



Australian
Human Rights
Commission

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

[2020] AusHRC 137

15 September 2020

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Australian Human Rights Commission
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Hamedani v Commonwealth (Department of Home Affairs)

[2020] AusHRC 137

Report into arbitrary detention

Australian Human Rights Commission 2020

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the human rights complaint of Mr Hamedani, alleging a breach of his human rights by the Department of Home Affairs (Department).

This is a complaint of arbitrary detention contrary to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR). The right to liberty and freedom from arbitrary detention is not protected in the Australian constitution. The High Court has upheld the legality of indefinite detention under the Migration Act. As a result, there are limited avenues for an individual to challenge their detention.

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.

In order to avoid detention being arbitrary under international human rights law, detention must be justified as reasonable, necessary and proportionate on the basis of the individual's particular circumstances. Furthermore, there is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of the immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was 'arbitrary'. Moreover, just because detention is lawful under Australian law does not prevent it from being considered 'arbitrary' under the international covenants that Australia has ratified.

Mr Hamedani was detained in an immigration detention centre in Australia for 28 months from 5 August 2016 to 4 December 2018. He complains that his detention was arbitrary, contrary to article 9(1) of the ICCPR.

As a result of this inquiry, I have found that the Department's delay in referring Mr Hamedani's case to the Minister for consideration of his discretionary intervention powers, and the Minister's delay in considering whether to exercise his power to make a residence determination under s 197AB of the *Migration Act 1958* (Cth) were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.

On 28 April 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 14 July 2020. That response can be found in Part 9 of this report. The report below largely concerns information relevant as at 28 April 2020 when it was issued.

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
President
Australian Human Rights Commission
August 2020

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr Ghasem Hamedani against the Commonwealth of Australia, Department of Home Affairs (Department) alleging a breach of his human rights.
2. Mr Hamedani arrived in Australia by boat at Christmas Island on 31 July 2013. On 2 September 2013 he was transferred to Manus Island Regional Processing Centre. On 5 August 2016, Mr Hamedani was transferred to Australia for medical treatment. On 4 December 2018, Mr Hamedani was released into community detention where he remains.
3. He complains that his detention in Australia for 28 months was arbitrary, and therefore inconsistent with or contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).ⁱ
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. This report is issued pursuant to s 29(2) of the AHRC Act setting out the findings of the Commission in relation to Mr Hamedani's complaint.

2 Summary of findings and recommendations

6. As a result of this inquiry, I find that the Department's delay in referring Mr Hamedani's case to the Minister for consideration of his discretionary intervention powers until 13 June 2017, and the Minister's delay in considering whether to exercise his power to make a residence determination under s 197AB of the *Migration Act 1958* (Cth) (Migration Act) were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.
7. I make the following recommendations:

Recommendation 1

Monthly detention reviews seek and consider IHMS advice regarding detention placement. Where IMHS recommends community detention, an individual's case

be immediately referred for assessment against the Minister's guidelines for possible consideration under s 197AB of the Migration Act.

Recommendation 2

Where an individual who has significant health concerns has been referred to the Minister for consideration under section 197AB, the Department follow up on a monthly basis the referral with the Minister's office.

Recommendation 3

The Commonwealth acknowledge that the combined delay and continued closed detention had a significant impact on Mr Hamedani's declining mental health.

3 Background

8. Mr Hamedani is a national of Iran. He arrived in Australia by boat at Christmas Island on 31 July 2013.
9. Since Mr Hamedani arrived in Australia after 19 July 2013, government policy meant that he was subject to regional processing arrangements. He was initially detained on Christmas Island pursuant to s 189(3) of the Migration Act. On 2 September 2013 he was transferred to Manus Island Regional Processing Centre pursuant to s 198AD of the Migration Act.
10. On 5 August 2016, Mr Hamedani was transferred to Australia for medical treatment.
11. On 15 August 2016, he was discharged from hospital and detained at Villawood Immigration Detention Centre (VIDC).
12. On 17 September 2016 Mr Hamedani was found to be a refugee.
13. On 4 December 2018, Mr Hamedani was released into community detention where he remains.

4 Conciliation

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

5 Procedural history of this inquiry

15. On 6 December 2019, I issued a preliminary view in this matter and gave Mr Hamedani, the Department and the Minister the opportunity to respond to my preliminary findings. On 22 February 2020, the Department responded to my preliminary view.
16. On 28 April 2020, I provided the Department with a notice issued under s 29(2) of the AHRC Act setting out my findings and recommendations in this matter. The Department provided its response to my findings and recommendations on 14 July 2020.

6 Legislative framework

6.1 Functions of the Commission

17. 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.
18. 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.
19. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

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

20. 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.
21. 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.
22. 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.ⁱⁱ

6.3 What is a human right?

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

24. Article 9(1) of the ICCPR relevantly provides:

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

7 Arbitrary detention

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

7.1 Law on article 9 of the ICCPR

26. 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 detentionⁱⁱⁱ
- lawful detention may become 'arbitrary' when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate in the particular circumstances^{iv}
- 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability^v
- detention should not continue beyond the period for which a State party can provide appropriate justification.^{vi}

27. 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.^{vii}

28. The UN HR Committee has stated in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive

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

29. Relevant jurisprudence of the UN HR Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.^{ix}

30. Under international law the guiding standard for restricting rights is proportionality, which means that deprivation of liberty (in this case, continuing immigration detention) must be necessary and proportionate to a legitimate aim of the State Party (in this case, the Commonwealth of Australia) in order to avoid being 'arbitrary'.^x
31. It is therefore necessary to consider whether the detention of Mr Hamedani in closed detention facilities can be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention. If his detention cannot be justified on these grounds, it will be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and therefore considered 'arbitrary' under article 9 of the ICCPR.

7.2 Act or practice of the Commonwealth

32. As Mr Hamedani 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.
33. From 5 August 2016 to 4 December 2018, Mr Hamedani was detained pursuant to s 189(1) of the Migration Act.
34. While the Migration Act required the detention of unlawful non-citizens, there are a number of powers that the Minister could have exercised to detain Mr Hamedani in a manner less restrictive than a closed immigration detention facility.
35. Section 197AB of the Migration Act permits the Minister, where the Minister considers that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. The residence determination may be made subject to other conditions such as reporting requirements.
36. 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 to grant a visa to a person in immigration detention, again subject to any conditions necessary to take into account their specific circumstances.
37. I consider two acts of the Commonwealth as relevant to this inquiry:
 - The Department's delay in referring the case to the Minister in order for the Minister to assess whether to exercise his discretionary powers under s 197AB until 13 June 2017.
 - The Minister's delay in considering to exercise his discretionary powers under s 197AB of the Migration Act until 29 November 2018.

7.3 Findings

38. Mr Hamedani was transferred from Manus Island Regional Processing Centre to Australia on 5 August 2016. He was detained from this date until 4 December 2018 for a period of almost 28 months.

39. On 23 February 2017, the Department found that Mr Hamedani did not meet the Ministerial Intervention Guidelines under s 197AB, and he was therefore not referred to the Minister for a residence determination.
40. On 13 June 2017, the Department found that Mr Hamedani met the s 197AB guidelines and a submission was sent to the Minister.
41. On 4 September 2018 this submission was returned by the Minister's office to the Department unsigned and without a decision having been made.
42. On 9 October 2018, the Department again referred Mr Hamedani's case to the Minister for consideration under s 197AB.
43. On 29 November 2018, the Minister intervened to grant Mr Hamedani a residence determination order.
44. On 29 March 2015, the Hon Peter Dutton MP, Minister for Home Affairs, published guidelines to explain the circumstances in which he may wish to consider exercising his residence determination power under s 197AB of the Migration Act.^{xi}
45. On 21 October 2017, Minister Dutton re-issued these guidelines which are currently in use by the Department.^{xii}
46. 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.
47. The guidelines also state that the Minister will consider cases where there are 'unique or exceptional circumstances'.
48. 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.^{xiii} 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.
49. The Department did not refer Mr Hamedani to the Minister for consideration of his Ministerial Intervention powers until 13 June 2017. It is my view that Mr Hamedani's case should have been referred to the Minister earlier. In my view the existence of the following factors are relevant to an assessment as to whether Mr Hamedani's case presented 'unique or exceptional circumstances':
- At the time of the Department's initial assessment of Mr Hamedani against the relevant guidelines, he had been detained for over ten months in Australia and 35 months on Manus Island
 - IHMS recommended community detention as early as 4 October 2016 due to his mental health issues.
50. The Department's delay in referring Mr Hamedani's case to the Minister until June 2017 is particularly concerning, given the mental health concerns raised frequently by IHMS since he was transferred back to Australia.
51. Mr Hamedani's Department case reviews reveal protracted and serious mental health issues that were known by the Department since his transfer from Manus Island to Australia on 5 August 2016. I have set out below the points at which the Department was aware of Mr Hamedani's mental health issues and their level of seriousness.
52. First, on 5 August 2016, Mr Hamedani was transferred from Manus Island to Australia via air ambulance for medical treatment. He was admitted to Concord Hospital on arrival. Department documents reveal that he was transferred for the following reasons:
- Hamedani was transferred from an RPC to Australia for investigations as he was presenting with severe dehydration, jaundice, hallucinations and seizure like activities, due to his experiencing auditory hallucinations which would not allow him to eat.
53. IHMS advised the Department that in a review on 4 October 2016 Mr Hamedani:
- was noted to be reluctant to engage with mental health staff and was

experiencing ongoing anxiety, low mood, negative rumination and disrupted sleep patterns. At this time, **his IHMS psychiatrist supported community detention due to the high risk of deterioration in [his] mental health.**
(emphasis added)

54. IHMS also advised the Department on 19 January 2017 that Mr Hamedani 'was assessed by four different psychiatrists and the consensus was that [he] was experiencing PTSD'. They stated that Mr Hamedani's mental health situation was fragile and precarious and that he will require ongoing referral and review to mental health professionals upon any transfers or movement.
55. Despite this information about Mr Hamedani's poor mental health, on 23 February 2017 the Department concluded that Mr Hamedani did not meet the guidelines for referral of his case to the Minister for consideration for community detention placement under s 197AB of the Migration Act. The following points were listed as the rationale for the decision:
- Mr Hamedani's case falls within the scope of those the Minister has indicated he does not wish to be referred for his consideration
 - While IHMS advised that he has some medical issues, they also advise that, from a medical perspective, he can be returned to an RPC
 - Mr Hamedani has been found to be a refugee, has no ongoing litigation as a barrier to his return, and could be considered eligible for consideration for the US resettlement deal
 - Under current policy relating to the RPC cohort, his case does not present exceptional circumstances.
56. The Department states that, between 23 February 2017 and 15 May 2017, Mr Hamedani's mental health deteriorated and he was involved in an act of self-harm on 9 May 2017. The Department's records indicate that he attempted to strangle himself and was ultimately scheduled under the *Mental Health Act 2007* (NSW) and taken to hospital where he remained for one night.
57. On 13 June 2017, the Department referred Mr Hamedani to the Minister for consideration of his Ministerial Intervention powers. The Commission requested a copy of this submission, however it was not provided. The Department stated that:

On 13 June 2017, a section 197AB submission dated 9 June 2017 was referred to the Minister for consideration of a possible residence determination. This submission was returned to the Department on 4 September 2018 unsigned and without a decision having been made. As this document is not signed by the Minister, the Department will not be providing a copy of this submission.

58. As explained by the Department, the s 197AB submission dated 9 June 2017 was returned by the Minister's office on 4 September 2018 without a decision having been made. On the material before me it is unclear why no action was taken by the Minister's office for over 14 months and then returned to the Department.
59. The Department said that it did not directly follow up the progress of the submission with the Minister's office until after 23 March 2018. This is a period of more than 9 months.
60. This is particularly concerning given that throughout this period there were clear indications of Mr Hamedani's declining mental and physical health.
61. For example, material provided by the Department discloses the following incidents:
 - On 14 August 2017, Mr Hamedani was admitted to hospital suffering 'auditory hallucinations, weight loss and seizure like activity post food/fluid refusal and exacerbation of his post-traumatic stress disorder'
 - In October 2017, Mr Hamedani was assessed at hospital following a likely 'pseudoseizure'
 - On 10 February 2018, Mr Hamedani placed himself on voluntary food and fluid refusal
 - On 12 February 2018, Mr Hamedani self-harmed 'by placing a cord around his neck and banging his head on a table'
 - On 13 February 2018, Mr Hamedani was assessed as suffering from 'a severe adjustment reaction with depression and anxiety, with a moderate risk of self-harm/ suicide, and is at risk of the return of psychotic-like symptoms'.
62. I understand that, between 23 March 2018 and 23 April 2018, the Department was in contact with the Minister's Office seeking advice on the progress of the submission. The Minister's office requested further information regarding Mr Hamedani's health, and the Department provided a response on 23 April 2018.

63. On 9 October 2018, the Department made a second s 197AB submission to the Minister's office recommending again that Mr Hamedani be considered for community placement under a residence determination following further deterioration in his mental health.
64. On 29 November 2018, the Minister intervened in Mr Hamedani's case and made a residence determination under s 197AB of the Migration Act.
65. I find that the Minister's delay of over 17 months in considering the exercise of the discretionary powers under s 197AB resulted in the prolonged detention of Mr Hamedani. The Commonwealth had an obligation to detain Mr Hamedani in the least restrictive manner possible. It is my view that the delay in considering Mr Hamedani's residence determination referral resulted in his detention being 'arbitrary' for the purposes of article 9(1) of the ICCPR.
66. As discussed above, the Department did not refer Mr Hamedani's case to the Minister for consideration of his intervention powers until 13 June 2017. It is my view that the delay of the Department to invite the Minister to consider exercising his discretion under s 197AB also contributed to the continued detention of Mr Hamedani without consideration of whether that detention was justified in the particular circumstances of Mr Hamedani's case. I find that has the result that his detention may be considered as 'arbitrary' for the purposes of article 9(1) of the ICCPR.

8 Recommendations

67. As a result of this inquiry, I find that the Department's delay in referring Mr Hamedani's case to the Minister for consideration of his discretionary intervention powers until 13 June 2017, and the Minister's delay in considering whether to exercise his power to make a residence determination under s 197AB of the Migration Act were acts that were, taken together, inconsistent with or contrary to article 9(1) of the ICCPR.
68. 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.^{xiv} The Commission may include in the notice any recommendation for preventing a repetition of the act or a

continuation of the practice.^{xv} The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.^{xvi}

69. The Department advises that it conducts formal monthly reviews of efforts to resolve the status of people in detention. It advises that the purpose of these reviews is to ensure that:

- where a person is managed in a held detention environment, the detention remains lawful and reasonable
- the location of the person's detention remains appropriate to their individual circumstances and conducive to status resolution
- regardless of the location where the person is being held, their case is progressing and departmental activity is underway to reach an outcome
- appropriate services are being provided in an effective and cost-efficient manner.

70. In my view, these monthly reviews did not adequately consider the health impacts of continuing to detain Mr Hamedani. As discussed, IHMS recommended community detention as early as 4 October 2016 due to his mental health issues. Although his mental health continued to decline, Mr Hamedani was only released from closed detention on 4 December 2018.

71. I make the following recommendations:

Recommendation 1

Monthly detention reviews seek and consider IHMS advice regarding detention placement. Where IMHS recommends community detention, an individual's case be immediately referred for assessment against the Minister's guidelines for possible consideration under s 197AB of the Migration Act.

Recommendation 2

Where an individual who has significant health concerns has been referred to the Minister for consideration under section 197AB, the Department follow up on a monthly basis the referral with the Minister's office.

Recommendation 3

The Commonwealth acknowledge that the combined delay and continued closed detention had a significant impact on Mr Hamedani's declining mental health.

9 The Department's response to my findings and recommendations

72. On 28 April 2020, I provided the Department with a notice of my findings and recommendations.
73. On 14 July 2020, the Department provided the following response to my findings and recommendations:

AHRC's finding

The Department's delay in referring to Mr Hamedani's case to the Minister for consideration of his discretionary intervention powers until 13 June 2017, and the Minister's delay in considering whether to exercise his power to make a residence determination under section 197AB of the Migration Act, were acts that were, taken together, inconsistent with or contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Department's response to finding

The Department does not accept the findings of the Australian Human Rights Commission (AHRC) as set out in the notice issued under section 29 of the *Australian Human Rights Commission Act 1986*.

As per the Department's response to the section 27 notice of the AHRC regarding this case, the Department maintains that Mr Hamedani's placement in held detention prior to his placement under residence determination arrangements under section 197AB of the *Migration Act 1958* (the Act) was appropriate, reasonable and justified in the individual circumstances of his case.

Cases may be referred for a guidelines assessment via a number of avenues, including by Status Resolution Officers following their monthly reviews of detention placements. The Department only refers cases to the Minister where it is assessed that a case meets the Ministerial Intervention guidelines. It is not a legal requirement that a case be considered against the guidelines, or be referred to the Minister.

It is noted that Mr Hamedani could only be placed into the community under a residence determination arrangement by the Minister. Section 197AB of the Act states that the Minister may only exercise the power personally. It also provides that the Minister's powers are non-compellable, meaning the Minister does not have a duty to consider whether to exercise his power, whether or not requested by any person or in any other circumstance.

Once the Minister had exercised his power to make a residence determination, Mr Hamedani was placed into the community as soon as reasonably practicable.

The Department refutes that it delayed referral to the Minister for consideration under section 197AB.

On 10 November 2016, Mr Hamedani's case was referred for assessment against the Minister's guidelines under section 197AB of the Act. On 23 February 2017, his case was assessed as not meeting the Minister's guidelines. Although he presented with some mental health issues, Mr Hamedani's case fell within the scope of the types of cases the Minister did not wish to be referred. This was due to advice from the Department's health care provider, international Health and Medical Services (IHMS), that from a medical perspective, Mr Hamedani could be returned to a regional processing centre.

In addition, as Mr Hamedani had been found to be a refugee by the Government of Papua New Guinea, if he returned he would not be subject to detention and would be eligible for consideration for resettlement under the United States resettlement arrangement.

Mr Hamedani's case continued to be regularly reviewed by the Department throughout his placement in held detention. His mental health issues were monitored closely and managed as necessary by IHMS. The Department notes that Mr Hamedani declined to trial medication, refused regular therapy and displayed a reluctance to engage with mental health staff, having declined a consultation with a psychiatrist and failing to attend psychologist appointments.

Following advice from IHMS that there had been a deterioration of Mr Hamedani's mental health, on 13 June 2017, his case was referred to the Minister for consideration under section 197AB. On 23 April 2018, following a request from the Minister's Office, the Department provided the Minister with further information regarding Mr Hamedani's health. On 4 September 2018, the submission was returned from the Minister's Office for updating following a change in Minister.

Following the return of the unsigned submission, the Department again assessed Mr Hamedani's circumstances against the section 197AB guidelines and on 9

October 2018, a further submission was referred for the (new) Minister's consideration.

On 29 November 2018, the Minister intervened under section 197AB and Mr Hamedani was placed into the community under resistance determination arrangements on 4 December 2018.

AHRC's recommendation

Monthly detention reviews seek and consider IHMS advice regarding detention placement. Where IHMS recommends community detention, an individual's case be immediately referred for assessment against the Minister's guidelines for possible consideration under s 197AB of the Migration Act.

Response to recommendation

Detention cases are reviewed monthly by Status Resolution Officers, and already take into account available health information as reported by IHMS. Where the information before a Status Resolution Officer indicates ongoing placement in held immigration detention may no longer be appropriate, the Status Resolution Officer will refer the case for assessment against the Minister's Intervention Guidelines.

AHRC's recommendation

Where an individual who has significant health concerns has been referred to the Minister for consideration under section 197AB, the Department follow up on a monthly basis the referral with the Minister's office.

Response to recommendation

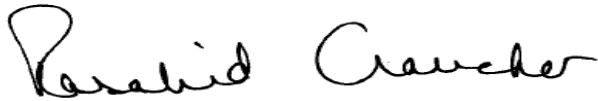
The Department does not accept this recommendation. The Minister's power is non-compellable, and exercisable only by the Minister on the basis of his assessment of the 'public interest'. A monthly 'follow up' by the Department with the Minister is not appropriate. However, the Department advises that where a detainees circumstances significantly change, including deterioration of any health issues, the Department does raise those changes of circumstance with the Minister's office.

AHRC's recommendation

The Commonwealth acknowledge that the combined delay and continued closed detention had a significant impact on Mr Hamedani's declining mental health.

Response to recommendation

The Department refutes that it delayed referral, and the consideration about whether to make a resident determination is a matter for the Minister.



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

20 August 2020

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- ⁱ 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).
- ⁱⁱ 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.
- ⁱⁱⁱ Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014). See also Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (2002) (*C v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (2003) (*Baban v Australia*).
- ^{iv} Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18]; Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6].
- ^v *Manga v Attorney-General* [2000] 2 NZLR 65 [40]–[42] (Hammond J). See also the views of the Human Rights Committee in *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (1997) (*A v Australia*); Human Rights Committee, *Views: Communication No. 631/1995*, 67th sess, UN Doc CCPR/C/67/D/631/1995 (1999) (*Spakmo v Norway*).
- ^{vi} Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]; Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (2014); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*) (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for

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- four years); Human Rights Committee, *Views Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*).
- vii Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*).
- viii Human Rights Committee, *Views: Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*); Human Rights Committee, *Views: Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004*, 90th sess, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (20 July 2007) (*Shams & Ors v Australia*); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*); Human Rights Committee, *Views: Communication No. 1050/2002*, 87th sess, CCPR/C/87/D/1050/2002 (9 August 2006) (*D and E and their two children v Australia*).
- ix Human Rights Committee, *General Comment No. 35 Article 9 (Liberty and security of person)*, 112th Sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18], footnotes omitted.
- x Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]; Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) (*Van Alphen v The Netherlands*); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (*A v Australia*); Human Rights Committee, *Views Communication No. 900/1999*, 76th sess, UN Doc CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*).
- xi The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- xii The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 21 October 2017. The guidelines are incorporated into the Department's Procedures Advice Manual.
- xiii The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's guidelines on Ministerial powers (s 345, 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.
- xiv *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(a)*.
- xv *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(b)*.
- xvi *Australian Human Rights Commission Act 1986 (Cth) s 29(2)(c)*.