a) Detention between 12 February 2018 and 16 May 2018**

72. In respect of the period from 12 February 2018 to 16 May 2018, the Department's response of 30 July 2020 stated that:

From the time Mr [LF] was detained on 12 February 2018 to 16 May 2018, his case was regularly reviewed. In each review, the Department took into account Mr [LF]'s circumstances, including his immigration pathway, ongoing criminal charges, as well as his health and welfare needs were being met in immigration detention. Given Mr [LF]'s criminal charges were not yet resolved and the absence of evidence that his health could not be managed in a held detention environment, it was considered there was

no need to refer his case for assessment under sections 195A or 197AB of the Act.

73. As highlighted in the Department's response, its monthly case reviews focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual. The reviews of Mr LF's detention did not consider the necessity of his detention.
74. While Mr LF was charged with crimes that were sufficiently serious to attract a term of imprisonment, this does not mean that Mr LF would necessarily have failed the character test in s 501 of the *Migration Act* prior to his conviction and sentencing on 16 May 2018. The Commission understands that the Court had determined Mr LF to be an appropriate candidate to be released on bail, and granted bail, during this period from February to May while he awaited his trial.
75. Further, on 23 January 2018 the Minister granted Mr LF's application for a BVE and Mr LF was released into the community, after he had been charged with the offences. That BVE was then cancelled on the grounds that Mr LF had been charged with the offences. The grant indicates that, at least at that time, the Minister considered that Mr LF was an appropriate candidate to be released into the community pending resolution of the matters relating to his visa. In response to my preliminary view, the Department stated on 30 July 2020 in respect of the grant of Mr LF's BVE that:

Mr [LF]'s application was granted in accordance with section 65 of the Act as the delegate was of the view that Mr [LF] met the requirements for grant, including regulation 050.212(4)(b) of the *Migration Regulations 1994* (the Regulations) having applied for merits review of the Student visa cancellation decision. Condition 8564 – "Must not engage in criminal conduct" was imposed on Mr [LF]'s BVE. At the time of grant, the delegate was satisfied that Mr [LF] would abide by all the conditions imposed on the visa per regulation 050.223 and 050.618.

On 12 February 2018, Mr [LF]'s BVE was cancelled under section 116(1)(g) of the Act as prescribed grounds existed under reg 2.43(1)(p)(ii) of the Regulations. The delegate had regard to Ministerial Direction 63, which requires delegates to consider applying regulation 2.43(1)(p) for criminal behaviour of any nature. This is a primary consideration, which was given more weight by the delegate over the secondary considerations listed in Direction 63. Because of the BVE cancellation, Mr [LF] was detained under s 189(1) of the Act.

76. The Department's response does not address the fact that Mr LF had already been charged with the offences prior to the grant of the BVE. The Department states that the delegate was satisfied at the time of grant that Mr LF would abide by all of the conditions imposed on the BVE. In fact, Mr LF did

not commit and was not charged with any further offences after the time he had been granted the BVE. The acts relied on to cancel the visa existed prior to its grant.

77. In the circumstances, it appears that prior to 16 May 2018, the Ministerial Guidelines did not prevent the Department referring Mr LF's case to the Minister to consider the exercise of his discretionary powers. It is my view that the Department should have referred Mr LF to the Minister to consider exercising his discretion under s 195A and s 197AB of the *Migration Act*. It is my view that Mr LF's continued detention during the period of 12 February 2018 to 16 May 2018 without consideration of less restrictive alternatives and without referral to the Minister has not been justified and appears to be more than was necessary and was disproportionate in the circumstances.

**(b) Detention between 27 June 2018 and 7 September 2018**

78. In respect of the period of 27 June 2018 to 7 September 2018, the Department stated in its response to my preliminary view that:

From the time Mr [LF] was re-detained on 27 June 2018 to 7 September 2018, his case was regularly reviewed. In each review, the Department took into account Mr [LF]'s circumstances, including his ongoing appeal of his criminal conviction as well as his health and welfare needs. No circumstances were identified indicating a visa grant or a less restrictive detention placement under residence determination arrangements were appropriate in Mr [LF]'s circumstances. As such, he was not referred for assessment against sections 195A or 197AB of the Act.

On 6 August 2018, a departmental delegate refused to grant a Criminal Justice Stay Visa (CJSV) in respect of Mr [LF]. The delegate was not satisfied Mr [LF] met the requirements for the grant of a CJSV, as the frequency of the offences and the predatory approach allegedly exhibited by Mr [LF] led the delegate to form the view that Mr [LF] presented a high risk of harm to the safety of the community. The NSW Office of the Director of Public Prosecutions, who indicated their belief that Mr [LF] represented a danger to the community, supported this view.

79. As shown in the Department's response, its monthly case reviews focus on whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual. The reviews of Mr LF's detention did not consider the necessity of his detention.
80. After being convicted and sentenced of three of the charges against him on 16 May 2018, while Mr LF would not have met the character test in s 501 of the *Migration Act*, the Court determined Mr LF to be an appropriate candidate



to be released on bail, and granted bail, in June 2018 pending the outcome of his appeal against his convictions.

81. In circumstances where the Court considered it unnecessary for Mr LF to be detained and that it was appropriate for Mr LF to reside in less restrictive conditions pending the outcome of his appeal, it is arguable that Mr LF showed unique or exceptional circumstances, warranting consideration by the Department and the Minister for less restrictive options than detention. As noted above, it is open to the Minister to exercise the discretionary powers to grant a visa or make a residence determination, subject to conditions necessary to mitigate any identified risk. These conditions can include reporting obligations, and other 'bail like' conditions.
82. In my view, it is at least arguable that, between Mr LF's release on bail on 27 June 2018 and the outcome of his appeal on 7 September 2018, Mr LF exhibited exceptional circumstances warranting referral to the Minister for consideration of the exercise of his discretion under s 195A and s 197AB of the *Migration Act*. As a result, Mr LF's continued immigration detention during this period may have been more than was necessary and disproportionate in the circumstances.

**(c) Detention between 7 September 2018 and 12 October 2018**

83. Mr LF continued to be held in detention for 35 days, between 7 September 2018 and 12 October 2018, after his appeal against his convictions was successful and all charges against him had been dismissed. During this period, Mr LF made two BVE applications and requested Ministerial Intervention under s 351 of the *Migration Act*. Both applications were deemed invalid and the request for Ministerial Intervention was denied for failing to meet the guidelines for referral to the Minister. It was not until 12 October 2018 that Mr LF was granted a BVE without application and was released from detention.
84. In respect of this period, the Department stated in its response to my preliminary view that:

On 7 September 2018, Mr [LF]'s appeal of his criminal convictions was upheld and all criminal charges were dismissed.

On 10 September 2018, Mr [LF] lodged a section 351 Ministerial Intervention request, which was assessed by the Department as not meeting the guidelines. On 25 September 2018, the request was finalised by the Department without referral to the Minister.

As Mr [LF] was unable to lodge a BVE application due to his previous BVE cancellation under section 116(1)(g) of the Act, an assessment was

undertaken to determine if he met the criteria for grant without application under Regulation 2.25.

In Mr [LF]'s case, the delegate was required to seek advice from an external agency on whether he posed a national security risk due to an allegation the Department had received. Upon receiving final advice that there were no objections to grant a visa from a national security perspective and being satisfied that all other visa criteria were met, the delegate granted Mr [LF] a BVE on 12 October 2018 and he was subsequently released from immigration detention.

85. In the usual course, following Mr LF's successful appeal and the dismissal of all charges against him on 7 September 2018, the Department should immediately have referred Mr LF to the Minister for consideration of the exercise of his discretion under s 195A and s 197AB of the *Migration Act*. However, the Department's response of 30 July 2020 to my preliminary view states that an allegation was made to the Department that required it to 'seek advice from an external agency on whether he posed a national security risk'. This is the first time during the Commission's inquiry into Mr LF's complaint that the Department has provided this information. I note the Department has not said when the allegation was made, or how quickly the Department sought advice from the external agency. We do know that the allegation did not ultimately prevent Mr LF's release from immigration detention.
86. However, in the circumstances, in light of the Department's assertion that an allegation was made that required advice from an external agency as to whether he posed a national security risk, it is not possible to form a concluded view as to whether Mr LF's continued immigration detention during this period was more than was necessary or disproportionate in the circumstances.

## 8 Recommendations

87. As a result of this inquiry, I find that the decision of the Department not to invite the Minister to consider exercising his discretion under s 195A and s 197AB for the periods of Mr LF's detention from 12 February 2018 to 16 May 2018 and 27 June 2018 to 7 September 2018 contributed to the continued detention of Mr LF, without consideration of whether that detention was justified in the particular circumstances of Mr LF's case was inconsistent with or contrary to article 9(1) of the ICCPR.
88. 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>15</sup> The Commission may

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

89. The detention review processes conducted by the Department consider whether there are any circumstances that indicate a detainee cannot be appropriately managed within a detention centre environment. Reviews do not consider whether detention is necessary or proportionate. They focus on whether there is any need for an individual to be released from detention, rather than if there is necessity in continuing to detain the individual. Accordingly, the current review process does not adequately safeguard against arbitrary detention.

### **Recommendation**

The Department should regularly conduct open periodic reviews of the necessity of detention for people in immigration detention centres. The reviews should focus on whether detention in an immigration detention centre is necessary in the specific case and if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be considered.

## **9 The Department's response to my findings and recommendations**

90. On 13 October 2020, I provided the Department with a notice of my findings and recommendations.
91. On 13 November 2020, the Department provided the following response to my findings and recommendations:

### **Arbitrary Detention**

The Department notes the Commission's recommendation, and does not agree that detention review processes conducted by the Department do not consider whether detention is necessary or proportionate.

The Department has a framework in place of regular reviews, escalation and referral points to ensure that people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department also maintains that review mechanisms regularly consider the necessity of detention and where appropriate, identify alternate means of detention or the grant of a visa.

Detention Review Managers conduct an initial review of the exercise of powers to detain under section 189 of the Migration Act 1958 (the Act),

providing independent assurance regarding the lawfulness and reasonableness of the decision to detain.

Each detainee's case is reviewed monthly by a Status Resolution Officer to ensure that emerging vulnerabilities or barriers to case progression are identified and referred for action. In addition, the Status Resolution Officer also considers whether ongoing detention remains appropriate and refers relevant cases for further action. Monthly detention review committees also provide formal executive level oversight of the placement and status resolution progress of each immigration detainee.

The Department proactively continues to identify and utilise alternatives to held detention. Status Resolution Officers use the Community Protection Assessment Tool to assess the most appropriate placement for an unlawful non-citizen while status resolution processes are being undertaken. Placement includes looking at alternatives to an immigration detention centre, such as in the community on a bridging visa, or under a residence determination placement. The tool also assesses the types of support or conditions that may be appropriate and is generally reviewed every three to six months and/or when there is a significant change in an individual's circumstances.

Using the Community Protection Assessment Tool, Status Resolution Officers assess and determine whether the detainee meets the legislative requirements and criteria for a bridging visa to allow the non-citizen to temporarily reside lawfully in the community while they resolve their immigration status. Status Resolution Officers identify cases where the Minister is the only person with the power to grant the non-citizen a visa or to make a residence determination in order to allow an unlawful non-citizen to reside in community detention. Where the case is determined to meet the Ministerial Intervention Guidelines, the case is referred to the Minister for consideration under section 195A of the Act to grant a visa to a person in immigration detention, or under section 197AB of the Act, allowing a detainee to reside in the community. The Department notes that the Minister's powers under sections 195A and 197AB of the Act cannot be delegated and are non-compellable. The Minister is under no obligation to consider a case or to make a decision on a case. The Minister is also not required to provide an explanation for the decision and is not bound by any timeframes.

## **Report Findings**

### *Bridging Visa Grant*

In relation to paragraph 76 of the report, the Department reiterates that Mr LF's Bridging E Visa (BVE) was granted in association with his application to the Administrative Appeals Tribunal for review of his Student visa cancellation in relation to which he satisfied the BVE criteria. Condition 8564 – "Must not engage in criminal conduct" was imposed on Mr LF's BVE, however it only considers whether Mr LF will be involved in future criminal conduct and does

not consider risk to the community or community protection. However, due to the seriousness of Mr LF's ongoing criminal matters and community protection risk concerns at the time, his case was referred to Australian Border Force Field Compliance for consideration and further action.

#### *Unique or Exceptional Circumstances*

In paragraph 81 of the report, in which the Commission states that it is arguable that Mr LF showed unique or exceptional circumstances, warranting consideration by the Department and the Minister for less restrictive options than detention, the Department's view remains that being granted bail for ongoing criminal charges would generally not be considered a unique or exceptional circumstance, and that there was no evidence before the Department that Mr LF met any of the criteria warranting referral of his case for consideration against the Ministerial Intervention Guidelines.

#### *Allegation*

At paragraph 86 of the report, in which the Commission states that it is not possible to form a concluded view as to whether Mr LF's continued immigration detention during the period 7 September to 12 October 2018 was more than was necessary or disproportionate in the circumstances, the Department advises that the allegations were received in April 2018 and were being investigated. Once Mr LF's criminal matters were finalised, and he was being considered for a BVE grant without application under regulation 2.25 of the Migration Regulations 1994, the delegate immediately sought advice from the external agency as to whether Mr LF posed a national security risk based on the allegations. The BVE was then granted to Mr LF on the same day the final advice was received that there were no objections to grant Mr LF a visa from a national security perspective.



Emeritus Professor Rosalind Croucher AM

**President**

Australian Human Rights Commission

15 December 2020

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- <sup>1</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- <sup>2</sup> *Al-Kateb v Goodwin* (2004) 219 CLR 562.
- <sup>3</sup> (New York, 16 December 1966), 999 UNTS 171, [1980] ATS 23 (entered into force for Australia 13 November 1980).
- <sup>4</sup> See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- <sup>5</sup> Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 900/1999*, 67<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- <sup>6</sup> Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18]; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- <sup>7</sup> *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the Human Rights Committee in *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 631/1995*, 67<sup>th</sup> sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- <sup>8</sup> Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*) (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); Human Rights Committee, *Views: Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*).
- <sup>9</sup> Human Rights Committee *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).
- <sup>10</sup> Human Rights Committee, *Views: Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*); Human Rights Committee, *Views: Communications Nos. 1255,1256,1259,1260,1266,1268,1270 &1288/2004*, 90<sup>th</sup> sess, UN Doc CCPR/C/90/D/1255 1256,1259,1260,1266,1268,1270 &1288/2004 (20 July 2007) (*Shams & Ors v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78<sup>th</sup> sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*); Human Rights Committee, *Views: Communication No. 1050/2002*, 87<sup>th</sup> sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- <sup>11</sup> Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112<sup>th</sup> Sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18], footnotes omitted.
- <sup>12</sup> Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *Views: Communication No. 305/1988*, 39<sup>th</sup> sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59<sup>th</sup> sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); Human Rights Committee, *Views Communication No. 900/1999*, 76<sup>th</sup> sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*).

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- <sup>13</sup> The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- <sup>14</sup> The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, 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.
- <sup>15</sup> *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a)*.
- <sup>16</sup> *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(b)*.
- <sup>17</sup> *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c)*.