

Information Sheet for People in Detention Considering Legal Action Seeking Release

Long Version

Introduction:

Recently there have been a number of people released from immigration detention including some people who had been transferred to Australia for medical treatment (**medical transferees**). As there was no court judgment or order that led to these releases¹, the reason for release in each case is not legally clear. It may or may not be related to the commencement of legal proceedings in court, alleging that their ongoing detention was unlawful or other such provisions which are not made in law.

These cases have understandably raised a lot of hope and questions from other people who remain detained, about whether they may also be able to be released and whether there is a quick and easy way to achieve such a result.

This information sheet provides some basic information on some common questions and some explanation of the law which may have been relevant to these releases. **However, this information sheet is no substitute for each person getting individual legal advice. This is crucial as every person's legal circumstances, and the risks they could face, will be different.** See below for contact details for free legal advice lines.

Key Messages:

- **Please do not request removal from Australia unless you definitely want to be removed from Australia and have obtained individual legal advice regarding the possible risks of doing so in your case.** If you do request removal, you will not be given a choice in how the Australian government decides to process your removal from Australia. There is no legal certainty that the Australian government will release you from detention and there are a number of other risk factors that will vary, depending on your circumstances, which need to be carefully considered on an individual basis. These include:
 - The possibility of being returned to PNG or Nauru
 - The possibility of being returned to your country of origin
 - The possibility of being sent to another country (for example, if the Australian Government made a special arrangement for that)
 - Even if you were temporarily released from detention, the possibility that the Australian Government could re-detain you once it is possible to remove you from Australia.

¹ Except for the case of AJL20, who did receive a court judgment. Please note that AJL20 is an onshore detention case, not a medical transfer case, and there are differences in the laws which apply, which could also affect court decisions in medical transfer cases.

* Public Interest Advocacy Centre (**PIAC**) lawyers are not licensed to provide immigration law advice. We work in collaboration with the sector more broadly on detention matters.

- **There is no quick or easy way to secure a similar result as that achieved in these other cases.**
 - The law regarding unlawful detention and release by a court, especially of medical transferees, remains uncertain.
 - Many cases will not have relevant facts for such legal action; it will vary case to case.
 - There are some significant risks (explained below) which may be involved in bringing a case to court, which you need to be aware of and willing to accept.
 - The cases where people were released from detention likely took months of preparation in order to first gather all the relevant documents under Freedom of Information ('FOI'), International Health and Medical Services ('IHMS') etc needed to file a case in court, as well as legal submissions made to the court.
- **If you need legal advice or assistance, please contact one of the organisations below.** Do not expect that they will be able to take immediate action to seek your release from detention. First, they will need to get details of your particular situation, and may then assist you to apply for copies of your documents. Once these have been received (**which typically takes a minimum of 2-3 months**), your lawyer can then assess whether there is a feasible case that could be made to a court to seek your release from detention. As noted above, not every case will have a basis for a court application for release.

Frequently Asked Questions

Q: Should I request removal from Australia as a way to get out of detention and into the Australian community while I wait for US Resettlement or any other visa opportunities?

A: No. The short answer is that you should only request removal from Australia if you definitely want to leave Australia, and only after receiving individual legal advice so that you are aware of the risks of doing so.

The Migration Act also says that if a person makes a voluntary request to leave Australia, then the Department is obliged to remove that person from Australia as soon as is 'reasonably practicable'. There is no clear time frame provided in the law for what is considered to be 'reasonably practicable.'

If the stated reason why a person is detained is for removal, and if the Australian Government is taking reasonable steps to make arrangements for removal, (such as seeking a travel document for the person, or liaising with the receiving country about arrangements for the return process, or waiting for COVID-19 travel restrictions to ease), then a court is likely to find that the detention remains lawful. These steps taken by the Department might only be from time to time, but may well still be enough for the court to conclude that the detention remains lawful.

If there is no chance of the person ever being removed from Australia (ie because they are stateless and no country will accept them, or if they are too old or permanently unwell to travel anywhere) then in a previous and binding High Court decision², the court said that even very long term or indefinite detention can be lawful in Australia. So the law makes it very difficult to succeed in convincing a court that detention has become unlawful. We do not pretend that this is easy!

It is also important to know that once a person requests removal, then the Australian Government is obliged to remove them from Australia. **Just because a person requests that they be sent back**

² *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, High Court (Australia).

to a particular country, (eg PNG or to Nauru), does not mean that this is the only country they could be sent to. Once a person requests removal, then **the Department must take active steps to remove the person to any country** where the person may have a right to enter and reside in.

- This **could be PNG or Nauru** if the person was found to be a refugee in one of those two countries, or where PNG or Nauru has agreed to take back a person after they received medical treatment in Australia.
- **Or it could be they are sent to another country to which they have no connection which the Australian Government has made special arrangements for them** to be allowed to be admitted and reside there.
- Most importantly, or it could be that the Australian Government tries to **send the person back to their country of origin, even if they have been found to be a refugee from that country.** It is really important to know that unfortunately Australian laws do not provide legal protection against a refugee being sent back to their country of origin, and so this may be a risk a person faces if they ask ABF for removal from Australia.

We know there are some countries such as Iran and Afghanistan who refuse to accept back nationals who are being forced to return, and therefore the Australian Government could not readily send refugees or non-refugees who did not want to go back, to those countries. However there are other countries which do not have a similar policy, and where a person could possibly risk being removed even if they have been found to be a refugee against that country and certainly if they have not.

This is one important reason why we are urging caution and that anyone considering requesting removal from Australia needs to do so only on the basis of qualified legal advice, and after very careful consideration of the risks, as the stakes for them could be very high, and this will vary from case to case.

Q: Why have some people who seem to be in similar situations to me been released, but I remain in detention?

A: It is difficult to know the exact reasons for the Government deciding to release some people but not others. We recognise that this seems very unjust and is causing many people a lot of distress and frustration. However, any options to request release or commence litigation will depend on a detailed case by case analysis, and we therefore urge people to seek legal advice about their own specific circumstances.

Q: I have heard about the AJL20 case, where a person who had applied for refugee status in Australia was released by the court. Can a similar result be achieved for me?

A: It is important to first note that AJL20 was not a medical transferee, but rather a person who had been through the Australia refugee determination process. Due to legal differences, there is uncertainty regarding how the case law established in AJL20 would apply to a person brought to Australia for the temporary purpose of medical treatment.

The Court ordered AJL20's release because it concluded that his detention had become unlawful. The reasons for this are **legally quite complicated**, and also dependent a lot on the **individual circumstances** of AJL20's case. Here is some of the legal background:

The Migration Act says that if a person does not hold a valid visa, then they must be detained and remain in detention until they are either granted a visa or removed from Australia.

It also says that such detention remains lawful as long as it is for one of the following three purposes:

1. While awaiting a final decision on whether to grant the person a visa. (ie if a person is awaiting for a visa decision from the Department, the IAA/AAT, a court decision or a result from an initial ministerial request for a visa.)
2. While awaiting a decision from the Minister as to whether the person can apply for, or be granted a visa or may be released into community detention.
3. While making arrangements for a person to be removed from Australia. (ie if a person has voluntarily requested to leave Australia, or where the person has exhausted their legal case or the purpose for them being in Australia and the Department is now removing them even if they do not want to leave.)

It is only if none of these three reasons exist that a person's detention potentially becomes unlawful, and may given them a legal basis to approach the court for an order for release from detention. **This is a very difficult legal test to meet, and will depend very much on the individual circumstances and facts of each case, as well as developments in the case law as to how the courts view each individual scenario.**

Q: Now that AJL20 has been decided, doesn't that benefit a wider group of us?

A: The case of AJL20 was decided by a single judge of the Federal Court and is currently under appeal by the Government. The appeal is likely to be heard sometime in early 2021, such as in February. If the Government wins the appeal, then AJL20 may decide to seek leave to appeal to the High Court. This would then take more time for a final legal position to be decided by the Courts. In addition, as noted above, AJL20 is not a medical transferee and so there is uncertainty as to how the principles raised in AJL20 would apply to medical transfer cases.

Q: If I am released from detention after filing an unlawful detention case in the court, will I be granted a visa?

A: In the case of AJL20, that person was released from detention by the Court but not granted any visa by the Government, so has remained unlawful in the community, leaving him with a very uncertain legal status.

In the case of the Medevac transferees so far released from detention, to the best of our knowledge they have been released based on intervention by the Minister and granted 6 month BV E's with work rights and Medicare. There are no legal rights to bridging visas for medical transferees, they are all based on what the Minister decides case by case, and therefore it is hard to give certain answers about what might occur. This is the best information we can provide based on the current situation and the pattern we see emerging.

If a person is released from detention as a result of a court decision, then the person may be in the same situation as AJL20, and may not be granted any visa and could have an unlawful status while living in the community, and no right to work, access Medicare or any other assistance, unless the Government decided to make a special arrangement for them.

If a person is released from detention due to the Minister intervening to grant a BV E (based on previous cases more likely after the person has filed their case in court but prior to it being decided by the court), then they will most likely be granted a BV of some kind. There is no guarantee that the bridging visa would allow for work rights or access to Medicare, this is up to the discretion of

the Department. Even if the BV E does allow for work rights and Medicare, there is no entitlement to housing or income support, and so people released on BVEs are likely to be dependent on community support until or unless they are able to find a job and start earning their own income.

Q: Could I renew my bridging visa when it comes up for expiry?

A: Once granted a bridging visa, there is no guarantee that these BV Es will be renewed again. A new application will need to be made prior to the BV E expiring, and then it will be up to the Minister again to decide whether or not to allow a further BV E to be granted. Each Bridging Visa has its own expiry date and conditions. It is important you seek advice about the terms of your own visa and understand that there is no guarantee of a new Bridging Visa and that grants are not automatic. It is essential you seek advice independent to you about this process.

Q: If I hold a BV E can I apply for any other visa?

A: No. The Migration Act prevents people transferred to Australia for medical treatment from applying for any visa, unless the Minister exercises his personal power to allow them to on an individual basis. There is no indication that this will happen.

Q: Could applying to the court for release from detention impact on my US Resettlement application?

A: Whilst there is no formal link between the US Resettlement process and whether a person is in detention or in the community, there is no reason for us to believe there may be any impact. However this is unprecedented and the US resettlement is contingent on legal processes by the US, for which we do not have expertise and so each case should be decided individually as to any potential impacts.

A final note: If you do have an application being made to the Court by your lawyer, you are entitled to receive copies of all documents filed with the Court. If you haven't been provided with a copy of them, then you should request these immediately from your lawyer in writing.

CONTACT DETAILS FOR OBTAINING FREE LEGAL ADVICE

ASRC: Please call 0478 700 605 between 10.30-12.00 Mondays and Thursdays (for people detained in all states except for NSW)

Refugee Legal: Please call 03 9413 0100 between 10.00-14.00 Wednesdays and Fridays (for people detained in all states except for NSW)

RACS: Telephone advice: Monday – Friday 10am – 1pm or 2pm – 4pm on 02 8355 7227 or by emailing admin@racs.org.au with your name and phone number and we will call you back (for people detained in all states except for Victoria)