COMMONWEALTH OMBUDSMAN

FOR CONSUMERS

Report on people Detained and Later Released as Not Unlawful

Own Motion Investigation: 1 July 2022 to 30 June 2023

May 2024

Contents

What we looked at

We considered reports the Department of Home Affairs (the Department) provided to our Office between 1 July 2022 and 30 June 2023 about individuals detained during the period based on suspicion they were unlawful non-citizens, who it subsequently found were not unlawful and released.

Under s 189 of the *Migration Act 1958*, an officer must detain a person they 'know or reasonably suspect' to be an unlawful non-citizen. In these cases, the detention was lawful under the Migration Act (because the officer making the decision held the required reasonable suspicion), but it was not appropriate because the basis on which the officer held that suspicion was incorrect.

Depriving people of their liberty in error is serious. Our report identifies improvements the Department can make to ensure it forms accurate and timely assessments of an individual's immigration status and avoids further instances of inappropriate detention.

What we found

The number of people inappropriately detained and the average length of time that a person is held in inappropriate detention continues to decrease.

The Department should resolve all visa status issues for non-citizens who are being released from criminal custody at least 2 months prior to release.

We are satisfied with the Department's proposed approach to remedy an error that arose from communication with the Administrative Appeals Tribunal about a detainee's release.

Introduction & background

This is the second standalone report about the Ombudsman's ongoing own motion investigation into the Department's action to detain people it suspects are unlawful non-citizens but subsequently identifies are not unlawful and releases from immigration detention.

This report covers the period from 1 July 2022 to 30 June 2023.

Overall, the number of people the Department inappropriately detained and the average length of time people were held in inappropriate detention has continued to decrease since occurrences peaked in 2017. In 2022-23, inappropriate detentions, as a percentage of all detentions, occurred at the lowest rate since the Ombudsman began monitoring occurrences in 2007.

In this reporting period, the Department identified 5 inappropriate detentions, a notable decrease from the 18 cases identified during the 2021-2022 reporting period. The longest period of inappropriate detention was 3 days, and the shortest was 1 day. Based on our assessment of these occurrences, the Ombudsman makes one recommendation aimed at reducing the likelihood of similar cases in future.

Separately from this report, the Office monitors individual instances of inappropriate detention and engages with the Department to track its implementation of the Ombudsman's recommendations for improvement.

Analysis and Suggestions

Visa notification errors

The Department identified 3 cases where it inappropriately detained a non-citizen due to a 'visa notification' error.

In each case, the non-citizen was initially held in criminal custody. The Department detained the non-citizen after their release from criminal custody, on the grounds that their visa had been either cancelled or refused before or during their imprisonment.

However, the Department subsequently found, as part of its quality assurance processes, that the notices it provided the non-citizens of their visa being cancelled or their visa application being refused were either incorrect or insufficient to meet the requirements of the Migration Act.

Under section 189 of the *Migration Act 1958*, a non-citizen who does not hold a valid visa is an 'unlawful non-citizen'. The Department must detain and eventually deport unlawful non-citizens unless they are granted a valid visa.

Unlawful non-citizens who are in criminal custody can be granted a 'bridging visa E' (BVE). This provides lawful status to an unlawful non-citizen in criminal custody such that immigration detention is unnecessary for the duration of the criminal custody. The BVE ceases on release from criminal custody, at which the point the holder will revert to being unlawful.

Where the Department fails to correctly notify a visa holder their visa is cancelled, that visa remains valid until (and unless) the Department remedies the defective notification or cancels the visa under a different ground.

Where the Department provides incorrect or insufficient notification to a visa applicant when it refuses an application, the refusal is held to be invalid, and the applicant will typically continue to hold the bridging visa associated with their application.

These individuals were detained for between 1 and 3 days while the Department resolved the visa notification issue. The detention of these individuals was later

found to be inappropriate, because the notification errors meant they continued to hold valid visas while in immigration detention.

When the Department determined the detention was inappropriate, the individuals were released. In 2 of the 3 cases, the Department re-detained the individuals once it gave them appropriate notification regarding their visas.

The visa notification errors in these 3 cases occurred because:

1. In seeking to remedy an earlier defective notification to refuse a visa application, the Department used an incorrect re-notification template, which stated an incorrect timeframe to seek review of the Department's decision.

2. The Department's notification to the individual about the refusal of their visa application in 2011 provided insufficient reasons for the decision.

3. The Department did not have sufficient evidence that it sent the applicant a letter in 2015 to invite them to comment on adverse information the Department received, so could not rely on 'deemed receipt' of the letter under s 494C(4) of the *Migration Act 1958*.

The Department advised it took a range of remedial action in response to these cases, including expanding its existing guidance, appointing specialist staff as advice contact points, re-circulating guidance and providing further training on notification issues, and implementing new prioritisation protocols aimed at resolving potential visa status issues sooner.

Cases 2 and 3 involved visa processing steps, templates and procedural guidance documents that are now obsolete, and we are satisfied that in the intervening period the Department has made improvements so that these specific notification issues are unlikely to recur.

For case 1, the Department's remedial action to expand guidance, appoint specialist staff as advice contact points and remind staff to use the correct re-notification template will assist to prevent this specific re-notification error recurring, and mitigate the risk of re-notification errors more generally.

At the same time, there is a common issue in these cases related to the Department's quality assurance processes and timeframes for identifying and resolving the visa status of non-citizens in criminal custody.

In all 3 cases, the Department could have identified the visa notification errors and avoided inappropriately detaining these individuals by finalising quality checking processes to determine their visa conditions prior to them being released from criminal custody.

For various reasons, these quality checking processes were either not initiated or not appropriately prioritised until shortly before, or even after the individuals were due to be released from criminal custody.

Based on the cases in this reporting period, and noting the Department's workload, priorities and available resources, we estimate that aiming to finalise these checks at least 2 months before individuals are released from criminal custody would be appropriate. This timeframe would allow sufficient time to work through any complex, unusual or unexpected issues, and make any required referrals to the Department's Status Resolution Helpdesk or other areas.

Recommendation

The Department should finalise all quality assurance checks of a non-citizen's visa status at least 2 months (or as early as is otherwise practical) prior to their release from criminal custody, to ensure that all visa status issues are appropriately identified, prioritised and resolved prior to the person's release.

The Department has responded that it agrees in-principle with this recommendation and has implemented alternative measures and monitoring that achieve the recommendation's intent (Attachment A). The Office will continue to monitor these measures to ensure they appropriately identify, prioritise and resolve visa status issues prior to releasing people from criminal custody.

Tribunal process error

The Department advised us of a case where the Administrative Appeals Tribunal (AAT) overturned the Minister's decision to cancel the individual's visa while they were in immigration detention.

The AAT advised the Department of the decision after close of business on a Friday, and the person remained in detention over the weekend and was released the following Monday. The Department advised that this occurred despite AAT procedures which outline that, in order to mitigate the risk of an individual being detained inappropriately, the AAT should advise the Department ahead of time if it expects to make a decision late in the day.

This is a similar factual scenario to a case that was included in the Department's report to our Office for July to December 2020. In that instance, an AAT decision to revoke a visa cancellation was sent after business hours on a Monday to the Department's litigation area. While the litigation area forwarded the notification to the immigration detention centre, staff at the immigration detention centre had ceased monitoring the mailbox for the day. In response to that case, the Department advised that it took remedial action, including to:

- update its email distribution lists to include a wider range of recipients
- provide further guidance for Departmental and AAT staff about the importance of timely notification of decisions
- monitor hearings relating to detention cases that occur on a Friday.

Our Office also suggested that the Department ensure the distribution list includes mailboxes which are routinely checked outside of business hours, require the forwarder (in the Department's litigation area) to obtain confirmation the relevant area received the decision, include follow up actions where confirmation of receipt could not be obtained, and update its induction and refresher training for litigation staff about communicating decisions.

In this case, the error occurred because staff at the Department were not aware the decision was about to be made and staff at the immigration detention centre had ceased monitoring the mailbox.

The Department advised that following this latest occurrence, it took additional corrective action, including:

- Establishing an out-of-hours phone contact for each immigration detention facility which is available to the AAT
- Requesting the AAT to call the relevant status resolution phone number when it expects to notify the Department of a decision requiring release outside business hours
- Applying an 'out-of-office' message to all status resolution mailboxes, which will advise the sender that the incoming email has not been read and providing escalation instructions.

We are satisfied the Department's response appears to address the gaps that led to this inappropriate detention and do not consider further corrective action is required.

Error arising from impact of Federal Court judgment

In 2022, the Full Court of the Federal Court delivered its judgment in *Pearson v Minister for Home Affairs* [2022] FCAFC 203 ('Pearson'). The Court determined that a single aggregate sentence of imprisonment for 2 or more offences totalling 12 months or more was not 'a term of imprisonment for 12 months or more' for the purposes of s 501(7)(c) of the *Migration Act 1958*, and thus did not trigger the 'mandatory visa cancellation' provisions in s 501(3A).

Prior to Pearson, the Department's standard operating procedures required its decision makers to cancel an individual's visa if they received an aggregate custodial sentence of 12 months or more.

In this reporting period, the Department took one individual into immigration detention after they were released from criminal custody, as their visa was cancelled under the mandatory cancellation provisions while they were imprisoned.

Under state sentencing provisions, the individual was sentenced to a 'single custodial sentence' of over 12 months, based on two or more offences that each attracted individual sentences of less than 12 months. While functionally similar, the terminology of 'aggregate sentence' was not used in the individual's sentence. The Department advised that initially it did not fully understand the

impact of the Pearson judgment and because of this and the wording used in the individual's sentence, it did not immediately identify the individual was affected by the Pearson decision.

Upon taking the individual into detention, the Department reviewed the case. The next day, the Department obtained legal advice which stated the detainee was affected by the Pearson judgment, as the single sentence given for more than one offence was functionally identical to the 'aggregate sentences' considered in Pearson. The Department released the detainee that day.

Soon after Pearson, the government introduced legislation (the Migration Amendment (Aggregate Sentences) Bill 2023) which resulted in aggregate sentences triggering mandatory cancellations in the same way as a single-offence sentence. After this legislation was passed, the Department re-detained the individual.

A factsheet outlining the impacts of the Pearson judgment and the Government's response is available on the Department's website.

Noting the relevant changes to the Migration Act, we are satisfied that no further action is required.

Appendix A: Department of Home Affairs response

Australian Government
Department of Home Affairs

SECRETARY

OFFICIAL

EC24-001407

Mr Iain Anderson
Commonwealth Ombudsman
Office of the Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Anderson

Thank you for providing me with a draft copy of your *Report on People Detained and later Released as Not Unlawful 2022- 2023* (the DRNU Annual Report) and for the opportunity to provide comments prior to its publication.

The Department agrees in-principle with the recommendation and has implemented alternative measures and monitoring that achieve the recommendation's intent. Please refer to **Attachment A** for our full response.

Should your team wish to discuss any aspect of the Department's response, they may contact Assistant Secretary, Status Resolution Programs and Capability Branch, David Arnold on [redacted] or [redacted] Please feel free, of course, to contact me directly if that would be helpful.

Yours sincerely

Stephanie Foster

Stephanie Foster PSM

26 April 2024

OFFICIAL

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Attachment A

The Department welcomes the opportunity to respond to the Commonwealth Ombudsman's draft copy of the *Report on People Detained and later Released as Not Unlawful 2022- 2023.*

Recommendation:
The Department should finalise all quality assurance checks of a non-citizen's visa status at least 2 months (or as early as is otherwise practical) prior to their release from criminal custody, to ensure that all visa status issues are appropriately identified, prioritised and resolved prior to the person's release.

The Department **agrees in-principle** to this recommendation and considers its intent is being achieved through alternative measures.

On 15 March 2023, the Australian Border Force (ABF) provided operational instructions to all ABF Field Operations Officers regarding the management of non-citizens in criminal custody. The instructions require officers, once notified by external stakeholders of a non-citizen entering criminal custody, to undertake identity and status checks, including completion of a Comprehensive Assessment Tool (CAT). The purpose of the CAT is to assist officers determine whether a person's immigration status is affected by a defective notification. If notification errors are identified they are referred for rectification at that time.

Officers managing criminal custody caseloads must put in place appropriate arrangements to monitor non-citizens for changes in their circumstances, including but not limited to:

- release on bail
- successful appeal against sentence, sentenced on additional charges, changes to parole date (which could result in a change to the non-citizen's actual release date)
- grant of visa or issue of a Criminal Justice Stay Certificate
- cancellation of existing visa or revocation of cancellation (which changes immigration status), and
- request for voluntary removal.

The combination of initial identity/status checks and ongoing monitoring constitutes a quality assurance process throughout a person's period in criminal custody.

Appendix B: Administrative Appeals Tribunal response

Administrative Appeals Tribunal

Dear [redacted],

Thank you for providing the AAT with the opportunity to comment on sections detailing its involvement within your *Report on people detained and later released as not unlawful*.

We have identified the two AAT cases referenced on page 8 under the heading "Tribunal process error." The review of the matter that fell within the reporting period occurred within the Migration & Refugee Division (MRD), while the older case referenced fell under the jurisdiction of the General Division (GD) as a character-related matter (per section 500 of the Migration Act).

From a review of the report, the AAT notes that there are no obvious errors of fact in relation to either matter referenced. The AAT regrets our involvement in both matters, which resulted in inappropriate detention. However, we wish to provide the following contextual information:

- The AAT endeavours to notify all decisions involving detainees, where the AAT overturns the original decision, prior to close of business. In the overwhelming majority of cases, the AAT notifies the affected party within the operational working hours of departmental and detention centre staff.
- Further, the MRD aims, where possible, to provide a notice of a decision in a matter to parties in detention before 4:00pm on the date of decision. The GD more generally endeavours, where possible, to provide notice of a decision in a matter to the parties before 2:00pm on the date of a decision.
- As outlined in the report, it is now current practice for the AAT to notify departmental staff, where possible, of a decision requiring release outside business hours. The GD also endeavours, where possible, to provide 24 hours' notice of the time a decision will be provided to applicants, respondents and their representatives to enable the parties to prepare.
- The AAT would note that instances of delayed notification for applicants in detention have declined in the period since 2020, when the GD matter in question was finalised. This is due to enhanced training of Tribunal staff and the membership as well as the tightening of Department procedures referenced in the report. We continue to emphasise the need for timely notification in relation to these matters.
- Applications to the AAT for review of decisions about visas made on character-related grounds require the AAT to conduct an expedited merits review process for certain applications and determine the application within 84 days after the date on which the applicant was notified of the decision. If it does not do so, the decision under review is taken to be affirmed under section 500(6L) of the Migration Act.

We would be happy to provide further details around the processing of either decision or any further clarification necessary.

Yours sincerely,

Michael Hawkins AM
Registrar