



Australian
Human Rights
Commission

Mr KJ v Commonwealth of Australia

(Department of Home Affairs)

[2024] AusHRC 158

February 2024

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[2024] AusHRC 158

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 KJ, alleging a breach of his human rights by the Department of Home Affairs (Department).

Mr KJ arrived in Australia by boat at Christmas Island, and was transferred into Manus Regional Processing Centre in Papua New Guinea in January 2014. In September 2019, Mr KJ was transferred to Australia for medical treatment for his pressing physical and mental health concerns. Mr KJ would then remain in a closed immigration detention facility in Queensland, Australia, until his release into the community in March 2021.

Notwithstanding Mr KJ's ongoing serious health concerns, and a lack of security concerns, the Department did not refer to Mr KJ's case to the Minister for 11 months after a Ministerial Instruction was issued. Mr KJ spent all this time awaiting Ministerial referral in the closed immigration detention facility, and his examinations in this time revealed serious vulnerabilities, including attempts at major self-harm.

As a result of this inquiry, I have found that the Department's delay in referring Mr KJ's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the *Migration Act 1958* (Cth) until 8 February 2021, is inconsistent with, or contrary to, the right to freedom from arbitrary detention under article 9(1) of the *International Covenant on Civil and Political Rights*.

On 3 October 2023, 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 14 February 2024. That response can be found in Part 8 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

February 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 KJ against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of his human rights. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr KJ arrived in Australia by boat at Christmas Island on 10 August 2013. On 28 January 2014, he was transferred to the Manus Regional Processing Centre in Papua New Guinea. Accordingly, he became a 'transitory person' as defined within s 5(1) of the *Migration Act 1958* (Cth) (Migration Act). On 5 September 2019, Mr KJ was transferred to Australia for medical treatment. On 2 March 2021, Mr KJ was released into the Australian community on a bridging visa where he remains.
3. Mr KJ complains that his detention in Australia for 18 months was arbitrary, and therefore inconsistent with or contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
4. The right to liberty and freedom from arbitrary detention is not protected in the Australian Constitution or in legislation. The High Court has upheld the legality of indefinite detention under the Migration Act.² As a result, there are limited avenues for an individual to challenge the lawfulness of their detention under Australian law.
5. 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.
6. 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'.
7. This document comprises a notice of my findings in relation to this inquiry and my recommendations to the Commonwealth.
8. I have decided to make a direction pursuant to s 14(2) of the AHRC Act prohibiting the disclosure of Mr KJ's identity in relation to this inquiry. While he has not specifically requested me to do so, I am mindful that my report into his case discloses the fact that he has claimed asylum from his country of origin. I consider it necessary for Mr KJ's privacy and human

rights that his name not be published.

2 Summary of findings and recommendations

9. As a result of the inquiry, I find that the following act of the Commonwealth is inconsistent with, or contrary to, article 9(1) of the ICCPR:
 - The Department's delay in referring Mr KJ's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s 197AB of the Migration Act until 8 February 2021.
10. I make the following recommendations:

Recommendation 1

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB.

Recommendation 2

The Commission recommends that the Department consider Mr KJ's eligibility for Status Resolution Support Services (SRSS) in light of his particular vulnerabilities and mental health issues, and facilitate a warm referral of his case to an appropriate service provider.

3 Background

11. Mr KJ is from Iran and arrived at Christmas Island by boat on 10 August 2013. He was detained under s 189(3) of the Migration Act and was accommodated at Christmas Island Immigration Detention Centre (IDC).
12. On 28 January 2014, Mr KJ was taken to Papua New Guinea in accordance with s 198AD of the Migration Act and was accommodated in the Manus Regional Processing Centre in Manus Province. The Migration Act defines any person taken to a regional processing country as a 'transitory person'. Mr KJ was found to be a refugee through a Papua New Guinea refugee status determination process.
13. On 5 September 2019, Mr KJ was transferred from Manus Island to Brisbane to obtain medical treatment. He was detained upon his arrival under s 189(1) of the Migration Act and sent to the Brisbane Immigration Transit Accommodation (BITA) on the same day.

14. On 23 October 2019, Mr KJ was transferred from BITA to the Kangaroo Point Alternative Place of Detention, where he was detained until 2 March 2021.
15. On 9 September 2019, Mr KJ's case was referred for assessment by the Department against the Minister's guidelines under s 197AB of the Migration Act.
16. On 3 March 2020, the then Minister for Home Affairs instructed that transitory persons in immigration detention should be referred for possible consideration under s 195A of the Migration Act, for the grant of a Final Departure Bridging E visa (FDBVE). As a result, the Department stopped progressing its consideration of Mr KJ's case under s 197AB of the Migration Act.
17. On 8 February 2021, the Department referred a submission for Mr KJ's case to the then Minister for consideration under s 195A of the Migration Act in response to the Minister's 3 March 2020 instruction.
18. On 18 February 2021, the Minister exercised his power under s 195A of the Migration Act to grant Mr KJ a Humanitarian Stay (Temporary) (subclass 449) (HSTV) visa in effect until 9 March 2021 and a Bridging E (subclass 050) visa (BVE) in effect until 2 September 2021. Both visas were to come into effect on 2 March 2021, and Mr KJ was released from immigration detention on that day. Mr KJ has been granted subsequent BVEs and remains in the community.
19. The relevant period of detention covered by this complaint is from 5 September 2019 when Mr KJ arrived in Brisbane to 2 March 2021 when he was released from detention. This period is approximately 18 months.

4 Legislative framework

4.1 Functions of the Commission

20. 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.
21. 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.
22. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

4.2 What is an 'act' or 'practice'

23. 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.
24. 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.
25. 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.³

4.3 What is a human right?

26. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR.
27. 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.

5 Arbitrary detention

28. Mr KJ complains about his detention in a closed immigration detention facility. This requires consideration to be given to whether his detention was 'arbitrary', contrary to article 9(1) of the ICCPR.

5.1 Law on article 9 of the ICCPR

29. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - 'detention' includes immigration detention⁴
 - 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

- 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
 - detention should not continue beyond the period for which a State party can provide appropriate justification.⁷
30. In *Van Alphen v The Netherlands* the United Nations Human Rights Committee (UN HR Committee) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁸
 31. 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
 32. 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.¹⁰ A similar view has been expressed by the UN HR Committee:

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.¹¹
 33. 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.¹²
 34. 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.¹³
 35. 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.

36. It is therefore necessary to consider whether the detention of Mr KJ 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 may be considered 'arbitrary' under article 9 of the ICCPR.

6 Assessment

6.1 Act or practice of the Commonwealth

37. As Mr KJ arrived in Australia by boat without a valid visa, he was an 'unlawful non-citizen', and therefore the Migration Act required that he be detained.
38. From 5 September 2019, when Mr KJ arrived in Brisbane to 2 March 2021, when he was released from immigration detention on a Bridging visa, he was detained pursuant to s 189(1) of the Migration Act.
39. While the Migration Act requires the detention of unlawful non-citizens, there are a number of powers that the Minister could have exercised to detain Mr KJ in a manner less restrictive than a closed immigration detention facility.
40. 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.
41. In addition to the power to make a residence determination under s 197AB, the Minister also has a discretionary non-compellable power under s 195A of the Migration Act to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
42. I consider the following act of the Commonwealth as relevant to this inquiry:

- The Department's delay in referring Mr KJ's case to the Minister for consideration of his discretionary intervention powers under s 195A and/or s197AB of the Migration Act until 8 February 2021.
43. In October 2017, the Hon Peter Dutton MP, then Minister for Home Affairs, reissued guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act. These guidelines are currently in use by the Department.
 44. These guidelines provide that the Minister would not expect referral of cases where a person was transferred from an offshore processing centre to Australia for medical treatment unless there were exceptional circumstances.
 45. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
 46. The phrase 'unique or exceptional circumstances' is not defined in any of the guidelines, however it is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.¹⁴ In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
 - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration
 - the length of time the person has been present in Australia (including time spent in detention)
 - compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.
 47. Similarly, guidelines have been published in relation to the exercise of the Minister's power under s 195A of the Migration Act to grant a visa to a person in immigration detention.
 48. In November 2016, Minister Dutton reissued the s 195A guidelines, which are the current guidelines in use by the Department. Although there is no exception for unique or exceptional circumstances – unlike the other ministerial intervention guidelines referred to above – under these guidelines the Minister will consider cases where there are 'compelling or compassionate circumstances'.

6.2 Findings

49. On 5 September 2019, Mr KJ was transferred from Manus Island to Brisbane to obtain medical treatment and was detained upon his arrival.

50. Shortly thereafter, on 9 September 2019, Mr KJ's case was referred by the Department for assessment against the Minister's guidelines for a residence determination under s 197AB of the Migration Act.
51. However, in March 2020, the Department stopped progressing its consideration of Mr KJ's case against the s 197AB guidelines on the basis that, on 3 March 2020, the then Minister for Home Affairs instructed that transitory persons in immigration detention should be referred for possible consideration under s 195A of the Migration Act. Mr KJ's case was captured within this group. The Department has not provided an explanation for the 6-month delay in its consideration of Mr KJ's case between September 2019 and March 2020.
52. In its response to my preliminary view, the Department explained that the reason for stopping consideration of Mr KJ's case for referral was because the Minister 'did not agree for the Department to refer transitory persons for consideration under section 197AB unless they were engaged in United States resettlement'. As Mr KJ was not so engaged, he was no longer able to be considered for referral under that intervention power.
53. It then took the Department approximately 11 months to refer a submission for Mr KJ's case to the then Minister for consideration under s 195A of the Migration Act. This referral was made on 8 February 2021. The Department acknowledged that, in the 12-month period following the Minister's instruction of 3 March 2020, 'a number of group submissions of transitory persons in immigration detention' were put to the Minister for consideration under s 195A.
54. On that basis I find that Mr KJ's case should have been referred to the Minister earlier.
55. The Department's delay in referring Mr KJ's case to the Minister for a period of 17 months until 8 February 2021 is particularly concerning, given his vulnerabilities: in particular, the physical and mental health concerns consistently noted in the reviews conducted by Status Resolution Officers under the Department's Community Protection Assessment Tool (CPAT) process.
56. Mr KJ's Department case reviews reveal protracted physical and mental health issues that were known by the Department and were the reason for his transfer from Manus Island to Australia.
57. Each review conducted under the Department's CPAT process records that:
 - when Mr KJ was transferred onshore, he was assessed as requiring psychiatric treatment and assessment

- from 1 November 2017 to 4 September 2019, Mr KJ had engaged in one incident of minor self-harm and two further incidents of major self-harm
 - Mr KJ was suffering from a number of health problems including oral issues, reflux, liver function and gallbladder problems, left kidney problems and back pain.
58. The above information is replicated in most of the case reviews conducted by the Department between 11 October 2019 and 28 August 2020.
59. I note that, despite the above information, the Department's CPAT reviews state, under the heading 'Recommended Support Services', that 'Nil [was] required' in Mr KJ's case and further state that 'Mr [KJ] is linked with IHMS [the Department's Detention Health Service Provider] and knows how to access support should it be required'. Mr KJ was assessed as requiring psychiatric treatment, and his incidents of self-harm were noted.
60. I note that there were no security-related concerns that would justify Mr KJ's detention in a closed immigration detention facility. The Department has provided no information to suggest that closed detention was necessary, for example, to prevent flight or for community safety. In fact, the Department's case reviews consistently state that 'Mr [KJ]'s placement in held detention is inconsistent with his CPAT assessment of Tier 1.3 Residence Determination'.
61. I acknowledge that the s 197AB guidelines exclude transitory persons from referral unless there are exceptional circumstances, and that the s 195A guidelines exclude them 'generally', however I consider Mr KJ's vulnerabilities as outlined above, are relevant to an assessment as to whether his case presented 'unique or exceptional circumstances' or 'compelling or compassionate circumstances'. Arguably, there was scope to bring Mr KJ's case within the Minister's s 197AB or s 195A guidelines, as his continued detention may have resulted in irreparable harm and continued hardship to him given his psychological state and physical health issues.
62. In response to my preliminary view, the Department wrote:
- The Department is committed to the health and welfare of detainees within the Immigration Detention Network. The Department's [sic] maintains that Mr [KJ]'s health needs were appropriately met whilst he was in immigration detention. Mr [KJ] had access to health screening and assessments that were appropriate to his individual circumstances and commensurate with the healthcare practices that would be available in the Australian community as per the Royal Australian College of General

Practitioners Standards for Health Services in Australian Immigration Detention Centres.

The Detention Health Services Provider (DHSP) evaluated Mr [KJ]'s health and the effectiveness of treatment at the time of presentation based on signs, symptoms, and diagnostic results, to which treatment was adjusted as required. If clinically indicated, the DHSP referred Mr [KJ] to a specialist or allied health professional that provided further assessment and interventions. Mental health screening for Mr [KJ] was conducted as clinically indicated and was offered according to a routine schedule.

63. On 8 February 2021, a submission was ultimately made by the Department to the Minister, referring 69 transitory persons held in closed detention for the Minister's consideration under s 195A of the Migration Act to grant these persons a HSTV and a FDBVE. Mr KJ's case was included in this submission.
64. As stated above, this submission was made in response to the specific Ministerial instruction issued on 3 March 2020.
65. I am concerned that it took the Department approximately 11 months after the Ministerial instruction was issued, and 17 months after Mr KJ's detention commenced, to make this submission to the Minister. I do not consider that Mr KJ's lack of engagement in the United States resettlement program provides a sufficient justification for the lack of progress towards finding an alternative to held detention for Mr KJ.
66. In a response dated 16 October 2020 to information sought by the Commission in relation to this complaint, the Department stated:

The Department focused its efforts on the Government's COVID-19 response and diverted resources to critical functions from March 2020. Non-critical functions were ceased or slowed during this period but have progressively been returning to more normal activity since 1 June 2020. MI [Ministerial Intervention] slowed during this period but the Department continued to assess cases against the MI guidelines and referred section 195A cases on an exceptional basis to the relevant Minister. The Department is currently working to review transitory persons in held immigration detention in line with the Minister for Home Affairs' instruction (made in March 2020) for possible referral under section 195A. Mr [KJ]'s case will be assessed in due course.
67. While I understand that the Department's Ministerial Intervention processes slowed for a period while it redirected resources and focused its efforts on the Government's COVID-19 response, the above states that the Department began returning to its normal activities from 1 June 2020. In my view, the Department's above response is not a sufficient

justification for the length of time it took to refer a submission to the Minister, particularly in the following circumstances:

- a Ministerial instruction had been issued that transitory persons such as Mr KJ should be referred for possible consideration of a visa
 - Mr KJ had significant mental and physical health conditions that were known to the Department, and there were no security or community safety issues justifying his detention.
 - Mr KJ's CPAT assessment was Tier 1: Residence determination.
68. To avoid being arbitrary, alternatives to closed detention should be routinely considered for all detainees, with conditions applied to mitigate risks as appropriate. Closed detention should only be used in exceptional circumstances where identified risks cannot be managed through less restrictive means.
69. The Department's delay in referring Mr KJ's case to the Minister resulted in his continued detention totalling approximately 18 months from when he arrived in Brisbane for medical treatment. The Department has denied that this constituted a delay, and stated that Mr KJ's individual circumstances had been considered by them in progressing his case within 'internal processes and caseload priorities within available resources'. For the reasons outlined above, I consider that Mr KJ could have been referred to the Minister earlier than February 2021.
70. For the reasons set out above, I find that the Department's delay in referring Mr KJ's case to the Minister for consideration of his intervention powers resulted in Mr KJ's detention being 'arbitrary', contrary to article 9(1) of the ICCPR.

7 Recommendations

71. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁵ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁶ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.¹⁷

7.1 Transitory persons

72. According to the Department, there were 1,083 transitory persons in Australia at 31 March 2023.¹⁸ Of these, 23 were in detention. The

remainder were in the community either in community detention (237) or on BVEs (823).

73. Of those transitory persons who remain in held detention (either in immigration detention facilities or alternative places of detention), the Commission does not have sufficient information to make findings about the appropriateness of their detention.¹⁹
74. However, it remains a concern that the current ministerial guidelines on referrals to the Minister under s 197AB exclude for referral transitory persons, unless there are exceptional reasons or on the Minister's request, and those under s 195A exclude them without exception.
75. The ministerial guidelines should be amended to remove these exclusions. A transitory person should not be detained merely for the fact of them falling within that definition, unless there are other factors relevant to their individual circumstances that justifies their detention as necessary, proportionate and reasonable. Otherwise, their detention may be considered arbitrary and contrary to article 9(1) of the ICCPR.

Recommendation 1

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that:

- all transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB.

7.2 Support services

76. In correspondence to the Commission following his release from detention, Mr KJ complained that his BVE prevented him from accessing TAFE or Centrelink, and that he had had difficulties accessing appropriate support services for housing.
77. At 31 March 2023, 603 of the 1,083 transitory persons in Australia were receiving some kind of support through the Status Resolution Support Services (SRSS).²⁰ For 446 of these, their SRSS included financial assistance.
78. The Department's website describes SRSS as providing support to 'approved persons' including those who are holding a BVE, are recently released from immigration detention, or are facing significant barriers that are impacting on their ability to resolve their immigration status. The support provided can include financial, accommodation, access to health care, case worker support and case management.²¹

79. The Commission recommends that the Department consider Mr KJ's eligibility for SRSS in light of his particular vulnerabilities and mental health issues, and facilitate a warm referral of his case to an appropriate service provider. The Commission suggests that consideration be given to this support extending to:
- financial assistance
 - accommodation assistance, to ensure that Mr KJ is able to access safe and secure accommodation
 - health and wellbeing services, to ensure that Mr KJ is able to access ongoing torture and trauma counselling services, or general psychological services.

Recommendation 2

The Commission recommends that the Department consider Mr KJ's eligibility for SRSS in light of his particular vulnerabilities and mental health issues, and facilitate a warm referral of his case to an appropriate service provider.

7.3 Durable solution

80. As with other transitory persons in Australia, Mr KJ remains on a BVE for an uncertain period. As long as the Commonwealth's policy remains that transitory persons will not be permanently settled in Australia, then Mr KJ's options for his future remain limited.
81. Mr KJ has been found to be in need of protection, and cannot be returned to his country of origin, Iran. The Commission does not have any information before it as to the efforts being made to resettle Mr KJ in any third country, and so cannot make any specific recommendations in this respect. However, the Commission remains concerned of the risk of Mr KJ being redetained in future in light of his visa status.
82. The Commission encourages the Department to continue efforts to find a durable solution for Mr KJ in light of his protection needs.

8 The Department's response to my findings and recommendations

83. On 16 October 2023, I provided the Department with a notice of my findings and recommendations.
84. On 19 January 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.

Recommendation 1 – Partially agree

The Commission recommends that the Minister's s 195A and s 197AB guidelines should be amended to provide that all transitory persons in closed immigration detention are eligible for referral under ss 195A and 197AB.

The Minister is currently considering the implications of the High Court's decision in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10 on requests for him to exercise his personal intervention powers, including in relation to requests that have already been made. Further information about the Department's approach will be made available in due course.

The Department partially agrees to this recommendation, as the Department is not able to amend the Ministerial Intervention instructions. It is at the discretion of the Minister what criteria they determine should be included in any new Ministerial Intervention instructions.

The Department will provide the Commission's recommendations for the Minister's consideration when briefing the Minister on options to review the sections 195A and 197AB Ministerial Intervention instructions.

Recommendation 2 – Partially agree

The Commission recommends that the Department consider Mr KJ's eligibility for Status Resolution Support Services (SRSS) in light of his particular vulnerabilities and mental health issues, and facilitate a warm referral of his case to an appropriate service provider.

On 14 November 2022, the Minister for Immigration, Citizenship and Multicultural Affairs extended eligibility for Status Resolution Support Services (SRSS) to transitory persons if they meet an exceptional circumstances criteria including to those who:

- have a significant diagnosed mental health illness where they may likely inflict harm to others or themselves; or
- have a significant physical health concern that deems them unfit to depart the country, or have a life expectancy of less than 12 months; or

- are on a departure pathway and actively engaged with one of the Departure Service Providers.

SRSS applications from clients in the community must go through an SRSS service provider. Mr KJ, a friend, family member, community group or advocate can contact an SRSS provider who will be able to apply for SRSS. Contact details for SRSS providers can be found on the Department's website: [Status Resolution Support Services \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au/status-resolution-support-services)

85. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL
President
Australian Human Rights Commission
February 2024

Endnotes

- ¹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), [1980] ATS 23 (entered into force for Australia 13 November 1980).
- ² *Al-Kateb v Goodwin* (2004) 219 CLR 562.
- 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 (2014). See also UN Human Rights Committee, *Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); UN Human Rights Committee, *Communication No 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); UN Human Rights Committee, *Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (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 (2014) [18]; UN Human Rights Committee, *General Comment 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 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee, *Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); *A v Australia*, UN Doc CCPR/C/59/D/560/1993; UN Human Rights Committee, *Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (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, *Communication No 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (2006) (*D and E and their two children v Australia*).
- ¹⁰ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ¹¹ 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].
- ¹² 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].
- ¹³ 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.

- ¹⁴ The Hon Chris Bowen MP, Minister for Immigration and Citizenship, Minister's guidelines on ministerial powers (s345, s 351, s 417 and s 501J), 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- ¹⁵ *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- ¹⁶ *Ibid*, s 29(2)(b).
- ¹⁷ *Ibid*, s 29(2)(c).
- ¹⁸ Senate Standing Committee on Legal and Constitutional Affairs Budget Estimates, Parliament of Australia, *Question on notice no. 766* (Home Affairs Portfolio, BE23-766, May 2023).
- ¹⁹ In budget estimates for the Home Affairs Portfolio, Senator McKim asked the Secretary to explain the reason for the continued detention of 23 transitory persons in Australia. The Department responded to the question on notice that 'transitory persons are detained under section 189 of the Act on arrival to Australia and can only be placed in the community through the exercise of the Minister's powers under sections 195A or 197AB of the Act.' Senate Standing Committee on Legal and Constitutional Affairs Budget Estimates, Parliament of Australia, *Question on notice no. 93* (Home Affairs Portfolio, BE23-093, May 2023).
- ²⁰ Senate Standing Committee on Legal and Constitutional Affairs Budget Estimates, Parliament of Australia, *Question on notice no. 764* (Home Affairs Portfolio, BE23-764, May 2023).
- ²¹ Department of Home Affairs, *Status Resolution Service* (webpage) <https://immi.homeaffairs.gov.au/what-we-do/status-resolution-service/status-resolution-support-services>.