



Note No. 64/2013

The Australian Permanent Mission to the United Nations and Other International Organisations in Geneva presents its compliments to the Working Group on Arbitrary Detention (Working Group) and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur).

The Australian Government has the honour to refer to the communication from the Officer in Charge, Special Procedures Branch, Office of the High Commissioner for Human Rights, of 13 December 2012, advising the Australian Government of the joint urgent appeal regarding the ongoing detention of Mr Abdul Wahid Rezaee. The Working Group and the Special Rapporteur have requested that Australia take all necessary measures to guarantee his rights not to be deprived arbitrarily of his liberty and to fair proceedings before an independent and impartial tribunal. The Working Group and Special Rapporteur have also requested information on measures taken by the Government to safeguard the rights of Mr Rezaee in compliance with the international instruments referred to in the joint urgent appeal, and additionally the Government's observations regarding four specific questions within 30 days.

The Australian Government hereby provides its response in respect of the matters raised in the joint urgent appeal. The Australian Government apologises for the delay in providing its response.

The Australian Permanent Mission avails itself of the opportunity to renew to the Working Group and Special Rapporteur the assurances of its highest consideration.



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Australian Government response to the joint urgent appeal of 13 December 2012 from the Working Group and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health concerning measures taken to safeguard the rights of Mr Rezaee in compliance with international instruments and the Government's observations on four specific questions.

1. The Australian Government is committed to ensuring that people in immigration detention are treated humanely and all necessary measures are taken to ensure their rights.
2. The Working Group on Arbitrary Detention (Working Group) and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur) requested that Australia provide information on the steps the Government has taken to safeguard the rights of Mr Rezaee under articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), as well as article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). A further request has been made for the Government's observations on four specific questions which were attached to the joint urgent appeal of 13 December 2012.
3. The Australian Government sets out below its responses to the four specific questions. The Australian Government considers that these responses also address the request for information on measures taken to safeguard the rights of Mr Rezaee under the international instruments referred to above. In particular, the response to question 2 addresses Australia's compliance with articles 9 and 14 of the ICCPR (which raises the same issues as articles 9 and 10 of the UDHR) and the response to question 3 addresses Australia's compliance with article 12 of ICESCR.

Question 1: Are the facts alleged in the summary of the case accurate?

4. The Working Group and the Special Rapporteur have requested that Australia comment on the accuracy of the details of the case contained in the summary from the Special Procedures with respect to Mr Rezaee.
5. Mr Rezaee arrived in Australia as an undocumented Irregular Maritime Arrival (IMA) on 12 June 2010 on suspected illegal entry vessel number 158. As an unlawful non-citizen Mr Rezaee was detained at Christmas Island Detention Centre in accordance with sections 189 and 196 of the *Migration Act 1958* (Cth) (the Act). On 12 November 2010 he formally submitted an application for refugee status. As a result of processing requirements and a backlog of interviews due to the significant number of arrivals during this period, there was a delay between Mr Rezaee's arrival to when he submitted his application for refugee status. These timeframes are consistent with other arrivals at this time.
6. Australia notes that the summary states that Mr Rezaee had an interview as part of his Refugee Status Assessment (RSA) on 20 December 2010, however, Australia would like to confirm that this interview took place on 15 November 2010. On 27 April 2011 Mr Rezaee

was found to meet the definition of a refugee as set out in Article 1A of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. He was notified of this decision in accordance with Department of Immigration and Citizenship's (DIAC) procedures on 2 May 2011.

7. A number of factors contributed to the overall time taken to process Mr Rezaee's application. Mr Rezaee arrived in Australia at a time when RSA processing of Afghans had been suspended (9 April 2010 to 30 September 2010). Following the lifting of the processing suspension, DIAC was faced with a large backlog of Afghan clients requiring processing. To meet the increased workload, a RSA processing capability was established in DIAC's Perth office. However, as this was a new RSA processing centre and most staff were new to RSA processing, all cases were required to be reviewed through the Quality Control process performed by staff from the Victorian office which resulted in slower processing than usual. As Mr Rezaee was interviewed by a case officer in the Perth office, this contributed to the longer processing time between the RSA interview and the 1A assessment than would otherwise be expected.

8. Following the RSA where the delegate found Mr Rezaee to engage Australia's protection obligations, a security assessment was initiated on 2 May 2011. Security assessments are a routine part of the Protection visa application process, and are initiated after a person has been found to engage Australia's protection obligations. On 12 May 2011, DIAC received an allegation that Mr Rezaee was involved in people smuggling. Various checks were undertaken with other agencies to determine the credibility of the allegation. Following this Mr Rezaee's case was formally referred to the Australian Federal Police (AFP) on 15 July 2011. The Australian Government notes that on 3 October 2012, the AFP advised that Mr Rezaee was no longer under investigation and that no charges would be laid.

9. Additionally, on 28 September 2011 Mr Rezaee's case was referred for another security assessment. This assessment remains ongoing, as such Mr Rezaee will not be granted a Protection visa until which time this has been completed, and providing the outcome is a cleared response. Due to the nature of security assessments where additional information is received in relation to a client, that client can be referred to the Australian Security Intelligence Organisation (ASIO) again for further checking which may result in a different security assessment outcome being furnished. This is also true of the Independent Review of Adverse Security Assessment process whereby clients who are found to be refugees and are the subject of Adverse Security Assessments will be periodically reviewed by the Independent Reviewer. As part of this review new information will be considered by the Independent Reviewer and where the new information may affect the appropriateness of the security assessment decision this will be forwarded to the Director General of ASIO for consideration in reviewing the security assessment outcome. While the formal periodic review process occurs on a 12 month basis, ASIO may still take appropriate action outside of

the process if new information were to come to light that might change the security assessment.

10. DIAC formally escalated Mr Rezaee's security assessment on 3 April 2012. The timing for completion of security assessments varies from case to case, depending on personal circumstances. DIAC and ASIO have escalation procedures in place within the context of the Government's duty of care for clients in detention. DIAC liaises with ASIO to escalate individual cases of concern for priority assessment, such as unaccompanied minors, families with young children, IMAs with mental health concerns, and other compassionate and compelling circumstances. In October 2011 a managed escalation process was introduced between DIAC and ASIO to also include prioritisation of long standing detention cases awaiting security assessment. Mr Rezaee's case is complex and no time for completion is currently available. However, the DIAC is actively pursuing resolution of this, including having engaged with the relevant agency as recently as 13 March 2013.

11. On 14 March 2013 DIAC initiated a referral on behalf of Mr Rezaee to the Minister for Immigration and Citizenship (Minister) on a section 197AB submission for a Residence Determination (community detention). This is when the Minister may determine that a person can reside at a specified place in the community rather than being held in a detention facility. Only the Minister can approve community detention for people in immigration detention and this power is non-compellable. A person in community detention remains administratively in immigration detention while living in the community. On 21 March the Minister agreed to intervene to place Mr Rezaee into community detention. Mr Rezaee now resides with his brother in Melbourne whilst he awaits his security assessment.

12. Previously Mr Rezaee resided at Melbourne Immigration Transit Accommodation (MITA) where he was transferred on 27 February 2012.

13. In summary, the Australian Government confirms that:

- Mr Rezaee arrived in Australia as an undocumented Irregular Maritime Arrival (IMA) on 12 June 2010 and was detained at Christmas Island Detention Centre in accordance with sections 189 and 196 of the Act.
- On 12 November 2010 he formally submitted an application for refugee status.
- Mr Rezaee had an interview as part of his Refugee Status Assessment on 15 November 2010 and not 20 December as the summary states.
- Australia notes that the summary states that Mr Rezaee had an interview as part of his Refugee Status Assessment on 20 December 2010, however, the Australian Government confirms that this interview took place on 15 November 2010.

- On 27 April 2011 Mr Rezaee was found to meet the definition of a refugee as set out in Article 1A of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.
- Mr Rezaee was notified of the above decision in accordance with DIAC's procedures on 2 May 2011.
- Following the Refugee Status Assessment where the delegate found Mr Rezaee to be owed protection in Australia, security and character assessments were initiated on 2 May 2011. These assessments are a routine part of the Protection visa application process.
- On 12 May 2011, DIAC received an allegation that Mr Rezaee was involved in people smuggling. Various checks were undertaken by DIAC with other agencies to determine the credibility of the allegation.
- Mr Rezaee was assessed and cleared against the security assessment criteria on 2 June 2011.
- Mr Rezaee's case was formally referred to the Australian Federal Police (AFP) on 15 July 2011.
- On 28 September 2011 he was re-referred for security assessment. This assessment remains ongoing, as such Mr Rezaee cannot be granted a Protection visa until which time this has been completed with a cleared response.
- On 15 February 2012, DIAC requested a Bridging Visa E security assessment in consideration of granting Mr Rezaee a bridging visa.
- Mr Rezaee was cleared for community detention/bridging visa purposes his case was not referred to the Minister as he was the subject of an ongoing police investigation. The decision not to refer his case was informed by the Minister's preference that clients who were subjects of criminal investigations not be referred to him until such time as the investigation had been finalised.
- On 27 February 2012 Mr Rezaee was transferred to the Melbourne Immigration Transit Accommodation (MITA).
- On 3 April 2012, Mr Rezaee's security assessment was escalated as a long standing case based on the amount of time Mr Rezaee had spent in held immigration detention. This is a complex case and no time for completion is available. The timing

for completion of security assessments varies from case to case, depending on personal circumstances [DIAC is actively pursuing resolution of this, including having engaged with the relevant agency as recently as 13 March 2013].

- On 18 June 2012 Mr Rezaee attended a security assessment interview.
- On 3 October 2012, the AFP advised that Mr Rezaee was no longer under investigation and that no charges would be laid.
- On 16 November 2012, DIAC sent a submission to the former Minister requesting the Minister consider Mr Rezaee for a community detention placement.
- On 17 December 2012, the former Minister agreed to consider a community detention placement in respect of Mr Rezaee.
- On 24 December 2012 Mr Rezaee was referred to the former Minister on a second stage s197AB submission for a Residence Determination (community detention).
- On 5 February 2013, this submission was returned from the Minister's Office unsigned, due to a change of Minister.
- On 21 March 2013, the new Minister agreed to intervene under section 197AB of the Act to place Mr Rezaee into community detention.

Question 2: Information on the legal grounds for the ongoing detention of Mr Rezaee and how this measure is compatible with international norms and standards

14. As noted above, Mr Rezaee resided in a detention centre from the date of his arrival in Australia as an undocumented IMA on 12 June 2010 until 21 March 2013. Since 21 March, Mr Rezaee has been living in the community, under community detention. The Australian Government considers it is relevant to address compatibility with article 9(1) for the period 12 June 2010 to 21 March 2013, when Mr Rezaee was residing in a detention centre. Given that Mr Rezaee is currently residing in the community, the Australian Government considers that Mr Rezaee is not deprived of his liberty and therefore no issue under article 9(1) presently arises. The Australian Government does not consider that article 14 is directly relevant to Mr Rezaee's present circumstances. However, given that the Working Group and Special Rapporteur have specifically referred to this article, the Australian Government also addresses article 14 in its response below.

Article 9 of the International Covenant on Civil and Political Rights

15. Article 9(1) of the International Covenant on Civil and Political Rights (the ICCPR) states that:

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.

16. In order to establish that a deprivation of liberty amounts to a breach of article 9(1), it must be shown that: (i) the deprivation of liberty is not in accordance with procedures established by domestic law, or (ii) the detention is otherwise arbitrary.

17. Australia takes its obligations to people in detention very seriously. For the reasons set out below, the Australian Government considers that Mr Rezaee's detention from 12 June 2010 until 21 March 2013 was neither unlawful nor arbitrary.

The detention of Mr Rezaee from 12 June 2010 until 21 March 2013 was lawful

18. On Mr Rezaee's arrival in Australia in June 2010, he was detained in accordance with then subsection 189(2) of the *Migration Act 1958* (the Act). Subsection 189(2) stated that:

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

19. Section 196 of the Act required that an unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(b) an officer begins to deal the non-citizen under subsection 198AD(3); or

(c) he or she is deported under section 200; or

(d) he or she is granted a visa.

20. The Australian Government considers that the term 'law' in article 9(1) refers to law in the domestic legal system. The reasons for, and the conditions defining the duration of, immigration detention are clearly set out in the Act, thus establishing a lawful basis for Mr Rezaee's ongoing detention.

21. The Australian Government's position is that the detention of individuals requesting protection is neither unlawful nor arbitrary per se under international law. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. This will include a consideration of whether the detention is necessary, reasonable and proportionate in all the circumstances.

22. Government policy is that all unauthorised maritime arrivals will be subject to detention for the purpose of managing health, identity and national security risks to the community

and to facilitate removal when appropriate. This is both a reasonable and proportionate measure as the policy seeks to mitigate potential health or security risks to the Australian community.

Conclusion

24. The Australian Government considers that the placement of Mr Rezaee in a detention centre from 12 June 2010 until 21 March 2013 was neither unlawful nor arbitrary and therefore consistent with Australia's obligations under article 9(1) of the ICCPR. Mr Rezaee's security assessment is still being undertaken, however since 21 March 2013, he has been placed in community detention. Given that he is not presently deprived of his liberty, the Australian Government considers that no article 9(1) issue presently arises.

Article 14 of the International Covenant on Civil and Political Rights

25. The Working Group and Special Rapporteur refer to Article 14 of the ICCPR. Article 14(1) provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

26. Mr Rezaee is not subject to criminal proceedings and is no longer the subject of criminal investigations.

27. Mr Rezaee is in community detention under an administrative framework, while the Australian Government is determining his security assessment. For the reasons outlined below, the Australian Government considers that this process does not amount to a suit at law.

28. The jurisprudence of the Human Rights Committee has consistently held that proceedings relating to the expulsion of an alien, where the person is lawfully in the territory of the State party in question, will be governed by article 13; and therefore will not fall within the ambit of a determination of 'rights and obligations in a suit at law' under article 14. The Committee has also noted that where a State is considering a person's right to continue residing in the State party's territory, article 13, and not article 14 will be applicable.

29. Mr Rezaee's security assessment is occurring in the context of the overall consideration of whether he may lawfully stay in Australia. On this basis, the Australian Government considers that he is not subject to a 'suit at law' and therefore article 14 is not relevant to his circumstances.

Question 3: Information on the measures being taken to ensure the enjoyment of the right to health of persons in immigration detention.

30. The Working Group and Special Rapporteur have requested that Australia provide information on the measures taken to ensure the enjoyment of the right to health of persons in immigration detention.

General health

31. All people in immigration detention in Australia have access to appropriate health care, commensurate with the level of care available to the broader Australian community and consistent with the duty of care owed to people in immigration detention. The services are provided by a private company called International Health and Medical Services (IHMS) under contract to DIAC.

IHMS is a multidisciplinary group of health professionals including counsellors, mental health nurses, psychologists and psychiatrists. IHMS provide an appropriate level of health services and psychological support, as clinically indicated and in accordance with DIAC mental health policies, particularly the Psychological Support Program (PSP) and Mental Health Screening Policy.

32. All people entering immigration detention receive a Health Induction Assessment, conducted by health clinicians, within 72 hours of their detention. The assessment identifies any health conditions that will require attention and assists in formulating a personalised health care plan if needed. The assessment includes the collection of personal and medical history, a physical examination and formalised mental health screening and assessment.

33. For people in facility-based detention, primary health services are available onsite with referral to external health providers in the community as clinically required. For people in community detention and some immigration residential housing, health care services are provided by community-based health providers organised by IHMS. The costs of the health care are paid by the Australian Government.

34. All health services are provided by appropriately qualified and registered health care practitioners. Health care staff located onsite at immigration detention facilities include general practitioners, registered nurses, counsellors and psychologists. Other health care services, including but not limited to psychiatric, optometry, dental and physiotherapy, are provided by visiting practitioners or through appointments held outside the detention facility. People who are identified as survivors of torture or trauma are referred for specialist counselling. Acute care is provided in public hospitals.

Mental health

35. All people in immigration detention are provided with access to a range of mental health support services. DIAC has implemented policies and programs to minimise factors that contribute to the deterioration of the mental health of those in detention and to assist those in need, including prompt referral to appropriate treatment. Additionally, all personnel who work with people in detention are trained to recognise and respond to the warning signs and risk factors of self-harm and the deterioration of mental health.

36. The Australian Government has introduced three mental health policies to identify existing mental health issues, provide psychological support to people in immigration detention, and minimise self-harm risk. The policies are operational in immigration detention facilities. These policies include identification and support of people in immigration detention who are survivors of torture and trauma; a PSP for the prevention of self-harm in immigration detention; and mental health screening for people in immigration

detention. These policies were developed in consultation with DIAC's health advisory group (the Detention Health Advisory Group) and with reference to the Government's National Mental Health Policy and standards recommended by the Royal Australian College of General Practitioners.

37. IHMS is contractually required to follow Australian Government policy and its service delivery is monitored by DIAC. DIAC, and in particular the provision of detention services, is subject to extensive public scrutiny, including by the Australian Parliament, the Immigration Ombudsman's office, the Australian Human Rights Commission and the Red Cross

38. Client placement meetings are held between the detention and health service providers and the Australian Government on a weekly basis (or more regularly if warranted in particular cases) to holistically consider each client's individual circumstances, including their state of health, wellbeing and ongoing support needs, their immigration pathway and time in detention. Other operational factors may also be considered, such as accommodation availability, the co-location of people from the same language group, or the separation of people who engage in incidents or adverse behaviours that could affect the safety and good order of the facility.

39. In some cases, individuals may not be able to be treated effectively while they remain in the immigration detention environment. In such cases, IHMS notify DIAC and can recommend more rapid case resolution for the individuals in question.

40. In addition, IHMS provides individuals assessed to be at an increased level of risk with increased levels of supportive engagement and monitoring in accordance with the PSP. The Program is a clinically recommended approach to the management of persons in immigration detention who may be at increased risk of suicide and self-harm, which was developed by DIAC in consultation with the relevant experts within the DIAC Health Advisory Group.

41. IHMS relies on the cooperation and support of DIAC and Australia's detention services provider, Serco, in the implementation of the PSP, especially with regard to supportive monitoring and engagement provided by Serco staff when IHMS is not present. The PSP policy recognises that it is not possible to eliminate all risk in these circumstances. People who are found to be at high risk for more prolonged periods are referred to other external services for independent assessment. This has occurred in a number of the authors' cases.

42. Australia's detention services provider, Serco, has implemented a number of policies and procedures within the immigration detention network to support the physical and mental health of people in detention, protect people from self-harm, and alleviate the risk of anxiety associated with prolonged detention, including:

- Wellbeing of People in Detention
- Programs and Activities
- Individual Management Plan
- The Keepsafe Procedure and Psychological Support Program (referred to above) and
- Personal Officer Scheme

43. If persons in detention are considered to be at risk of self-harm and, in some cases, suicide, ongoing discussion of the management of the cases takes place in a number of settings.

44. For example, IHMS, Serco and DIAC hold a PSP meeting on a daily basis, where the care of people of concern are discussed and plans and interventions put into place. IHMS, Serco and DIAC are also involved in the following procedures:

- The weekly client preventative and placement meeting with all stakeholders
- Ongoing mental health reviews, inclusive of a risk assessment
- Escalation of concerns to the DIAC Detention Health Operations network, and
- Escalation of concerns to the IHMS Medical Director of the Mental Health Services.

45. Clients in detention are also directly involved in monthly review meetings, and are able to meet with their case manager at their own request or when there are updates in their case.

46. In addition to the measures described above, the persons in detention are currently offered the following support measures:

- Anxiety management
- Medication management and ongoing review to assess efficacy
- Ongoing appointments and review of the author's case with a psychiatrist
- Ongoing appointments and review of the author's case with a medical practitioner (for any physical issues)
- Ongoing appointments with external torture and trauma counselling services
- Discussion of the author's case and care options, if required, at the daily PSP meeting
- Initiation of increased levels of supportive monitoring and engagement under the PSP if the risk of self-harm escalates or if mental health is compromised to the point that it could escalate the risk, and
- Participation in groups, excursions and activities.

Application of the above policies and procedures to Mr Rezaee

47. With particular reference to Mr Rezaee, IHMS note that he has not sought any medical advice for any significant physical health issues within the last 6 months nor is he taking any regular medications for his health. IHMS therefore consider on that basis it is reasonable to conclude that Mr Rezaee's physical health is currently stable.

48. Like all of IHMS client's Mr Rezaee has access to primary health care nurses and doctors should he have any concerns with his physical health in future.

49. In respect to Mr Rezaee's mental health, while he has had periods where he has been on supportive monitoring and engagement (SME) due to his deteriorating mental state, he has not required SME since 27 December 2012 as his mental health has been assessed as being stable.

50. Mr Rezaee is being heavily supported by IHMS Mental Health nurses, and psychologists to address his mental wellbeing. As of January 2013, he is attending fortnightly appointments with these clinicians. He also participates in activities such as art therapy and gardening which Mr Rezaee has reported as being beneficial to him.

51. The Australian Government considers that the measures outlined above are consistent with its obligations under article 12 of ICESCR to ensure that Mr Rezaee enjoys the right to health.

Question 4: A detailed explanation as to why his case has not been considered for community detention in the interest of his health and in regard of his prolonged detention

52. The Working Group and the Special Rapporteur have requested that Australia provide an explanation as to why Mr Rezaee's case has not been considered for community detention.

53. Since the urgent appeal from Working Group and the Special Rapportuer, Mr Rezaee has moved into community detention, following the new Minister's agreement on 21 March 2013 to intervene under section 197AB of the Act. He now lives with his brother in Melbourne, while DIAC continues to assess his case.