



Australian
Human Rights
Commission

Mr LD v Commonwealth of Australia

(Department of Home Affairs)

[2024] AusHRC 173

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

Mr LD was granted a Global Special Humanitarian (subclass 202) visa in May 2004, and arrived in Australia in September 2005. He was granted this visa based on the harm faced by him in Sudan. His humanitarian visa was cancelled in April 2018, following his criminal conviction, and he was detained in Villawood Immigration Detention Centre, pending removal from Australia.

However, Mr LD was unable to be removed from Australia, as the only country to which he had any right to return, was also the country he had been recognised to be owed protection. With nowhere he could practically be removed to, Mr LD's detention became indefinite.

Mr LD remained in immigration detention until his release in November 2023, pursuant to the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

As a result of this inquiry, I find that the Department's failure to refer Mr LD's case to the Minister at any time during almost 5 years of detention for the Minister to consider exercising the Minister's discretionary powers under section 195A or section 197AB of the Migration Act, contributed to his detention becoming arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

On 13 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 19 July 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, flowing style.

Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

July 2024

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr LD against the Commonwealth of Australia (Department of Home Affairs) (Department), alleging a breach of human rights. The inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
2. Mr LD was detained from 20 December 2018 to 17 November 2023, after his visa was cancelled due to his criminal offending. Mr LD has been accepted by Australia as a refugee, meaning he is at risk of persecution if he were to be returned to South Sudan. He feared his detention had become indefinite unless he voluntarily chose to return to South Sudan despite that risk, or a safe third country was found for him, or the Minister personally exercised his discretion to end his detention. Accordingly, 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, outside seeking a writ of *habeas corpus*, 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 report of my findings in relation to this inquiry and my recommendations to the Commonwealth.
7. Mr LD has been accepted as a refugee, and this inquiry has considered sensitive personal information about him. I consider it necessary for the protection of Mr LD's privacy and human rights to make a direction under section 14(2) of the AHRC Act prohibiting the disclosure of his identity in relation to this inquiry.

2 Summary of findings and recommendations

8. As a result of this inquiry, I find that the Department's failure to refer Mr LD's case to the Minister at any time during almost 5 years of detention for the Minister to consider exercising the Minister's discretionary powers under section 195A or section 197AB of the Migration Act, contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.
9. I make the following recommendations:

Recommendation 1

The Commission recommends that the Department brief the Minister on the need for a new direction being issued pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- international obligations, including *non-refoulement*, be made a primary consideration
- ensure that decision makers make an assessment of, or obtain advice about, the prospects of removal from Australia in the event of the person's visa refusal or cancellation
- as part of the legal consequences of a relevant decision, decision makers be required to explicitly consider the risk of:
 - i. prolonged detention
 - ii. arbitrary detention, contrary to the ICCPR.

Recommendation 2

The Commission recommends that the Department brief the Minister on the legal options available for reconsideration of the previous visa cancellation or refusal decisions that led to the detention of each person within the *NZYQ* cohort, whether that be through intervention under section 501J or otherwise.

3 Background

10. Mr LD was granted a Global Special Humanitarian (subclass 202) visa on 4 May 2004, and arrived in Australia on 21 September 2005. He was granted this visa based on the harm faced by him in Sudan. Australia recognises him as a national of what is now the Republic of South Sudan.
11. His visa was cancelled on 16 April 2018 pursuant to section 501(2) of the

Migration Act 1958 (Cth) (Migration Act). Mr LD did not seek a review of the decision, and on 20 December 2018, he was detained under section 189(1) of the Migration Act as an unlawful non-citizen. He was detained at Villawood Immigration Detention Centre (VIDC) where he remained until his release on 17 November 2023.

12. The offences Mr LD was convicted of, and which caused him to fail the character test,² were various domestic violence offences, the most serious being assault occasioning actual bodily harm, for which he was sentenced to 16 months imprisonment in October 2013. That sentence was suspended upon him entering into a bond to be of good behaviour for 16 months. Mr LD also has prior convictions for contravening apprehended violence orders and other offences between January 2008 and October 2012. He has not been convicted of any offences since October 2013.
13. Mr LD has 3 Australian citizen children with his ex-wife and 2 grandchildren from his step-daughter, born while he has been in detention. His ex-wife was the victim of much of his prior offending, although the most recent offences were perpetrated against another victim. Mr LD now maintains a positive parental relationship with his ex-wife to enable him to remain in contact with his children.
14. On 21 February 2019, Mr LD lodged an application for a Protection (subclass 866) visa. The Department refused the visa application on 23 December 2019.
15. As part of the process of the Department considering his application, it was required to make an assessment of whether Mr LD was owed protection obligations by Australia. In doing so, the Department accepted that Mr LD was in need of international protection from return to South Sudan. However, the Department found that Mr LD's visa should be refused because he failed the character test.
16. Mr LD sought a review of the decision at the Administrative Appeals Tribunal (AAT). The AAT set the decision aside twice – first on 26 February 2020, which was quashed on judicial review by consent, and second on 2 March 2021.
17. On 7 March 2022, the then Minister,³ using the discretion conferred by section 501A(2) of the Migration Act, set aside the AAT's decision, and instead refused to grant Mr LD's Protection visa application on the basis that it was in the national interest to do so.
18. Mr LD sought judicial review of the Minister's decision. He was unsuccessful both at the Federal Court and on appeal to the Full Court of the Federal Court on 14 July 2023. An application for special leave to appeal to the High Court was refused on 7 December 2023.
19. Mr LD, having no legal proceedings on foot, was then liable for removal from Australia. However, his removal was unable to be effected because

the only country to which he had any right to return, was also the country from which he had been recognised to be owed protection. With nowhere he could practically be removed to, his detention had effectively become indefinite.

20. On 17 November 2023, the Department recognised that this meant that Mr LD was affected by the decision of the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 (NZYQ), and Mr LD was released from immigration detention and granted a Bridging (Removal Pending) visa. He now resides in the Australian community.

4 Legal Framework

4.1 Functions of the Commission

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

4.2 What is an 'act' or 'practice'

24. 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.
25. 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.
26. 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.⁴

4.3 What is a human right?

27. 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.

5 Australia's protection obligations

28. Australia has obligations under a number of human rights instruments, most notably those known as containing *non-refoulement* obligations: the *Convention relating to the Status of Refugees* (Refugee Convention), the ICCPR, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (Second Optional Protocol) and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).
29. Article 33(1) of the Refugee Convention prohibits the return of a refugee to the country in respect of which they have been found to be owed protection.
30. Australia's complementary protection framework encompasses Australia's commitment to not returning a person to a country where they face a real risk of harm under articles 6 or 7 of the ICCPR, article 3 of the CAT, and under the Second Optional Protocol.
31. Where a person has been found to be in need of international protection, section 197C(3) of the Migration Act prevents their removal from Australia to the country from which that protection is required.⁵ The 'protection finding'⁶ remains in place for that person unless and until a decision is made by the Department that the person 'is no longer a person in respect of whom any protection finding ... would be made'.⁷
32. Mr LD has had a protection finding made in his favour. The Department reviewed that finding on 22 June 2021 and agreed, recording in its decision record that Mr LD is a refugee, and that he is not a person who:
 - is a danger to Australia's security, or
 - having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.⁸
33. This means that Mr LD's detention cannot be ended by his removal to South Sudan unless he voluntarily requests that outcome in writing.⁹ Removal to a third country remains an option, but the Department has stated that 'the prospects of finding another country willing to receive him are poor'.
34. Prior to November 2023, it was settled law in Australia that potentially indefinite administrative detention for the purposes of removing a person from Australia was lawful.¹⁰ This was the case even when circumstances

prevented removal, such as where there was a protection finding made in their favour, or where the person was stateless.

35. This position changed when the High Court ordered the release of the plaintiff in the case of *NZYQ*. In doing so, the High Court reversed its earlier position, and made clear that there is a constitutional limit on the ability of the Australian Government to detain a person for the purpose of removal in circumstances where there is no real prospect of removal becoming practicable in the reasonably foreseeable future.¹¹

5.1 Ministerial directions

36. In making decisions regarding the refusal or cancellation of any visa pursuant to section 501 of the Migration Act, the Department and the AAT are bound to consider the terms of any direction issued by the Minister under section 499 of the Migration Act. A series of applicable directions have been made under this section. Relevant to Mr LD's case is *Direction No. 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (Direction No. 90).¹²
37. For the purpose of this inquiry, it is not necessary to provide an analysis of Direction No. 90 in its entirety. However, it is useful to set out its contents as they relate to Australia's obligations under article 9 of the ICCPR to understand the way this aspect of Mr LD's case was weighed by the Minister.
38. Direction No. 90 is split into two types of considerations: those identified as 'primary considerations', and those as 'other considerations'. Decision makers are informed that 'primary considerations should generally be given greater weight than the other considerations'.
39. International non-refoulement obligations appears as one of the 'other considerations'. Under this heading the following appears:
 - (2) In making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

- (3) However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa. This is because such a decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions.
40. On 3 March 2023, Direction No. 90 was replaced by Direction No. 99. While not in force at the time of the Minister's consideration of Mr LD's case, it is noted that this topic is expanded upon in Direction No. 99 to encompass the situation Mr LD found himself in, being covered by a protection finding.
41. The law inserting section 197C(3) into the Migration Act was assented to on 24 May 2021 – after the making of Direction No. 90.

6 Arbitrary detention

42. Mr LD complains about his detention from 20 December 2018 to 17 November 2023. This requires consideration to be given to whether his detention was 'arbitrary', contrary to article 9(1) of the ICCPR.

6.1 Law on article 9 of the ICCPR

43. 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.

44. 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 detention¹³
 - 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 system¹⁴

- 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 predictability¹⁵
 - detention should not continue beyond the period for which a State party can provide appropriate justification.¹⁶
45. 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.¹⁷
46. 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.¹⁸
47. 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.¹⁹
48. 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.²⁰ 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.²¹

49. 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.²²
50. A short period of administrative detention for the purposes of developing a more durable solution to a person's immigration status may be a reasonable and appropriate response by the Commonwealth. However, closed detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.²³
51. 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.²⁴
52. 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.
53. It is therefore necessary to consider whether the detention of Mr LD 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.

6.2 Act or practice of the Commonwealth

54. I consider the following act of the Commonwealth as relevant to this inquiry:
 - the failure of the Department to refer Mr LD to the Minister in order

for the Minister to consider whether to exercise the Minister's discretionary powers under section 195A or section 197AB of the Migration Act.

6.3 Failure of the Department to refer Mr LD to the Minister

(a) *Ministerial intervention powers*

55. At the time of his detention, Mr LD was an unlawful non-citizen within the meaning of the Migration Act, which required that he be detained.
56. Mr LD was unable to make a visa application due to the legislative bar imposed by section 501E of the Migration Act.
57. 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.
58. 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.
59. 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.
60. A ministerial instruction has been issued with respect to each of the discretionary powers available to the Minister. Presently, the relevant instructions or guidelines are as follows:
 - 'Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958)' as signed in November 2016 (the 195A Guidelines)²⁵
 - '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 197AB Guidelines)²⁶

61. The 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.

62. The 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; ...

63. These powers in the context of detainees who had visas cancelled or refused, and the legislative framework within the Migration Act regarding the character test, were outlined in the Commission's 2021 report,

*Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth).*²⁷

64. Specifically, that report highlighted that both sets of guidelines exclude referral of cases where the person does not meet the character test, unless there are exceptional circumstances.²⁸ The recommendation was made to amend the guidelines to allow for all people in immigration detention to be referred to the Minister, regardless of whether they have had a visa refused or cancelled under section 501.²⁹
 65. The guidelines must now be viewed in light of the High Court's assessment in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*; *DCM20 v Secretary of Department of Home Affairs*,³⁰ that the Ministerial Instructions used by the Department exceeded the statutory limitation of the power invested in the Minister by inviting Departmental officers to evaluate what is in the public interest.³¹ The criticisms levelled by the Court on the section 351 guidelines may equally apply to the section 195A and section 197AB guidelines, and the Commission understands that work is underway to revise them.
- (b) *Consideration*
66. The Department informed the Commission that it commenced a process of considering Mr LD's case for referral to the Minister under section 195A and section 197AB of the Migration Act on 23 August 2023. That process was finalised in light of the events following the High Court's decision in *NZYQ*.
 67. This means that the Department waited close to 5 years to consider an alternative to held detention for Mr LD.
 68. This was despite a number of factors which could amount to 'exceptional circumstances' or 'compelling and compassionate circumstances', bringing Mr LD's case within the guidelines for referral to the Minister.
 69. The duration of Mr LD's detention for a period of almost 5 years with no end date (prior to *NZYQ*) is a clear factor which should have weighed in favour of his case being referred to the Minister. When refusing his visa in 2021, the Minister recognised in the record of his decision that such a referral could take place, and would be the only likely way that Mr LD's detention could end.
 70. Included in the recommendations from the Department to the Minister in relation to the Minister's consideration of the visa application was the following:

note that Mr [LD] is the subject of a protection finding with respect to his home country, South Sudan and so, in accordance with s197C(3) of the Act, the Department of Home Affairs is not authorised to remove him to South Sudan. Consequently, if you refuse to grant Mr [LD] a Protection (Class XA) visa and do not wish to consider whether to grant Mr [LD] another visa under s195A, he will remain in detention for an indefinite period.

71. Next to this recommendation, the Minister has circled the word 'noted'.
72. In the Minister's decision record itself, consideration is given to this factor:

I am aware that the legal consequences of a decision to refuse Mr [LD]'s visa application are that, as an unlawful non-citizen, he must continue to be detained in accordance with s189 and s196 of the Act, until removed from Australia or granted a visa. Further, by reason of the protection finding made in the course of considering his protection visa application, s198 will not require or authorise him to be removed to South Sudan, except in certain limited circumstances which are not presently relevant (s197C(3)). The prospects of finding another country willing to receive him are poor. As a result, I am aware that Mr [LD] faces the prospect of immigration detention for an indefinite period.

...

I accept that indefinite or prolonged detention is likely to adversely impact Mr [LD]'s mental health and will be detrimental to the ongoing management of his physical injuries. I find that this weighs in favour [of] not refusing his visa application.

73. Despite this, the Minister determined that other factors weighed more heavily in favour of visa refusal.
74. It was recognised by the Department that Mr LD was affected by the High Court's orders dated 8 November 2023, which granted a writ of *habeas corpus* in favour of the plaintiff in *NZYQ*.
75. Mr LD has, similarly to the plaintiff in *NZYQ*, the benefit of a protection finding made pursuant to section 197C of the Migration Act. He has not requested removal to South Sudan. The Minister, based on the Department's advice, assessed the prospects of a third country taking Mr LD as 'poor'. This was recognised by the Department, when Mr LD was released on 17 November 2023. It is likely that his detention was unlawful, in addition to being arbitrary.
76. The duration of Mr LD's detention was particularly concerning as Mr LD was not required to serve any term of imprisonment for his most recent conviction that led to the cancellation of his Humanitarian visa. It is unknown whether he served any sentence of imprisonment for his past convictions. His most recent sentence that led to the cancellation of his

- visa was suspended upon him entering a 16-month good behaviour bond, which he completed without incident. The time that Mr LD spent in immigration detention may be considered disproportionate to his offending behaviour in light of the contrast between the judicially imposed sentence (16-month good behaviour bond) and his administrative detention (almost 5 years to the date of his release).
77. It is also relevant to note that Mr LD's most recent criminal conduct occurred more than 4 years prior to the cancellation of his Humanitarian visa. Mr LD lived in the community without incident for more than 4 years between 2013 and 2018, before he was administratively detained.
 78. Another relevant factor is that Mr LD has 2 minor children (twins aged 15 or 16) with whom it has been accepted he maintains a close relationship, and who are Australian citizens. He also has a son aged 18 or 19, and his step-daughter has given birth to 2 children that the AAT described as his grandchildren. Evidence by Mr LD's ex-wife was accepted by the AAT that she required Mr LD's support in raising the children, and that his detention was causing her hardship. The impact on the best interests of those children is a relevant consideration in the 195A Guidelines in considering whether to make a referral to the Minister.
 79. Throughout his time in detention, Mr LD was engaged with a counselling service specialising in victims of torture and trauma. Each of the multiple reports from that service provided to the Commission by the Department expressed concern that Mr LD's ongoing detention, uncertainty about his future, and fear of separation from his children, was causing him grave distress and a deterioration in his mental health.
 80. IHMS records provided to the Commission also show Mr LD suffering from a number of other health conditions, including chronic leg, shoulder and back pain from former injuries (including those suffered in traumatic circumstances in Sudan). While IHMS stated that each of his conditions could be appropriately managed in the detention environment, the cumulative impact of the conditions should have been considered in the Department's assessment of his suitability for referral. The Minister acknowledged when deciding to refuse Mr LD's visa that his ongoing detention was 'likely to adversely impact Mr [LD]'s mental health and will be detrimental to the ongoing management of his physical injuries'.
 81. Each of these factors had to be balanced against any risk assessments conducted by the Department with respect to Mr LD and viewed in light of the fact that a former Minister and the AAT have both accepted that Mr LD poses a low risk of future offending.
 82. Before the AAT, the Department appears to have accepted that the risk of recidivism by Mr LD was low, and the AAT Member accepted this

categorisation. In particular, the AAT found that:

The applicant has a strong desire not to reoffend, and a strong motivation to refrain from any conduct likely to lead to his deportation and separation from his children, including his stepdaughter and her two children.

...

His conduct from 2008 to 2013 was serious, and affected by alcohol consumption, which has since ceased altogether.³²

83. The Minister's consideration of this factor as part of his consideration of Mr LD's visa application concluded as follows:

I have found that the nature of Mr [LD]'s offending is very serious. I have also found that further family violence offending has the potential to cause physical and psychological injury to members of the Australian community and contribute to the significant impact of family violence on the wider Australian community. On balance I consider there to be a low likelihood that Mr [LD] will reoffend. Nevertheless, I considered that, should Mr [LD] engage in similar conduct there is a risk it may result in psychological and physical harm to members of the community and contribute to the significant impact of family violence on the wider Australian community.

84. 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.
85. 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.³³ The CPAT results in a risk category or 'tier' that corresponds to a recommended placement for a detainee.
86. The most recent CPAT conducted by the Department and provided to the Commission recommended that Mr LD be placed in held detention (tier 3). The only indicator giving rise to this assessment was that of criminality.
87. 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.
88. The most recent SRAT conducted by Serco and provided to the Commission was manually overridden to reduce Mr LD's risk profile for placement and escort risks from high to medium. No explanation for the override was provided to the Commission, however the incident history

provided by the Department for Mr LD shows him being involved in no serious incidents of abusive or aggressive behaviour, no incidents of violence, and being the victim of some minor assaults.

89. Issues with respect to the quality of risk assessments arising from the CPAT and SRAT have been discussed in previous Commission reports.³⁴
90. I am concerned that the CPAT prepared by the Department does not demonstrate a nuanced or individualised assessment of the risk posed by Mr LD to the Australian community. Nothing on the CPAT or SRAT provided, indicates to me that Mr LD's risk profile provided sufficient justification for his continued detention, in that his past criminal actions are the only indicator of harm. As set out above, his most recent conviction was in 2013 and did not result in a term of imprisonment. He lived in the community for 4 years after this conviction without incident. The Minister and the AAT have both assessed his risk of re-offending as low. Mr LD's SRAT records no serious incidents of violence or aggressive behaviour while in immigration detention. He was also assessed as a low risk of escape on the SRAT, and a low risk of not engaging with the Department on the CPAT. The AAT accepted that his motivation to reconnect with his family decreased any likelihood of him reoffending.
91. The Department responded to my preliminary view disagreeing with the position taken by the Commission. The Department's response highlighted that Mr LD's detention was lawful due to his being an unlawful non-citizen whose visa had been cancelled. They also referred to the fact that, as soon as it became apparent that he was affected by the *NZYQ* decision, he was released. The Department referred to their regular reviews of detention by a status resolution officer and the six-monthly completion of the CPAT. The Department identified that there was no legal obligation on the Department to refer a case to the Minister for the possibility of intervention. My position was not altered by anything that came to light in the Department's response to my preliminary view.
92. For the above reasons, it is my view that the continued detention of Mr LD in closed detention facilities could not 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. I find that the Department's failure to refer Mr LD's case to the Minister at any time during the almost 5 years he was detained for the Minister to consider exercising their discretionary powers under section 195A or section 197AB of the Migration Act, contributed to his detention becoming arbitrary, contrary to article 9(1) of the ICCPR.

7 Recommendations

93. 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.³⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.³⁶ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.³⁷

7.1 Ministerial Direction No. 99

94. The analysis at 5.1 above relates to Direction No. 90, which is no longer in force. Instead, Direction No. 99 came into force on 3 March 2023 and is the current guidance for delegates of the Minister about the factors they must take into account when considering whether to refuse or cancel a visa on character grounds (or revoke a mandatory cancellation). The issues that were of concern to the Commission in Direction No. 90 have not been remedied through the new direction.
95. The Commission considers that the case of *NZYQ* highlights the importance of having the Minister make a new ministerial direction which gives greater priority for decision makers to consider international obligations and the prospects of removing the person from Australia, if their visa is refused or cancelled. For those with protection findings, they will be unable to be detained following cancellation of their visas unless removal to a third country is feasible. There remains also the possibility that the detention of people without protection findings, but whose removal is not possible or likely to be protracted, could be prolonged as a result of the visa refusal or cancellation decision.
96. Early consideration of these factors would be of benefit to the Department as well as visa holders, as it will avoid adding to a cohort of people who may perpetually hold a series of annual 'removal pending' visas, but with no real prospect of removal being achieved in the reasonably foreseeable future.

Recommendation 1

The Commission recommends that the Department brief the Minister on the need for a new direction being issued pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- international obligations, including *non-refoulement*, be made a primary consideration
- ensure that decision makers make an assessment of, or obtain

advice about, the prospects of removal from Australia in the event of the person's visa refusal or cancellation

- as part of the legal consequences of a relevant decision, decision makers be required to explicitly consider the risk of:
 - i. prolonged detention
 - ii. arbitrary detention, contrary to the ICCPR.

7.2 Reconsideration of previous section 501 cancellations

97. For Mr LD and others within the NZYQ cohort whose visas were cancelled pursuant to section 501 of the Migration Act, their visas were cancelled according to a ministerial direction which did not prioritise Australia's international non-refoulement obligations, and left most in a situation of protracted and indefinite detention.
98. While it is encouraging that Mr LD and others within the NZYQ cohort have now been released from detention, the Commission notes that they all remain on a 'removal pending' bridging visa. Detention for the purpose of removal remains a possibility for them in future. For those with a protection finding in their favour, this would realistically only be able to occur if section 197D of the Migration Act is utilised to reverse that finding, given the real practical difficulties of third country resettlement and the highly unlikely situation of a person volunteering to return to a country in respect of which Australia owes them protection. The Commission has raised concerns about the current drafting of section 197D.³⁸
99. Until that occurs, the NZYQ cohort will remain on bridging visas for an indefinite period of time. The Commission reported on the detrimental effects of prolonged time spent on a bridging visa in its report *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'*.³⁹ Issues faced by this comparable group of people included:
 - inadequate access to income support
 - increased pressure on non-governmental services
 - barriers to employment
 - difficulties accessing affordable health care
 - negative impact on mental health due to ongoing uncertainty.

100. It follows from the Commission's first recommendation that the Minister should also allow each of the *NZYQ* cohort to have their cancellation decisions reconsidered in light of the implications of the High Court's decision for them, and with the increased prioritisation of Australia's human rights obligations.
101. It is noted that most of the cohort will have had the opportunity to live in the Australian community, and their behaviour since release can be used for a more realistic risk assessment than may have been available at the time of their cancellation decisions.
102. The Minister recently provided information about a 'Community Protection Board' established to provide advice on the management of those required to be released.⁴⁰ The Commission encourages the Department to consider using this resource in briefing the Minister about the use of his personal discretions to find more durable solutions for this cohort.

Recommendation 2

The Commission recommends that the Department brief the Minister on the legal options available for reconsideration of the previous visa cancellation or refusal decisions that led to the detention of each person within the *NZYQ* cohort, whether that be through intervention under section 501J or otherwise.

8 The Department's response to my findings and recommendations

103. On 13 February 2024, I provided the Department with a notice of my findings and recommendations.
104. On 19 July 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 Department brief the Minister on the need for a new direction being issued pursuant to s 499 of the Migration Act to replace Direction No. 99, and that in the new direction:

- *international obligations, including non-refoulement, be made a primary consideration*

- *ensure that decision makers make an assessment of, or obtain advice about, the prospects of removal from Australia in the event of the person's visa refusal or cancellation*
- *as part of the legal consequences of a relevant decision, decision makers be required to explicitly consider the risk of:*
 - i. prolonged detention*
 - ii. arbitrary detention, contrary to the ICCPR*

The Department partially agrees with Recommendation one.

Ministerial Direction 110 commenced on 21 June 2024, replacing Ministerial Direction 99. The Department will provide the Commission's recommendations for the Minister's consideration in any briefing on future policy settings concerning character-related visa decision-making under section 501 of the *Migration Act 1958* (Cth).

Recommendation 2 - Disagree

The Commission recommends that the Department brief the Minister on the legal options available for reconsideration of the previous visa cancellation or refusal decisions that led to the detention of each person within the NZYQ cohort, whether that be through intervention under section 501J or otherwise.

The Department does not agree with recommendation two.

Individuals are encouraged to make themselves aware of pathways for resolving their immigration status, and can seek legal advice for any assistance. Information is available online on pathways including in respect of the Ministerial Intervention powers at [Ministerial intervention \(homeaffairs.gov.au\)](https://www.homeaffairs.gov.au). It is a matter for the Minister to decide whether to exercise the non-compellable, non-delegable powers, such as section 501J to substitute a more favourable decision following refusal or cancellation of a Protection visa.

105. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM FAAL

President

Australian Human Rights Commission

July 2024

Endnotes

- ¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005.
- ² Migration Act, section 501(6).
- ³ Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
- ⁴ 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.
- ⁵ For a more detailed analysis of the history, language and intent of section 197C, see Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, Submission to the Parliamentary Joint Committee on Intelligence and Security, 20 June 2023, available at [https://humanrights.gov.au/our-work/legal/submission/review-migration-amendment-clarifying-international-obligations-removal#:~:text=Summary,2021%20\(the%20CIOR%20Act\)](https://humanrights.gov.au/our-work/legal/submission/review-migration-amendment-clarifying-international-obligations-removal#:~:text=Summary,2021%20(the%20CIOR%20Act).).
- ⁶ As defined within subsections 197C(4)–(7) of the Migration Act.
- ⁷ Migration Act, section 197D(2).
- ⁸ Migration Act, section 36A(1)(a); subsections 36(2)(a) and 36(1C).
- ⁹ Migration Act, section 197C(3)(c).
- ¹⁰ *Al-Kateb v Godwin* (2004) 219 CLR 562.
- ¹¹ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [70].
- ¹² In force from 15 April 2021 to 3 March 2023, accessed on LEGENDcom.
- ¹³ 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*).
- ¹⁴ 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).
- ¹⁵ *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*).
- ¹⁶ 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.
- ¹⁷ *Van Alphen v the Netherlands*, UN Doc CCPR/C/39/D/305/1988.
- ¹⁸ *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 vAustralia*).

- ¹⁹ Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 at [18].
- ²⁰ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].
- ²¹ 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].
- ²² 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].
- ²³ UN Human Rights Committee, *Communication No 794/1998*, 74th sess, UN Doc CCPR/C/74/D/794/1998 (2002) ('Jalloh v the Netherlands'); *Baban v Australia*, UN Doc CCPR/C/78/D/1014/2001.
- ²⁴ 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.
- ²⁵ Accessed on LEGENDcom.
- ²⁶ Accessed on LEGENDcom.
- ²⁷ [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 21-24
- ²⁸ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 36
- ²⁹ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* [2021] AusHRC 141, <<https://humanrights.gov.au/our-work/legal/publications/immigration-detention-following-visa-refusal-or-cancellation-under>>, 94.
- ³⁰ [2023] HCA 10.
- ³¹ *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs* [2023] HCA 10, [38].
- ³² *BNGP and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 374, at [27]–[29].
- ³³ Department of Immigration and Border Protection, *Detention Capability Review: Final Report*, (Report, August 2016) 52 <<https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf>>.
- ³⁴ For example, see the discussion of the SRAT contained within Australian Human Rights Commission, *Use of force in immigration detention* [2019] AusHRC 130, pp 34-41.
- ³⁵ Australian Human Rights Commission Act ('AHRC Act'), s 29(2)(a).
- ³⁶ AHRC Act, s 29(2)(b).
- ³⁷ AHRC Act, s 29(2)(c).
- ³⁸ Australian Human Rights Commission, *Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, Submission to the Parliamentary Joint Committee on Intelligence and Security (20 June 2023) 15-18 <https://humanrights.gov.au/sites/default/files/review_of_the_migration_amendment_clarifying_australias_obligations_for_removal_act_2021_0.pdf>.

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- ³⁹ Australian Human Rights Commission, *Lives on hold: Refugees and asylum seekers in the 'Legacy Caseload'* (Report, July 2019)
<https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf>.
- ⁴⁰ The Hon Andrew Giles MP, *Doorstep interview, Parliament House*, 6 February 2024,
<https://minister.homeaffairs.gov.au/AndrewGiles/Pages/doorstep-interview-parliament-house-06022024.aspx>.