



Australian
Human Rights
Commission

Mr IB and Mr IC v
Commonwealth of
Australia (Department
of Home Affairs)

[2019] AusHRC 129

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Report into arbitrary detention

Australian Human Rights Commission 2019



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**Australian
Human Rights
Commission**

The Hon Christian Porter MP

Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

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

Mr IB and Mr IC complain that their detention in an immigration detention facility was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

As a result of this inquiry, I have found that Mr IB's detention, for a period of almost two years, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR. I also find that Mr IC's detention, for a period of more than two years, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

The department provided a response to my findings and recommendations on 7 December 2018. That response can be found in Part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher".

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

May 2019

Australian Human Rights Commission

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1 Introduction

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into complaints by two individuals, Mr IB and Mr IC. The complaints are against the Commonwealth of Australia—specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department) alleging a breach of human rights.
2. Mr IB and Mr IC were each detained in closed immigration detention facilities for approximately two years. They complain that their detention was ‘arbitrary’, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
3. The Commission is inquiring into these complaints collectively as they are similar in substance and share common themes.
4. This inquiry is being undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. This notice is issued pursuant to s 29(2) of the AHRC Act setting out the findings and recommendations of the Commission in relation to Mr IB and Mr IC’s complaints.
6. Mr IB and Mr IC have requested that their names not be published in connection with this inquiry. I consider that the preservation of their anonymity is necessary to protect their human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and will refer to Mr IB by the pseudonym ‘IB’, and Mr IC by the pseudonym ‘IC’, in the Commission’s report to the Minister.

2 Summary of findings and recommendations

7. As a result of conducting this inquiry, I find that:
 - the department’s failure to refer Mr IB’s case to the Minister for the consideration of the exercise of his discretionary powers from 30 September 2014 to 12 September 2016 led to his detention being arbitrary and inconsistent with article 9 of the ICCPR
 - Mr IB’s detention for almost 2 years was arbitrary and inconsistent with his rights under article 9 of the ICCPR
 - the department’s failure to refer Mr IC’s case to the Minister for the consideration of the exercise of his discretionary powers from 28 August 2014 to 12 September 2016 led to his detention being arbitrary and inconsistent with article 9 of the ICCPR

- Mr IC's detention for just over 2 years was arbitrary and inconsistent with his rights under article 9 of the ICCPR.

8. In light of these findings, I recommend that:

- For cohorts and individuals with no countervailing security concerns who cannot be returned involuntarily, the department considers alternatives to closed detention at the earliest possible opportunity.

3 Background

9. The two complainants are Iranian nationals who came to Australia by boat seeking asylum. After an initial period in detention, they were released and permitted to live in the community while their claims for protection were being processed. Each ultimately received negative protection decisions and exhausted their avenues of judicial review. Subsequently, upon expiry of their BVEs, they were returned to immigration detention.
10. Mr IB was re-detained on 30 September 2014 and remained in closed immigration detention for just under 2 years, until he was granted a BVE on and released into the community sometime in late September 2016. Mr IC was re-detained on 28 August 2014 and remained in closed immigration detention for 25 months, until he was granted a BVE and released into the community on 21 September 2016.

3.1 Mr IB

11. Mr IB arrived in Australia by boat without a visa on 13 April 2012. As an 'illegal maritime arrival'² (IMA) and unlawful non-citizen,³ he was detained upon arrival in Australia under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act) in immigration detention facilities on Christmas Island.
12. Mr IB was transferred from Christmas Island to immigration detention centres on the Australian mainland, with detention continuing under s 189(1) of the Migration Act.
13. As an IMA, Mr IB was barred under s 46A of the Migration Act from lodging a protection visa application. This bar was lifted by a former Assistant Minister for Immigration and Border Protection, and Mr IB was allowed to apply for a protection visa on 22 July 2012. On 30 August 2012, Mr IB was granted a BVE and released from detention.
14. The department refused to grant Mr IB a protection visa, and the Refugee Review Tribunal affirmed the department's decision. On 18 August 2014, he was granted a BVE valid to 29 September 2014. With no ongoing departmental or judicial matters, Mr IB was considered by the department to be 'finally determined' and was expected to cooperate with a return to Iran.

15. As an unlawful non-citizen and having failed to make arrangements to depart Australia in accordance with the conditions of his BVE, Mr IB was re-detained on 30 September 2014. He was released into the community sometime in late September 2016 having been granted a BVE by the Minister for Immigration and Border Protection (following submissions prepared by the department on 12 September 2016).
16. Mr IB complains that the period of immigration detention from September 2014 until September 2016 is 'arbitrary' and amounts to a breach of his human rights under article 9 of the ICCPR.

3.2 Mr IC

17. Mr IC arrived in Australia by boat without a visa on 22 November 2011 and thus was also an 'illegal maritime arrival' and unlawful non-citizen. He was detained upon arrival in Australia under s 189(3) of the Migration Act in immigration detention facilities on Christmas Island.
18. Mr IC was transferred from Christmas Island to an immigration detention centre (IDC) on the Australian mainland, with detention continuing under s 189(1) of the Migration Act. On 5 February 2012, he was interviewed regarding his claims for protection and on 26 March 2012, and received a negative protection outcome from the department. Mr IC sought judicial review of this decision.
19. On 21 June 2012, the Minister intervened under s 197AB of the Migration Act to grant Mr IC a residence determination and shortly thereafter he was placed into 'community detention' in Sydney. On the basis that he had an ongoing judicial review matter, Mr IC was granted a further BVE in February 2013. He received a negative judicial review outcome on 28 November 2013.
20. On 16 July 2014, Mr IC was granted a BVE on 'departure grounds' and directed to attend a departmental interview on 28 August 2014. As an unlawful non-citizen and having failed to make departure arrangements, Mr IC was re-detained on that date. He was released into the community on 21 September 2016 having been granted a BVE by the Minister (following submissions prepared by the department on 12 September 2016).
21. Mr IC complains that the period of immigration detention from August 2014 until September 2016 is 'arbitrary' and amounts to a breach of his human rights under article 9 of the ICCPR.

3.3 Current circumstances

22. As mentioned above, as a result of Ministerial Intervention, Mr IB and Mr IC were granted BVEs and released into the community in December 2016. As at 6 November 2018, they remained in the community. Their then current visas were due to expire in April 2018 (6 April for Mr IB, and 25 April for Mr IC).
23. The complainants are considered by the department to be 'finally determined' and on a 'removal pathway', because they have no current matters before the department, tribunals or courts. However, the complainants are not willing to return to Iran voluntarily: Mr IB has stated that he would 'prefer to die here than return to Iran and be tortured and killed'⁴ and Mr IC has stated that he 'has extreme fears and worries about having to return back to Iran'.⁵
24. Iran is not currently accepting involuntary repatriation of Iranian citizens and the Australian Government does not have a memorandum of understanding in place with Iran in relation to the latter's acceptance of persons removed involuntarily from Australia. At a press conference with Australian Foreign Minister Julie Bishop in Canberra in March 2016, Iran's Foreign Minister Javad Zarif confirmed his government's position that it would not accept involuntary repatriation of Iranian citizens.⁶

4 Legislative framework

4.1 Functions of the Commission

25. 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.
26. 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.

4.2 What is an 'act' or 'practice'

27. 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.
28. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
29. 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, its officers or agents.⁷

4.3 What is a human right?

30. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
31. Article 9(1) of the ICCPR relevantly provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

4.4 Article 9 of the ICCPR

32. 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 detention⁸
 - (b) lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances⁹
 - (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 predictability¹⁰
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.¹¹

33. In *Van Alphen v The Netherlands*, the UN 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.¹²
34. The UN HR Committee has held in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than 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'.¹³
35. 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.¹⁴
36. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.¹⁵
37. It is therefore necessary to consider whether the detention of Messrs IB and IC in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention. If their detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered arbitrary under article 9 of the ICCPR.

5 Assessment – Arbitrary detention

5.1 Alternatives to detention

38. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens until they are either granted a visa, deported or removed from Australia. When the complainants' BVEs expired in August and September 2014, they became unlawful non-citizens and therefore the Migration Act required that they be detained.
39. However, the Migration Act does not require that the complainants remain detained in an immigration detention centre.
40. Section 195A of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to grant a visa to a person detained under s 189 of the Migration Act. 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 (commonly referred to as 'community detention').
41. The Minister issues guidelines to explain (i) when officers of the department should refer a case to the Minister so he/she can consider exercising his/her discretionary power, and (ii) the circumstances in which the Minister may wish to consider exercising the discretionary power to grant a visa to a person in immigration detention.

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

42. For the period during which the complainants were detained, the s 195A guidelines provided for the department to refer cases to the Minister for the consideration of his detention intervention powers where:
- The person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable for reasons that may include ... cases where:
 - the person's country of origin refuses to accept their return or to issue a travel document to facilitate their return
 - it is not possible to return the person to their country of origin because of ... policy regarding involuntary removals.¹⁶

43. On 29 April 2016, replacement guidelines were issued that retained this provision, but also introduced types of cases that the Minister would not generally expect to be referred to him. These included:
- people with no outstanding immigration matters who are not cooperating with efforts to effect their departure from Australia
 - people whom I have previously considered under any of my Ministerial intervention powers, or who have previously been found not to meet any of my Ministerial intervention guidelines, and who have had no significant changes to their circumstances.¹⁷
44. The complainants clearly met the criteria for referral to the Minister under s 195A for the entirety of their detention. However from 29 April 2016, they also fell within a type of case that the Minister did not generally expect to be referred to him.

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

45. The s 197AB guidelines that applied during the period of the complainants' re-detention provided that the Minister would not expect the department to refer persons who have had their asylum claims rejected at primary and review stages ('finally determined'), unless there are 'exceptional reasons'.¹⁸
46. The complainants were considered to be 'finally determined' during the period of their detention. I note however that cases could still be referred where there were 'exceptional reasons'. Further, the guidelines allowed for the referral of cases where there are 'unique or exceptional circumstances'.¹⁹
47. The phrase 'unique or exceptional circumstances' is not defined in the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.²⁰ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- 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.
48. As at the date of his re-detention, Mr IB had been present in Australia for 29 months (with 4 of those months spent in detention). During his time living in the community, he made friends, started a relationship (with the relationship continuing once he was re-detained), worked as a youth fitness and swim trainer, coached a local football team, and contributed to the Australian wrestling society as a competitor and coach.
49. As at the date of his re-detention, Mr IC had been present in Australia for 33 months (with 6 of those months spent in detention). During his time living in the community, he made friends, met and became engaged to his (now) fiancée (with the relationship continuing once he was re-detained), and lived with a family receiving food, board and some personal money in return for doing household chores and cooking.

5.2 The department's response

50. Following their re-detention in August and September 2014, the first and only time that the department referred Mr IB's and Mr IC's case to the Minister was in September 2016. Those submissions ultimately led to the Minister intervening and the complainants being granted BVEs and released from detention.
51. Before this occurred, the Commission asked the department the reasons for their continued immigration detention and whether alternative, less restrictive detention options had been canvassed for the complainants since their re-detention. The department responded:
- Mr IB is an UNC [unlawful non-citizen] and is required under section 196 of the Act to be detained until he/she is granted a visa, deported under section 200 of the Act or removed from Australia under section 198 or 199 of the Act.
- ...
- To date, Mr IB's current detention placement is appropriate as he has not demonstrated circumstances to warrant referral for residence determination ... his needs are currently being met in the detention environment.
- As a finally determined IMA, Mr IB is currently ineligible for BVE considerations.
- Mr IC is an unlawful non-citizen and is required under section 196 of the Act to be detained until there is no longer reasonable suspicion that he is an unlawful non-citizen, he is granted a visa or removed from Australia.
- Mr IC's continued detention is considered to be appropriate by the department at this time.
- ...
- Alternative, less restrictive detention options have not been canvassed for Mr IC as he has no ongoing matters before the Department, he has made no arrangements to voluntarily depart Australia and his health and welfare needs are being met in his current placement.
- Mr IC does not meet the guidelines for referral to the Minister for Residence Determination (Community Detention) under section 197AB and 195A of the *Migration Act 1958* (the Act).
52. When asked by the Commission the basis for finding that Mr IB did not meet the guidelines for referral to the Minister for less restrictive detention options, the department responded:
- Mr IB did not present with any significant health or welfare issues or vulnerabilities that could not be addressed in a detention environment. As such his case was not identified by his case manager as one that should be referred as a priority for consideration of placement under residence determination.

53. When asked by the Commission the basis for finding that Mr IC did not meet the guidelines for referral to the Minister for less restrictive detention options, the department responded:

Mr IC did not meet the guidelines for referral to the Minister for less restrictive detention options as he was considered to be Finally Determined on the basis that he had no ongoing matters and was on a removal pathway.

...

Mr IC was unable to be assessed for a further BVE as per the section 91K preventing further lodgement of visa applications.

Mr IC's case was considered to be Finally Determined on the basis that he had no ongoing matters and was subject of removal. He did not meet the guidelines for referral to the Minister for Residence Determination (Community Placement) under section 197AB of the Act.

5.3 Findings

(a) Act or practice of the Commonwealth

54. Mr IB and Mr IC were each detained by the Commonwealth for approximately two years after the BVEs they were granted by the department expired in September and August 2014, respectively.
55. Although s 189(1) of the Migration Act requires the detention of unlawful non-citizens, there were a number of discretionary powers that the Minister could have exercised in order to detain Mr IB and Mr IC in a less restrictive manner. Alternatively, the Minister could have exercised his discretionary powers to grant them a visa.
56. Following their re-detention, the department referred the complainants' cases to the Minister for the consideration of the exercise of his discretionary powers under s 195A of the Migration Act for the first (and only) time on 12 September 2016. The department did not refer their cases to the Minister for consideration of a residence determination under s 197AB of the Migration Act at any time during this period of detention.
57. I find that the failures by the department to refer:
- Mr IB's case to the Minister for consideration of the exercise of his discretionary powers from 30 September 2014 until 12 September 2016
 - Mr IC's case to the Minister for consideration of the exercise of his discretionary powers from 28 August 2014 until 12 September 2016

constitute an 'act' within the definition of s 3 of the AHRC Act.

(b) Breach of article 9

58. It is necessary to consider whether the complainants' prolonged detention in a closed detention facility could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention.
59. Mr IB and Mr IC were re-detained in immigration detention centres for approximately two years. Having considered the material before me, I am not satisfied that their detention has been justified by the department. It has provided no particular reasons justifying detention specific to the complainants (such as an individualised risk of absconding or risk of crimes against others).
60. The s 195A guidelines permitted cases to be referred to the Minister where the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable. In light of Iran's refusal to accept involuntary repatriations, Mr IB and Mr IC plainly fell within the ambit for referral under these guidelines.
61. The department was clearly aware of this, with statements along the following lines appearing throughout its monthly Case Reviews and reports to the Commonwealth Ombudsman:

[Mr IB] has significant barriers to status resolution as he does not have a travel document and is not willing to return voluntarily.

Finally determined, invol removal p/way, nil o'standing matters, nil TD's [travel documents], [Mr IB] does not wish to return voluntarily, refused IOM engaged.

As an Iranian national (nil return MOU) such removals are currently on hold until further notice.

Mr IC has significant barriers to status resolution that cannot be resolved in the short term.

Mr IC does not wish to leave Australia voluntarily and the Iranian Embassy will not at this stage issue a travel document to remove an Iranian national involuntarily.

There has been no further case progression, without obtaining a travel document as Mr IC does not wish to return voluntarily.

- Finally Determined IMA
- Refuses to depart voluntarily
- Iranian National – poses a barrier to involuntary removal as he has no TD
- Expected protracted removal

Mr IC is a finally determined Iranian National who has repeatedly advised that he will not agree to return voluntarily and he cannot be involuntarily removed as he does not have a valid Travel Document. There is limited action that Case Management can take currently to reach case resolution.

62. Under the s 197AB guidelines, the Minister did not expect cases involving ‘finally determined’ persons to be referred to him absent ‘exceptional reasons’. A general category of cases with ‘unique or exceptional circumstances’ could also be referred. In my view, the following factors are relevant to an assessment as to whether the complainants’ cases presented ‘exceptional reasons’ and/or ‘unique or exceptional circumstances’:
- they have both been present in Australia for over 5 years
 - they both lived in and integrated into the community without incident for over two years²¹
 - they complied with their residence/visa obligations (save for the fact that they failed to make arrangements to return to Iran voluntarily)
 - Iran is not currently accepting involuntary repatriation of Iranian citizens and therefore their removal from Australia is not reasonably practicable
 - without intervention, they both faced the prospect of indefinite detention.
63. From the documents and information provided to the Commission, it does not appear that the department actively and genuinely considered available alternatives to closed detention in light of the individual circumstances of Messrs IB and IC during the two year period of their re-detention.
64. On 12 September 2016, the department referred the cases of 17 IMAs, including Mr IB and Mr IC, for possible Ministerial Intervention under s 195A and s 46A to the Minister. In its submission the department stated:
- Notwithstanding their status as ‘finally determined’, the 17 IMAs ... are effectively unable to be involuntarily removed in the immediate or near future.
- The 17 IMAs ... have been identified as having no recorded behavioural incidents of concern while in immigration detention. For those who previously held a Bridging E visa (subclass 050) (BVE) prior to becoming ‘finally determined’ and being re-detained, there is no recorded behaviour of concern in the community. In addition, these IMAs have been assessed by the Department ... to be of low risk of harm to the Australian community.
- Records held in departmental systems do not indicate any known public health, character or identity concerns for any of the IMAs ... none of the IMAs included in the submission are of interest to the Australian Security Intelligence Organisation at this time.
65. This is not new information. The same could equally have been said in respect of the complainants at the date of their re-detention, some 2 years earlier. From the information provided it is not clear whether this group submission was the result of a departmental decision, or policy directive from the Minister.

66. The failure of the department to justify detention, or to genuinely consider available alternatives to closed detention, on the basis of particular reasons specific to the complainants is further reflected in its Case Reviews that *inter alia* refer to:

DIBP strategy to manage the finally determined IMA cohort.

[A] network strategy for finally determined IMA single adult men.

Finally determined Iranian IMA cohort are being considered for progression under s195A.

[A]dvice not to refer this cohort for consideration as the MO is considering how to proceed with this cohort and that a group submission for s195A may be considered in the future.

[F]inally determined Iranians are being triaged for either cat 1 or 2 for group s195A submission.

67. I find that the department's failure to refer Mr IB and Mr IC's cases to the Minister for consideration of the exercise of his discretionary powers prior to September 2016 resulted in their detention being arbitrary, contrary to article 9 of the ICCPR.

68. In light of Iran's non-acceptance of involuntary repatriation, the eventual release from immigration detention of Mr IB and Mr IC was a practical and appropriate response. For as long as their individualised risk assessments support this, it should be continued.

6 Recommendations

69. For the reasons above, I find that Mr IB's detention, for a period of almost two years, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR. I also find that Mr IC's detention, for a period of more than two years, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.

70. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.²² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²³ The Commission may also recommend other action to remedy or reduce loss or damage suffered by a person.²⁴

71. Mr IB and Mr IC were part of a cohort of finally determined persons without a valid travel document and where the department could not obtain one. They were thus effectively unable to be involuntarily removed in the immediate or near future, and faced the prospect of indefinite closed detention.

72. The Commission recognises that the Government revised its position in relation to the management of this cohort and that consequently, the department recommended to the Minister that Mr IB and Mr IC (amongst others) be granted BVEs and released from immigration detention. This was a welcome solution given the circumstances.

73. I make the following recommendation:

Recommendation

For cohorts and individuals with no countervailing security concerns who cannot be returned involuntarily, the department considers alternatives to closed detention at the earliest possible opportunity.

7 The department's response to my findings and recommendations

74. On 6 November 2018, I provided the department with a notice of my findings and recommendations in respect of Mr IB and Mr IC's complaints.
75. On 7 December 2018, the department provided the following response to my findings and recommendations:

As per the Department's response to the section 27 notice regarding these cases, the Department maintains Mr IB's placement in detention from 30 September 2014 to 21 September 2016 and Mr IC's placement in detention from 28 August 2014 to 21 September 2016 were appropriate, reasonable and justified in the individual circumstances of their cases.

Mr IB and Mr IC's cases were reviewed regularly, on 20 and 23 occasions respectively, as highlighted in the Department's response to section 27 of the AHRC Act. In each review, the Department determined that their placement were appropriate and did not identify any unique and exceptional circumstances to warrant a referral under section 197AB or compassionate and compelling circumstances to warrant a referral under section 195A of the Act.

In light of a revised Government position of managing finally determined persons without a travel document and where the Department could not obtain one, Mr IB and Mr IC's case were granted Bridging E visas (subclass 050) by the then Minister for Immigration and Border Protection under section 195A of the Act on 21 September 2016.

Response to recommendation

The Department notes the AHRC's recommendation.

The Department has several existing mechanisms to regularly review and assess the appropriateness of detention placements, including but not limited to monthly reviews by Status Resolution officers and the Detention Review Committee. The Detention Review Committees conduct formal monthly reviews of efforts to progress detainees towards status resolution outcomes within held detention. The Department submits that current review mechanisms are appropriate.

When reviewing cases, the Department acts in line with the Government policy in relation to the management of cohorts and individuals who cannot be returned involuntarily. Where an individual's circumstances indicate that placement in held detention may not be appropriate, the Department considers options for alternative management, including consideration of a Bridging visa grant by a departmental delegate or referring the case for assessment under the Minister's section 195A or 197AB guidelines. There is no prescribed timeframe for when alternative management options can be used and consideration is given to alternatives as soon as reasonably practicable once it is identified that held detention may not be appropriate.

76. I report accordingly to the Attorney-General.

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

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- 1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 2 IMAs are referred to in the Migration Act as unauthorised maritime arrivals. Section 5AA(a) of the Migration Act defines a person as an 'unauthorised maritime arrival' if the person entered Australia by sea (i) at an excised offshore place at any time after the excision time for that place, or (ii) at any other place at any time after the commencement of this section. Christmas Island is an "excised offshore place" as of 8 September 2001.
- 3 Section 14(1) of the Migration Act: a non-citizen who is not a lawful non-citizen is an unlawful non-citizen. Section 13 defines a lawful non-citizen as someone who holds a visa.
- 4 Department Case Review notes for Mr IB dated 06/01/2015.
- 5 Letter from Psychologist treating Mr IC dated 25/7/2014.
- 6 Joint Press Conference with Iranian Foreign Minister Javad Zarif, 15 March 2016, Canberra, at http://foreignminister.gov.au/transcripts/Pages/2016/jb_tr_160315.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D (viewed 24 November 2017).
- 7 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 8 UN Human Rights Committee, General Comment No. 35 (2014) *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 9 UN Human Rights Committee, General Comment No. 35 (2014) *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 [18]; UN Human Rights Committee, General Comment No. 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6].
- 10 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 11 UN Human Rights Committee, General Comment 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6]; UN Human Rights Committee, General Comment 35 (2014) *Article 9 (Liberty and security of person)*; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 12 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 13 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 14 United Nations Human Rights Committee, General Comment No. 35 (2014), *Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 [18], footnotes omitted.
- 15 UN Human Rights Committee, General Comment 31 [80] (2004) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 [6]; *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 16 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Guidelines on Minister's Detention Intervention Power (s195A of the Migration Act 1958)*, 24 March 2012, at [4.1.1]; and the Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Guidelines on Minister's detention intervention power – s 195A of the Migration Act 1958*, 29 April 2016, at [3]. The guidelines are incorporated into the department's Procedures Advice Manual.
- 17 29 April 2016 Guidelines, *ibid*, at [4].
- 18 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, at [10]; and the Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under s 197AB and s 197AD of the Migration Act 1958*, 29 March 2015, at [10]. The guidelines are incorporated into the department's Procedures Advice Manual.
- 19 *Ibid*, at [8].
- 20 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on ministerial powers (s345, s351, s417 and s501)* 24 March 2012 (reissued on 10 October 2015), at [12]. The guidelines are incorporated into the department's Procedures Advice Manual. See also the replacement guidelines issued by the Hon Peter Dutton, Minister for Immigration and Border Protection, *Minister's guidelines on ministerial powers (s351, s417 and s501)* 11 March 2016, at [4], incorporated into the department's Procedures Advice Manual.
- 21 For Mr IB, from 30 August 2012 until 30 September 2014. For Mr IC, from 29 June 2012 until 28 August 2014.
- 22 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 23 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 24 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).

Further Information

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