



Australian  
Human Rights  
Commission

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# Ismail Mirza Jan v Commonwealth of Australia (DIBP)

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[2014] AusHRC 78

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**Ismail Mirza Jan v  
Commonwealth of Australia  
(Department of Immigration  
and Border Protection)**

Report into arbitrary detention

[2014] AusHRC 78

**Australian Human Rights Commission 2014**



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**Australian  
Human Rights  
Commission**

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June 2014

Senator the Hon. George Brandis QC  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made by Mr Ismail Mirza Jan.

I find that the failure of the Minister for Immigration and Citizenship (subsequently redesignated as the Minister for Immigration and Border Protection) to place Mr Mirza Jan into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 5 June 2014, the Department of Immigration and Border Protection provided its response to my findings and recommendation. I have set out this response in Part 9 of my report.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in blue ink, reading "Gillian Triggs".

Gillian Triggs  
**President**  
Australian Human Rights Commission

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# 1 Introduction

1. This is a Report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into the complaint lodged by Mr Ismail Mirza Jan.
2. Mr Mirza Jan alleges that his treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.

# 2 Summary of findings

3. I find that the failure of the Minister for Immigration and Citizenship (subsequently redesignated as the Minister for Immigration and Border Protection) to grant Mr Mirza Jan a visa or place him in a less restrictive form of detention than Villawood Immigration Detention Centre (VIDC), during the three years that he was detained there, was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

# 3 Summary of recommendations

4. Mr Mirza Jan has sought an apology from the Commonwealth as reparation. In light of my findings regarding the acts and practices of the Commonwealth I recommend that the Commonwealth, Department of Immigration and Border Protection (Department) provide a letter of apology to Mr Mirza Jan.

# 4 The complaint by Mr Mirza Jan

## 4.1 Background

5. Mr Mirza Jan made a written complaint to the Commission on 7 November 2011, alleging his detention by the Commonwealth was arbitrary within the meaning of article 9(1) of the ICCPR.
6. Mr Mirza Jan and the Commonwealth have had the opportunity to respond to my preliminary view of 12 July 2013 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.

## 4.2 Findings of fact

7. Mr Mirza Jan is a national of Afghanistan who arrived at Sydney Airport as an undocumented air arrival on 16 February 2010. Upon arrival Mr Mirza Jan was transferred to Villawood Immigration Detention Centre (VIDC).
8. On 9 November 2010, a delegate of the Minister found that Mr Mirza Jan was not a person to whom Australia owed protection obligations and accordingly did not grant him a Protection visa.
9. On 2 February 2011, the Refugee Review Tribunal affirmed the decision of the Minister's delegate to not grant Mr Mirza Jan a Protection visa.
10. On 3 March 2011, Mr Mirza Jan lodged an application for judicial review in the Federal Magistrates Court (FMC). On 19 April 2011, the FMC dismissed this application.
11. On 6 May 2011, Mr Mirza Jan made a request for Ministerial intervention pursuant to section 417 of the *Migration Act 1958* (Cth) (Migration Act). On 25 August 2011, the Minister declined to consider the section 417 intervention request.
12. On 31 October 2011, Mr Mirza Jan lodged ministerial intervention requests pursuant to sections 417 and 48B of the Migration Act. These requests were found not to meet the Minister's guidelines for referral to the Minister.
13. On 25 September 2012, Mr Mirza Jan married an Australian citizen at VIDC and shortly thereafter lodged a Combined Partner Visa application. On 27 March 2013, the Minister intervened pursuant to section 195A of the Migration Act and granted Mr Mirza Jan a Bridging visa, in association with his ongoing Combined Partner visa application. He was released from detention the same day.

# 5 The Commission's human rights inquiry and complaints function

14. Section 11(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) identifies the functions of the Commission. Relevantly section 11(1)(f) gives the Commission the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
15. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
16. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

## 5.1 The Commission can inquire into acts or practices of the Commonwealth

17. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that the reference to, or the doing of, an act includes the reference to the refusal or failure to do an act.



18. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.<sup>1</sup>

## 5.2 Failure to detain in the least restrictive manner possible

19. I find that the Minister's failure to grant Mr Mirza Jan a visa or place him in a less restrictive form of detention than VIDC, during the 3 years he was detained, constitutes an act under the AHRC Act.
20. Mr Mirza Jan was detained under section 189(1) of the Migration Act. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens.
21. However, under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Migration Act.
22. Under section 197AB of the Migration Act, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination that particular persons are to reside at a specified place, instead of in immigration detention.
23. Further, the definition of 'immigration detention' includes 'being held by, or on behalf, of an officer in another place approved by the Minister in writing.'<sup>2</sup>
24. Accordingly, the Minister could have granted a visa to Mr Mirza Jan, made a residence determination in relation to him under section 197AB of the Migration Act or could have approved that Mr Mirza Jan reside in a place other than VIDC.

## 6 Human rights relevant to this complaint

25. Section 3(1) of the AHRC Act defines 'human rights' to include the rights and freedoms recognised by the ICCPR.
26. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
27. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.
28. Article 9(1) of the ICCPR is of particular relevance to this complaint. It 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.
29. The following principles relating to arbitrary detention under article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention;<sup>3</sup>
  - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;<sup>4</sup>

- (c) arbitrariness is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;<sup>5</sup> and
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>6</sup> Every decision to keep a person in detention should be open to periodic review, in order to reassess the necessity of detention.<sup>7</sup>
30. In *Van Alphen v The Netherlands*, the UN Human Rights Committee (UNHRC) 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.<sup>8</sup> Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of three months in Switzerland was ‘considerably in excess of what is necessary’.<sup>9</sup>
31. The UNHRC has held in several cases 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.<sup>10</sup>

## 7 Assessment

32. Mr Mirza Jan was detained by the Commonwealth from 16 February 2010 until 27 March 2013, when he was granted a Bridging visa.
33. The information before the Commission suggests that the Commonwealth first considered placing Mr Mirza Jan in a less restrictive form of detention in March 2010, approximately a month after he was placed into immigration detention. The Department advises that:
- On 16 March 2010, Mr Mirza Jan’s case was referred for consideration under sections 195A and 197AB of the Migration Act, however, was not accepted due to outstanding identity issues;
  - On 25 July 2011 and 9 September 2011 respectively, two subsequent section 197AB referrals were initiated, however both were finalised as not accepted on 31 October 2011;
  - In May 2012, Mr Mirza Jan was found to have met the guidelines for referral to the Minister;
  - On 22 June 2012, Mr Mirza Jan’s case was referred to the Minister for consideration under section 197AB, however, on 1 July 2012 the Minister declined to intervene;
  - On 26 November 2012, the Minister considered Mr Mirza Jan’s case under section 195A, but declined to intervene. The Minister also declined to consider intervening under section 197AB; and
  - On 18 January 2013, the Department referred Mr Mirza Jan’s case to the Minister for consideration under sections 195A and 197AB. In February 2013, there was a change in ministerial responsibility and the submission was updated and referred to the new Minister on 15 February 2013. On 6 March 2013, the new Minister agreed to intervene under section 195A of the Act.
34. The Commonwealth claims that Mr Mirza Jan’s detention was not arbitrary and that it was justifiable as he arrived in Australia without identity documents and without a valid Australian visa. The Commonwealth claims that his detention was lawful, reasonable, and proportionate to the legitimate aim of managing Australia’s borders.

35. In its 9 September 2013 response to my preliminary view, the Department stated that Mr Mirza Jan's detention at VIDC 'remained appropriate as he was not immigration cleared upon his arrival to Australia and was not security cleared. Mr Mirza Jan was also on a negative immigration and removal pathway for the majority of his time in immigration detention'.
36. I understand that the Department was unable to establish Mr Mirza Jan's identity for a significant period of time. I accept that detention may be justified in order to conduct initial investigations including identity checks by the Department. However, if identity cannot be established after a reasonable period of time, consideration should be given to whether an individual can be detained in a less restrictive manner, if necessary with conditions, to mitigate any identified risks.
37. Mr Mirza Jan was detained in immigration detention for over three years and the Commonwealth has not explained why he could not have been placed in a less restrictive form of detention or granted a Bridging visa during this period.
38. I note that the Commonwealth Ombudsman reviewed Mr Mirza Jan's detention on 18 May 2012 and recommended that the Minister give consideration to the grant of a Bridging visa or a placement in community detention.<sup>11</sup>
39. Based on the material before me, I am of the view that the detention of Mr Mirza Jan in VIDC was not necessary or proportionate to the Commonwealth's legitimate aim of managing its borders. The Department has not explained why Mr Mirza Jan could not reside in the community or in a less restrictive form of detention while his identity and immigration status was resolved.
40. I find that the failure to grant Mr Mirza Jan a visa or place him in a less restrictive form of detention than VIDC during the 3 years he was detained was arbitrary and inconsistent with his right to liberty in article 9(1) of the ICCPR.

## 8 Recommendation

41. 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.<sup>12</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>13</sup>
42. The Commission may also recommend:
  - the payment of compensation to, or in respect of, a person who has suffered loss or damage and
  - the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>14</sup>

### 8.1 Apology

43. Mr Mirza Jan has sought an apology for his arbitrary detention. I consider it appropriate that the Commonwealth provide Mr Mirza Jan with a letter of apology.
44. The UNHRC has outlined that an effective remedy may take many forms, including 'measures of satisfaction, such as public apologies'.<sup>15</sup>

45. Mr Mirza Jan has not sought any other remedy. I note the UNHRC's views that reparations to individuals whose ICCPR rights have been breached 'generally entails appropriate compensation'.<sup>16</sup> However, given that Mr Mirza Jan has stated that an apology would be an effective remedy to his complaint, I do not recommend a compensation payment.

## 9 Commonwealth's response to findings and recommendation

46. On 8 May 2014, I provided a Notice to the Department under s 29(2)(a) of the AHRC Act setting out my findings and recommendation in relation to this complaint.
47. By letter dated 5 June 2014, the Department provided a response to my recommendation that the Commonwealth provide Mr Mirza Jan with a letter of apology:

The department does not accept this recommendation.

The department does not agree that Mr Mirza Jan's continued detention at the Villawood Immigration Detention Centre amounts to a breach of Article 9(1) of the ICCPR.

...

As outlined in the responses of 9 September 2013 and 15 March 2014, Mr Mirza Jan's continued detention was justifiable on a number of bases included establishing his identity, his lack of security clearance, being on a removal pathway, and the exercise of the Minister's non-compellable and non-delegable power to determine the appropriateness of community detention. As such, Mr Mirza Jan's detention was both reasonable and proportionate to the legitimate goal of mitigating risk to the Australian community and maintaining integrity of Australia's immigration framework.

The department remains of the view that Mr Mirza Jan's immigration detention was lawful and not arbitrary for the purposes of Article 9(1) of the ICCPR. As such, the department advises that no further action will be taken in relation to this recommendation.

48. I report accordingly to the Attorney-General.



Gillian Triggs  
**President**  
Australian Human Rights Commission

June 2014

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- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
  - 2 *Migration Act 1958* (Cth) s 5.
  - 3 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.
  - 4 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004), 308 [11.10].
  - 5 *Manga v Attorney-General* [2000] 2 NZLR 65, [40] - [42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.
  - 6 *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/76/D/900/1993; *C v Australia* Communication No 900/1999 UN Doc CCPR/c/76/D/900/1999.
  - 7 *Shafiq v Australia*, Communication No 1324/2004, UN Doc CCPR/C/88/1324/2004, para 7.2.
  - 8 *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.
  - 9 United Nations Human Rights Committee, concluding Observations on Switzerland, UN doc CCPR/A/52/40 (1997), [100].
  - 10 *C v Australia* Communication No 900/1999 UN Doc CCPR/c/76/D/900/1999; *Shams & Ors v Australia* UN Doc CCPR/C/90/D/1255; *Baban v Australia* CCPR/C/78/D/1014/2001; *D and E v Australia* CCPR/C/87/D/1050/2002.
  - 11 Commonwealth Ombudsman, *Report by the Commonwealth and Immigration Ombudsman to the Minister for Immigration and Citizenship Under s486 of the Migration Act 1958*, 18 May 2012.
  - 12 *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) s 29(2)(a).
  - 13 AHRC Act s 29(2)(b).
  - 14 AHRC Act s 29(2)(c).
  - 15 United Nations Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13.
  - 16 United Nations Human Rights Committee, General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13, para 16.



## Further Information

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