



Australian
Human Rights
Commission

Mr CF v Commonwealth of Australia

(Department of Home Affairs)

[2024] AusHRC 166

June 2024

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Report into arbitrary detention

Australian Human Rights Commission 2024

The Hon Mark Dreyfus KC 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 CF, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr CF arrived in Australia in 1969 at the age of 17 years from New Zealand, and he maintained an ongoing residence in Australia for 51 years thereafter. His visa was cancelled in October 2019, after Mr CF pled guilty to offending behaviour that occurred in 1995. On completion of his sentence in January 2020, he was taken into immigration detention, where he would remain until his removal to New Zealand in August 2020. Mr CF complained 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 failure to refer Mr CF's case to the Minister for consideration of his discretionary intervention powers under s 195A on 11 March 2020 or any time thereafter, and/or s 197AB of the *Migration Act 1958* (Cth) at any time, were acts inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the ICCPR.

It remains my view that factors weighed heavily in favour of Mr CF being considered for an alternative to held detention. These factors included his serious health concerns, risk of severe COVID-19, his claim to be Indigenous, his close relationships to family members (particularly his Indigenous wife) who were impacted by his detention, and the fact that his removal to New Zealand was not reasonably practicable at the time.

On 16 February 2024, 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 31 May 2024. That response can be found in Part 6 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

June 2024

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1 Introduction to this inquiry

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr CF against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of human rights. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr CF was detained in immigration detention facilities between 28 January 2020 and 5 August 2020. He complains that his detention was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. The right to liberty and freedom from arbitrary detention is not directly protected in the Australian Constitution or in legislation. As a result, there are limited avenues for an individual to challenge the lawfulness of their detention, for example in cases involving detention where removal from Australia is not practicable in the reasonably foreseeable future.¹
4. 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. Detention may be lawful under domestic law but still arbitrary and contrary to international human rights law.
5. 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. 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'.
6. This document comprises a notice of my findings in relation to this inquiry and my recommendations to the Commonwealth.
7. Sensitive information regarding Mr CF's personal, medical and criminal history has come to light in the course of this inquiry, and I consider it necessary for the protection of Mr CF's privacy and human rights to make a direction under section 14(2) of the AHRC Act requiring the use of a pseudonym in any report by the Commission regarding his complaint. For the same reason, citations to court decisions which may identify Mr CF have been omitted from this notice.

2 Summary of findings and recommendations

8. As a result of this inquiry, I find that the following acts or practices were inconsistent with, or contrary to, article 9(1) of the ICCPR:
 - (a) the failure of the Department to refer Mr CF's case to the Minister in order to consider whether to exercise his discretionary powers under section 195A of the Migration on 2 June 2020 or any time thereafter
 - (b) the failure of the Department to consider referring Mr CF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act at any time.
9. I make the following recommendations:

Recommendation 1

The Commission recommends that, in the Department's review of the CPAT, consideration be given to reducing the impact of offences which are old, and not followed by subsequent offending of a similar nature.

Recommendation 2

The Commission recommends that relevant policy and procedures be updated to require consideration of an alternative to held detention with appropriate conditions where a detainee has expressed a willingness to depart from Australia, but removal is currently not reasonably practicable.

Recommendation 3

The Commission recommends that any detainee who claims to be Indigenous, but is not accepted as meeting the Mabo tripartite test, should be considered for referral to the Minister for possible intervention, bearing in mind the comments made by the Federal Court and the Commission cited in this report.

3 Background

10. Mr CF arrived in Australia in 1969 at the age of 17 years from New Zealand. He returned to New Zealand twice for short periods as an adult, but maintained an ongoing residence in Australia thereafter.
11. Prior to Mr CF's detention, he had been residing in NSW with his partner, who is described in the complaint as being Indigenous and a member of

the 'Stolen Generation'.

12. During the 51 years in which Mr CF resided in Australia, his visa status remained that of a temporary resident, holding a Special Category (Class TY) (subclass 444) visa. The last visa granted to Mr CF was on 6 May 2008.
13. Mr CF's visa was cancelled pursuant to section 501(3A) of the Migration Act on 16 October 2019, while he was serving a sentence of imprisonment for a conviction for offences of indecent treatment of a child. This section of the Migration Act provides for mandatory cancellation in circumstances where the visa holder has failed the character test on the basis of their substantial criminal record or for sexually-based offences involving a child, and is serving a sentence of imprisonment.
14. Mr CF pleaded guilty to the offences, but maintained to the Department that he did not commit them, and says he had relied on poor legal advice in making his plea. The offending behaviour to which he pleaded guilty occurred in around 1995.
15. Mr CF was sentenced to 18 months imprisonment, suspended for two years after serving six months. He also has a small number of historic offences on his criminal record dating back to the 1960s and 1970s, from New Zealand and Australia, the most serious being break and enter with intent, for which he was sentenced to 4 months imprisonment.
16. On 16 November 2019, he sought revocation of the cancellation decision within the statutory time limit.
17. On 28 January 2020, Mr CF completed the portion of his sentence which was not suspended, and was immediately detained under section 189 of the Migration Act. He was taken to the Meriton Suites in Brisbane, which was designated as an alternative place of detention (APOD).
18. On 25 February 2020, Mr CF was transferred to the Villawood Immigration Detention Centre (VIDC).
19. Mr CF, as an unlawful non-citizen, was liable for removal from Australia. He signed a request for voluntary removal on 31 March 2020, however this request was later rescinded by him.
20. On 1 May 2020, Mr CF filed an application in the Federal Court seeking a writ of mandamus requiring that the Minister make a decision on his revocation request of 16 November 2019. The Court declined to make any orders but recorded a notation that the Minister would use his best endeavours to make a decision before 5pm on 6 May 2020.
21. The Minister made the decision not to revoke the cancellation of Mr CF's visa on 6 May 2020 – with the effect that Mr CF remained without a visa.
22. On the same day, Mr CF filed an interlocutory application in the Court

seeking his release from detention based on the High Court's decision in *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* (2020) 375 ALR 597 (*Love*) and due to his risk of contracting COVID-19 while in immigration detention.

23. The Court declined to hear the interlocutory application, but listed the matter for final hearing on 18 May 2020.
24. The Court's decision was handed down in May 2020. Mr CF's application was dismissed, but some factual findings were made in his favour (discussed below).
25. Mr CF withdrew his request for voluntary removal on 29 May 2020, but signed a further request on 21 July 2020.
26. On 5 August 2020, Mr CF was removed from Australia to New Zealand pursuant to section 198(1) of the Migration Act.

(a) *Indigeneity*

27. The High Court handed down the decision of *Love* on 11 February 2020. In that case, it was held that Aboriginal and Torres Strait Islanders are not 'aliens' within section 51(xix) of the Australian Constitution. The definition of Aboriginal and Torres Strait Islander was determined according to the test set out in *Mabo v Queensland [No 2]* by Justice Brennan, referred to as the 'tripartite test'.²
28. The test for recognition as an Indigenous person of Australia requires each of the following:
 - a. biological descent
 - b. self-identification as an Aboriginal or Torres Strait Islander person
 - c. recognition by elders or other persons of the same group enjoying traditional authority.
29. Mr CF identifies as an Aboriginal Australian, and evidence in support of this claim was provided to the Commission as part of his complaint.
30. In his Federal Court case, the judge found that Mr CF was biologically descended from an Aboriginal person of a particular group. The evidence before his Honour was that the last known person of that group had passed away in 1921.
31. However, Mr CF claimed to be culturally adopted into and recognised by a different Aboriginal society.

32. His Honour found that it was necessary under the tripartite test that the society from which a person had biologically descended needed to be the same society in which that person was recognised.
33. The judge was unable to find in Mr CF's favour with respect to his claim under the tripartite test, due to a lack of evidence of his cultural adoption into the Aboriginal society into which he claimed to be adopted.
34. The following comments summarise the difficulties which arose for Mr CF in establishing his claim to indigeneity:

It is one thing to be a member of an existing indigenous society or people and to have legal rules (such as the tripartite test) by which that membership can be assessed. It is another thing to deny that a person, who can prove that he or she is a direct biological descendant of persons who were in Australia before British sovereignty, is an Aboriginal Australian just because a consequence of that sovereignty was the destruction or disappearance of the antecedent society. I noted in *Warrie v Western Australia* ... the human tragedy that the historical displacement of Aboriginal Australians can create when their descendants seek to establish or ascertain, many years later, their true indigenous heritage and identity. Mr [CF] may be in a similar and equally unfortunate position.

(b) *Medical issues*

35. Mr CF suffers from a number of health complaints, including polycystic kidney disease, emphysema, hypertension, diabetes and depression. On 16 October 2020, the Department provided details to the Commission regarding his access to medication for each of these, and also for pain relief, while in immigration detention.
36. With his complaint, Mr CF provided 2 letters with respect to his diagnosis with metastatic melanoma. One of the letters, dated 26 September 2018, suggested that his prognosis of survival was only for a further 6 months. The second letter sought access to palliative care on his behalf.
37. Correspondence from Mr CF's representative to the Commission, the Department and various Ministers, made claims that Mr CF was at risk of dying in immigration detention. Subsequently, on 7 May 2020, the Department informed the Commission that information had been received from IHMS that Mr CF had been in remission from cancer since September 2019. IHMS records provided to the Commission confirm that IHMS became aware of this from Mr CF at his initial induction into immigration detention in January 2020.
38. On 4 February 2020, an initial GP review by IHMS identified that Mr CF suffered from chronic lower back pain, and sought further information from the Princess Alexandra Hospital oncology department.

39. On 16 April 2020, an IHMS mental health nurse noted that Mr CF 'appeared settled in mood and behaviour however became teary when voicing his anxiety about his wife'. The nurse recorded that Mr CF was feeling 'hopeless and helpless', and felt 'frustrated and angry with the system, the conditions in detention and the Immigration process'.
40. Mr CF declined to attend 2 appointments scheduled for him at the oncology section of the Bankstown Lidcombe Hospital while in immigration detention. He also did not attend 3 consecutive counselling sessions.

3.1 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 section 11(1)(f) be performed by the President.

3.2 What is an 'act' or 'practice'

44. The terms 'act' and 'practice' are defined in section 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 section 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.³

3.3 What is a human right?

47. The phrase 'human rights' is defined in section 3(1) of the AHRC Act to include, among others, the rights and freedoms recognised in the ICCPR.

4 Arbitrary detention

48. Mr CF complains about the period between 28 January 2020 and 5 August 2020 when he was detained in closed immigration detention. This requires consideration to be given to whether his detention was 'arbitrary', contrary to article 9(1) of the ICCPR.

4.1 Law on article 9 of the ICCPR

49. 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.

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 detention⁴
- (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 system⁵
- (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 predictability⁶
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁷

51. In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee (UN HR 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.⁸

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 closed detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁹

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 UN HR 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.¹⁰

54. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.¹¹ A similar view has been expressed by the UN HR Committee, which has said:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach.¹²

55. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.¹³
56. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, closed immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth) in order to avoid being arbitrary.¹⁴

57. Accordingly, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.
58. It is therefore necessary to consider whether the detention of Mr CF in a closed immigration facility can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

4.2 Act or practice of the Commonwealth

59. At the time of his detention, Mr CF was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
60. Mr CF was prevented from making a valid bridging or substantive visa application himself due to a legislative bar in place pursuant to section 501E of the Migration Act.
61. There are a number of powers that the Minister could have exercised either to grant a visa, or to allow the detention in a less restrictive manner than in a closed immigration detention centre.
62. Section 197AB of the Migration Act permits the Minister, where the Minister 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.
63. In addition to the power to make a residence determination under section 197AB, the Minister also has a discretionary non-compellable power under section 195A to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
64. I consider 2 acts of the Commonwealth as relevant to this inquiry:
 - (a) the failure of the Department to refer Mr CF's case to the Minister in order to consider whether to exercise his discretionary powers under section 195A of the Migration Act on 11 March 2020 or any time thereafter

- (b) the failure of the Department to consider referring Mr CF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act at any time.

4.3 Consideration

65. During the 6 months that Mr CF was in immigration detention, the Department once considered referring his case to the Minister for possible intervention, to consider an alternative to held detention.
66. A ministerial instruction has been issued with respect to each of the discretionary powers available to the Minister. At the time of Mr CF's detention, the relevant instructions or guidelines were as follows:
- a. 'Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958)' as signed in November 2016 (the s 195A Guidelines)
 - b. 'Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958' as signed on 10 October 2017 (the s 197AB Guidelines)
67. The s 195A Guidelines include as criteria for referral to the Minister:
- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
 - there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.
 - the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable
 - ...
 - there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and

there is no other intervention power available to grant a visa to the person.

68. The s 197AB Guidelines state:

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

- unaccompanied minors

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

- disabilities or congenital illnesses requiring ongoing intervention;
- diagnosed Tuberculosis where supervision of medication dispensing is required;
- ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention; and
- elderly detainees requiring ongoing intervention.

I will also consider cases where:

- there are unique or exceptional circumstances; ...

69. On their face, both sets of guidelines require officers of the Department to make an assessment of whether cases exhibit 'compelling or compassionate circumstances' (s 195A Guidelines) or 'unique or exceptional circumstances' (s 197AB Guidelines) which may fall within the public interest for the Minister to intervene. Such a direction goes beyond the scope of the powers vested personally in the Minister, and the current guidelines need to be revised in light of the decision of the High Court in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 (*Davis*).

70. The Department commenced its assessment of Mr CF's case against the s 195A Guidelines on 11 March 2020, and determined that he did not meet the guidelines for referral on 2 June 2020.

71. The reason the assessment was initiated was stated in the guidelines assessment supplied by the Department to be on the basis of his 'health conditions and his claimed indigenous background'.

72. The Department referred to medical advice obtained from IHMS dated 1 May 2020 which stated:

In the current COVID-19 pandemic, Mr [CF] has a number of risk factors that place him at increased risk for developing severe (including death)

COVID-19 disease. This risk will remain in the community. However, in the community, the detainee would no longer be in a high risk detention setting. The recommendation is made on the assumption that a detainee will follow government guidelines around social distancing and hygiene in the community setting.

73. Despite this recommendation, the departmental officer concluded that Mr CF's health conditions could be properly cared for in detention.
74. Similarly, the Department's guideline assessment outlined that Mr CF's partner has hypertension, depression and emphysema, and that she had informed the Department that 'she would die slowly if Mr CF is removed from Australia as he has been providing care for her'.
75. The officer observed that Mr CF's partner 'has been able to survive prior to living with him', and concluded that 'there is no information before the Department to indicate that Mr CF's ongoing detention or removal would result in irreparable harm or continuing hardship to an Australian citizen'.
76. The guideline assessment acknowledges that removal to New Zealand was not reasonably practicable at the time due to the pandemic, and yet again, this is not identified as a basis for referral.
77. Mr CF's various health conditions appear to place him within the scope of both sets of guidelines, although it may have been difficult for the Department to ascertain the exact nature of his illnesses and the requirements for treatment thereof in light of his multiple failures to attend scheduled health appointments. It is, however, clear that by May 2020, IHMS has informed the Department that Mr CF's health conditions placed him at increased risk of developing severe COVID-19 (including death) while he remained in a detention environment.
78. Furthermore, the comments of the Federal Court cited above highlight the unique and exceptional circumstances of Mr CF as a person accepted as being biologically descended from an Aboriginal person, but unable to establish recognition into that society.
79. Mr CF was also in a long-term relationship with an Australian citizen who is also Indigenous. Correspondence about her from Mr CF suggests that she has had a stroke, and needed him for her care.
80. The situation is complicated by the requests signed by Mr CF requesting voluntary removal from Australia. Section 198(1) of the Migration Act requires the Department to 'remove as soon as reasonably practicable' a person in these circumstances. Mr CF's 2 requests for removal placed him within the ambit of this section between 31 March 2020 and 29 May 2020, and again from 21 July 2020 onwards.

81. Mr CF's written request of 31 March 2020 is in the following terms:
- I wish for you to deport me back to new Zealand, and I will continue to fight my case from there, I don't won't [sic] to die in here and the heartless stance of the Australian gov and its employees has taken its toll on me, I love Australia and won't [sic] to stay here,
82. It is clear from his email that Mr CF was making the request in light of his continued detention, and he still ultimately held out hope of being able to remain in Australia.
83. Similarly, an officer of the Department spoke to Mr CF about his request on 30 April 2020. An email was sent on 8 May 2020 describing the meeting in the following terms:
- I advised him of all the barriers to his removal i.e. escorts, health and no current removals to New Zealand. Mr [CF] was polite and didn't have many questions. He made a statement that he doesn't want to go but feels like he has no other option and does not want to die in detention.
84. Furthermore, from 1 May 2020, Mr CF was pursuing litigation in the Federal Court seeking orders that, if granted, would have seen him released from detention, and recognised as a non-alien. This may suggest that he did not intend for his removal request to be in force during the period from 1 May 2020 to 29 May 2020.
85. In any event, his removal was not reasonably practicable from 15 March 2020 (when advice was received that the New Zealand Prime Minister had announced the closure of its borders) until 9 June 2020, due to the COVID-19 pandemic. According to the Department, from 9 June 2020, escorted removals to New Zealand were effected on chartered aircrafts only, in line with an agreement between the 2 governments.
86. Each of the above factors was known to the Department, and referred to in the guidelines assessment of 11 March 2020. As the pandemic progressed it became even more apparent that removal to New Zealand was not able to be progressed in the short term.
87. The UN HR Committee has found that detention for even 2 months may be arbitrary, where alternative places or modes of detention that impose a lesser restriction on a person's liberty are reasonably available, and in the absence of particular reasons specific to the individual.
88. Based on the above analysis about the practicality of removing Mr CF, his detention between 15 March and 9 June 2020 was not necessary for the purpose of his removal. Even if removal had been possible, Mr CF had twice made it clear to the Department that he was willing to be removed from Australia voluntarily. The possibility of allowing him to reside in the community until his departure was reasonably practicable does not appear to have been considered by the Department.

89. There are two tools used by the Department and Serco to assess risk with respect to detainees, and their suitability for release into the community.
90. The Community Protection Assessment Tool (CPAT) is a risk-based placement tool used by the Department to help make assessments of the suitability of detainees for release into the community.¹⁵ The CPAT results in a risk category or 'tier' that corresponds to a recommended placement for a detainee.
91. The first CPAT conducted upon Mr CF's detention was on 28 January 2020. In it, Mr CF is described as 'co-operative with status resolution' and 'well-behaved'. Despite these comments, Mr CF is assessed as being a high-risk of harm to the community, based solely on his historical criminal conduct and visa cancellation under section 501 of the Migration Act. Accordingly, the CPAT recommendation is that he remain in held detention (tier 3). This recommendation did not alter in further assessments conducted on 11 March 2020 and 11 May 2020.
92. The Security Risk Assessment Tool (SRAT) is a document produced by Serco which uses a series of risk indicators which then impact the placement of a detainee within the immigration detention network, and, for example, whether or not restraints are used by Serco on transfers within and outside of immigration detention.
93. The first SRAT conducted for Mr CF was on 2 February 2020. Similar to the CPAT, a high risk of aggression/violence and high placement risk are identified, based solely on Mr CF's historical criminal offending. The last SRAT conducted prior to Mr CF's removal from Australia, completed on 2 June 2020, shows that during the preceding 4 months, Mr CF had not been involved in any incidents in detention.
94. Issues with respect to the quality of risk assessments arising from the CPAT and SRAT have been discussed in previous Commission reports.¹⁶ Assigning Mr CF with a high-risk rating without an individualised assessment of his criminal profile was in my view unwarranted. In particular, the documents do not reflect the fact that Mr CF had not exhibited any offending behaviour for close to 30 years, and the convictions against him involving violence had taken place approximately 5 decades prior. Further, while the CPAT included details about his age and health conditions, I am not satisfied that the conclusion that Mr CF was a high risk of harm to the community sufficiently reflected the fact that he was then a 68 year old man with polycystic kidney disease and emphysema.
95. An initial period of immigration detention may have been warranted upon Mr CF's release from criminal custody in light of the fact that his visa had been cancelled, and the Department would have needed to consider his

suitability for an alternative to held detention. However, in light of his specific circumstances, I do not see sufficient justification to warrant him spending over 6 months in immigration detention.

96. The Department did not agree with my preliminary view on Mr CF's complaint, in which I expressed concern that Mr CF's detention may have been arbitrary due to the failure of the Department to refer his case to the Minister for consideration under section 195A of the Migration Act on 2 June 2020, or any time thereafter, and due to the failure to consider a referral under section 197AB at any time during his detention.

97. The Department responded by saying:

There is no legal requirement that the case of a client in detention be considered for Ministerial Intervention, or be referred to the Minister for consideration of their powers.

Throughout a person's time in detention, their case is regularly reviewed by a Status Resolution Officer (SRO) to consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention. SROs conduct monthly case reviews of all persons in immigration detention. Reviews of a detainee's risk to the community using the Community Protection Assessment Tool (CPAT) also occurs at regular intervals, at every six months for detainees who have had a section 501 cancellation and every three months for all other detainees.

During Mr [CF]'s time in detention, his case was regularly reviewed by his SRO to ensure his placement in held detention was appropriate, reasonable and necessary. In all instances, in line with the CPAT user guide, Mr [CF]'s CPATs recommended that Mr [CF] remain in a detention centre environment, primarily due to concerns around his ongoing risk to the community.

The Department notes that the CPAT does not determine the placement of the client. For example, if the CPAT recommends held detention, this does not mean that options are not considered, such as a referral for Ministerial Intervention.

On 11 March 2020, despite the recommendation of the CPAT that Mr [CF] remain in held detention, the SRO chose to refer Mr [CF] for consideration against the section 195A Ministerial Guidelines. This was done in order for the Department to assess whether his case should be referred to the Minister, in order for him/her to consider whether it was in the public interest to grant Mr [CF] a visa.

The referral was based on Mr [CF]'s complex medical factors, and the unknown timeframe for resolution of his ongoing cancellation revocation request. The officer did not refer Mr [CF] for a section 197AB guidelines assessment.

Ministerial Intervention case officers seek to progress cases in a timely manner. Timeframes to progress cases are dependent on a number of factors including complexity of a case and associated information collection requirements; overall case volume; staff resources; and the relative priority of other cases at a given point in time.

The section 195A Ministerial guidelines assessment took Mr [CF]'s health conditions into consideration, however it noted there was no indication that his health conditions could not be properly cared for in a detention centre environment. The guidelines assessments for Mr [CF]'s case were undertaken in a holistic manner and clearly demonstrate that the officer actively engaged with, and balanced, relevant factors.

On 2 June 2020, the Department determined Mr [CF] did not meet the section 195A Ministerial guidelines for referral to the Minister. The Minister accepts that, because of the reasoning of the High Court in *Davis*, the decision not to refer Mr [CF]'s matter to the Minister for Ministerial Intervention was made in excess of the executive power of the Commonwealth.

Finally, we note that it was open to Mr [CF] and his legal representative to initiate a Ministerial intervention request at any point in his time in detention. A review of records indicates that this did not occur.

98. It remains my view that there were factors which weighed heavily in favour of Mr CF being considered for an alternative to held detention. These included his poor health, his increased risk of severe COVID-19 (including death), his claim to be Indigenous (and the difficulties that arose for him in establishing that claim, as recognised by the Federal Court), his close, personal relationships to family members affected by his detention, and the fact that his removal to New Zealand was not reasonably practicable.
99. These factors were not outweighed, for example, by any current risk posed by Mr CF to the Australian community, nor any assessment that he was at risk of absconding.
100. I find the following acts or practices were contrary to article 9(1) of the ICCPR:
 - (a) the failure of the Department to refer Mr CF's case to the Minister in order to consider whether to exercise his discretionary powers under section 195A of the Migration Act on 2 June 2020 or any time thereafter
 - (b) the failure of the Department to consider referring Mr CF's case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under section 197AB of the Migration Act

at any time.

5 Recommendations

101. 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.¹⁷ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹⁸ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁹

5.1 Alternatives to held detention

102. The Department recently informed the Commission²⁰ that its Alternatives to Held Detention program has been impacted by the High Court's decision of *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (*NZYQ*), and that measures considered under that program, such as an Independent Assessment Capacity to advise on risk mitigation, have been paused while the Department considers the impact of *NZYQ*. The Department also informed the Commission that it is currently reviewing its status resolution tools, including the CPAT, with a view of focusing on a person's status resolution pathway and their most appropriate placement while their pathway is being pursued.
103. Mr CF's CPAT assessment indicated a tier 3 placement based solely on very outdated offences, which were not outweighed by his lack of any incidents in detention or his serious health conditions. Further, Mr CF had willingly agreed to be removed to New Zealand, but was unable to do so due to circumstances outside his control. His situation would not have been captured by the reasoning of the High Court in *NZYQ*, but highlights the importance of the Department taking an individualised approach to its assessments of each detainee's risk and removal prospects.

Recommendation 1

The Commission recommends that, in the Department's review of the CPAT, consideration be given to reducing the impact of offences which are old, and not followed by subsequent offending of a similar nature.

Recommendation 2

The Commission recommends that relevant policy and procedures be updated to require consideration of an alternative to held detention with appropriate conditions where a detainee has expressed a willingness to depart from Australia, but removal is currently not reasonably practicable.

5.2 Referrals of detainees who claim indigeneity

104. In its submissions made for the purpose of *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*, the Commission highlighted the importance of not taking an unduly narrow approach to the test as set out in *Love* when determining indigeneity. That case was discontinued before the High Court could determine whether the plaintiff could satisfy the tripartite test despite not being biologically descended from the group he claimed to have been accepted by.
105. The Commission highlighted the work of the UN Working Group on Indigenous Populations, which drafted the United Nations Declaration on the Rights of Indigenous Populations (UNDRIP). The Chairperson-Rapporteur noted that:
- Historically speaking, indigenous peoples have suffered from definitions imposed by others. For example, in the past the criterion for membership of an indigenous population in certain countries was based upon parentage or blood quotient and this is now deemed discriminatory as it denies the right of indigenous people to determine their own membership. For this and other relevant reasons the Working Group would not consider it appropriate to develop a definition of its own without full consultation with indigenous peoples themselves.²¹
106. As noted above at paragraph 34, Mr CF was unable to satisfy the Federal Court that he met the tripartite test. However, positive findings were made in his case that in the Commission's view, warranted consideration by the Minister.
107. The Commission encourages the Department not to focus solely on genetic relationships when considering eligibility under the tripartite test, and to engage with indigenous people in the development of their policies.

Recommendation 3

The Commission recommends that any detainee who claims to be Indigenous, but is not accepted as meeting the tripartite test, should be considered for referral to the Minister for possible intervention, bearing in mind the comments made by the Federal Court and the Commission.

6 Department's response to my findings and recommendations

108. On 16 February 2024, I provided the Department with a notice of my

findings and recommendations.

109. On 31 May 2024, the Department provided the following response to my findings and recommendations:

The Department of Home Affairs (the Department) values the role of the Australian Human Rights Commission (the Commission) to inquire into human rights complaints and acknowledges the findings identified in this report and the recommendations made by the President of the Commission.

The Department does not accept the finding of the Commission that it failed:

- a) to refer Mr CF's case to the Minister to consider whether to exercise his discretionary powers under section 195A of the Migration Act 1958 (the Act) on 2 June 2020 or any time thereafter; and
- b) to consider referring Mr CF's case to the Minister to assess whether to exercise his discretionary powers under section 197AB of the Act at any time;

or that this was inconsistent with, or contrary to, article 9(1) of the International Covenant on Civil and Political Rights.

Mr CF was lawfully detained as an unlawful non-citizen under section 189 of the Act and his detention was considered necessary, reasonable and proportionate in his individual circumstances. At no point did Mr CF's detention become arbitrary.

The Department undertakes regular reviews, escalations and referrals for persons in immigration detention to ensure the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status. The Department maintains its review mechanisms regularly to consider the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention.

Home Affairs Portfolio Ministers have personal intervention powers under the Act, which allow them to grant a visa to a person in immigration detention or to make a residence determination, if they think it is in the public interest to do so. The powers are non-compellable, that is, the Ministers are not required to exercise, or consider exercising their power. Further, what is in the public interest is a matter for the Minister to determine.

It is not a legal requirement that a detention case be considered for Ministerial Intervention, or be referred to the Minister for consideration of their powers. There are no requirements that a case should be referred to the Minister within a certain timeframe or at regular intervals.

The Department notes that it was open to Mr CF and his legal representative to initiate a Ministerial Intervention request at any point in his time in immigration detention. A review of records indicates that this did not occur.

Finally, the Department also notes that Mr CF's removal was progressed as quickly as possible, given the circumstances involved in his case, which include that he had ongoing immigration and judicial review processes, and the closure of the New Zealand border due to the COVID-19 pandemic.

Recommendation 1 - Partially agree

The Commission recommends that, in the Department's review of the CPAT, consideration be given to reducing the impact of offences which are old, and not followed by subsequent offending of a similar nature.

When completing a Community Protection Assessment Tool (CPAT), it is the Status Resolution Officer's (SROs) discretion to consider a substituted placement. For example, where the CPAT recommends a held detention placement, the SRO can consider additional factors, which might support a community placement, notwithstanding an individual's criminal history. The Department is currently undertaking a thorough review of each aspect contained within the CPAT and as part of the review; the Department is considering amendments to the rating thresholds (including the criminality rating threshold). The review will ensure that it maintains the option for SROs to consider a substituted placement based on a variety of strength based factors including the detainee's age, health, length of time in Australia, education history, community support and employable skills.

Recommendation 2 - Accept and has already addressed

The Commission recommends that relevant policy and procedures be updated to require consideration of an alternative to held detention with appropriate conditions where a detainee has expressed a willingness to depart from Australia, but removal is currently not reasonably practicable.

Following the decision by the High Court in the matter of *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor.* (2023) S28/2023, the department has updated relevant procedures to include consideration of the practicality of removal as part of the initial consideration to detain the individual. For individuals in held immigration detention who have expressed a willingness to depart Australia but their removal is protracted, the department reiterates the review and escalation mechanisms that are in place to ensure the most appropriate

placement to manage their health and welfare, and to manage the resolution of their immigration status. This includes where a referral to the Minister for possible Ministerial Intervention consideration should be progressed.

The Department's draft *Detaining unlawful non-citizens and managing them in detention* procedural instruction, outlines the requirement for SROs to conduct formal monthly reviews of each detention case. This is to ensure that:

- Detention remains lawful and reasonable.
- The location of the individual in held detention is appropriate to their individual circumstances and that consideration is undertaken as to whether the person is able to effectively resolve their immigration status within the community.
- Their case is progressing towards a timely and appropriate status resolution outcome and addressing barriers, including barriers to removal.

Through these reviews the Department considers the necessity of detention and where appropriate, the identification of alternate means of detention or the grant of a visa, including through Ministerial Intervention. Escalations and referrals are used to ensure people are detained in the most appropriate placement to manage their health and welfare, and to manage the resolution of their immigration status.

Recommendation 3 - Disagree

The Commission recommends that any detainee who claims to be Indigenous, but is not accepted as meeting the tripartite test, should be considered for referral to the Minister for possible intervention, bearing in mind the comments made by the Federal Court and the Commission cited in this report.

The Department is required to apply the law as decided by the High Court in the matter of *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (*Love*), and any subsequent decisions.

On 11 February 2020, a majority of the High Court found in *Love* that Aboriginal or Torres Strait Islander people who meet the tripartite test as formulated by Justice Brennan in *Mabo [No. 2]* (1992) 175 CLR 1 (*Mabo [No. 2]*) are not 'aliens' for the purposes of the aliens power in the *Constitution*, even if they are not Australian citizens. An individual who is not an Australian citizen and meets or probably meets the tripartite test as established in *Mabo [No. 2]*, will not be held in immigration detention or removed from Australia.

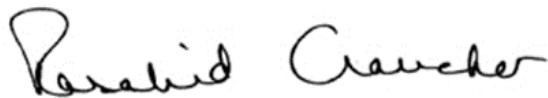
For the purposes of administering the Act, the Department considers the claims and evidence provided by anyone who is not an Australian citizen

and who claims to be an Aboriginal and/or Torres Strait Islander person. The nature and length of each assessment is influenced by the reasonably necessary steps that enable the Department to reach a considered view. The Department ensures that an individual is given a reasonable opportunity to provide information that is relevant to their claims. The Department considers any new information as a matter of urgency and whether it might affect any assessments already made about an individual.

If satisfied that the person cannot reasonably be suspected of meeting the tripartite test, the Department will issue a notice to the person informing them that the Department does not consider the person to meet the tripartite test and that removal will occur in due course. The Act provides the legal framework for the removal of unlawful non-citizens from Australia. Under section 198 of the Act, a Departmental officer has an obligation to remove an unlawful non-citizen who is liable for removal from Australia as soon as reasonably practicable.

If an individual has been assessed against the tripartite test and found not to be an Aboriginal or Torres Strait Islander non-citizen person, their case will not be referred for Ministerial Intervention as a matter of course. A Status Resolution Officer may decide to refer a case for Ministerial Intervention consideration, due to the individual's particular circumstances. In cases which are referred to the Minister and an assessment has been made under the tripartite test, details of the status of that assessment's outcome (if completed) would be included in the submission.

110. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

June 2024

Endnotes

- ¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.
- ² (1992) 175 CLR 1, 70.
- ³ 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.
- ⁴ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014); See also UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*).
- ⁵ UN Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 5–6 [18]; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).
- ⁶ *Manga v Attorney-General* [2000] 2 NZLR 65, 71 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); UN Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (11 November 1999) (*Spakmo v Norway*).
- ⁷ UN 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 (2004) [6]; UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (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*, UN Doc CCPR/C/76/D/900/1999.
- ⁸ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ⁹ *C v Australia*, UN Doc CCPR/C/76/D/900/1999; UN Human Rights Committee, *Communication No 1255,1256,1259,1260,1266,1268,1270,1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255/2004 (2007) (*Shams & Ors v Australia*); *Baban v Australia*, CCPR/C/78/D/1014/2001; UN Human Rights Committee, *Views: Communication No. 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- ¹⁰ Human Rights Committee, *General Comment 35 (2014), Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- ¹¹ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ¹² UN Human Rights Committee, *General Comment No 8: Article 9 (Right to Liberty and Security of Persons)*, 60th sess, UN Doc HRI/GEN/1/Rev.1 (1982) [4]. See also UN Commission on Human Rights, Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile, UN Doc E/CN.4/826/Rev.1 (1962) [783]–[787].
- ¹³ UN Human Rights Committee, *Communication No 1051/2002*, 80th sess, UN Doc CCPR/C/80/D/1051/2002 (2004) (*Mansour Ahani v Canada*) [10.2].
- ¹⁴ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6];

Van Alphen v the Netherlands, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

- ¹⁵ Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, (Report, August 2016) 52.
- ¹⁶ For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130 [34]-[41].
- ¹⁷ AHRC Act, s 29(2)(a).
- ¹⁸ AHRC Act, s 29(2)(b).
- ¹⁹ AHRC Act, s 29(2)(c).
- ²⁰ *Mr FF v Commonwealth of Australia (Department of Home Affairs)* [2024] AusHRC 156 [33].
- ²¹ UN Working Group on Indigenous Populations, *Note by the Chairperson-Rapporteur on criteria which might be applied when considering the concept of indigenous peoples*, UN Doc E/CN.4/Sub.2/AC.4/1995/3 (21 June 1995), 4 [6].