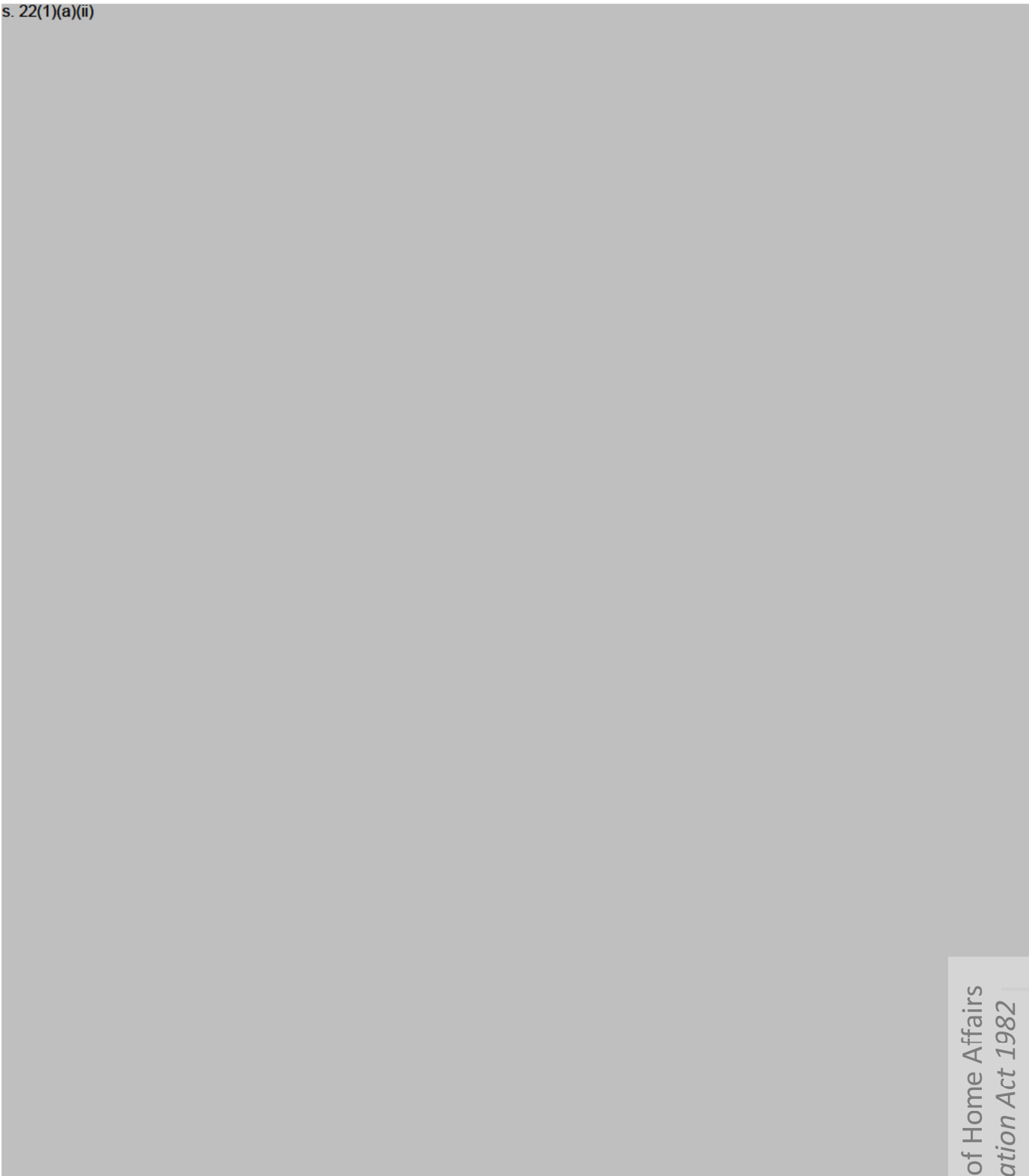


s. 22(1)(a)(ii)



Released by the Department of Home Affairs
under the Freedom of Information Act 1982

From: David GAVIN s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>

Sent: Wednesday, 8 November 2023 6:55 PM

To: s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [@HOMEAFFAIRS.GOV.AU](mailto:HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [@HOMEAFFAIRS.GOV.AU](mailto:HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>; s. 22(1)(a)(ii) [@HOMEAFFAIRS.GOV.AU](mailto:HOMEAFFAIRS.GOV.AU)>;

s. 22(1)(a)(ii) s. 22(1)(a)(ii) [@HOMEAFFAIRS.GOV.AU](mailto:HOMEAFFAIRS.GOV.AU)>; s. 22(1)(a)(ii)

s. 22(1)(a)(ii) [@HOMEAFFAIRS.GOV.AU](mailto:HOMEAFFAIRS.GOV.AU)>

Cc: Stephanie FOSTER s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>; DLO.O'Neil

s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>; DLO.Giles s. 22(1)(a)(ii) [@homeaffairs.gov.au](mailto:homeaffairs.gov.au)>; MO Registration

s. 22(1)(a)(ii) @homeaffairs.gov.au>; Budhy TANDDO s. 22(1)(a)(ii) @abf.gov.au>; Catherine CLARIDGE s. 22(1)(a)(ii) @abf.gov.au>; s. 22(1)(a)(ii) <s. 22(1)(a)(ii) @abf.gov.au>; Jodi STUBBS s. 22(1)(a)(ii) @abf.gov.au>; s. 22(1)(a)(ii) s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; Marian AGBINYA s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) <s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) s. 22(1)(a)(ii) @homeaffairs.gov.au>; Chad HODGENS <s. 22(1)(a)(ii) @homeaffairs.gov.au>; s. 22(1)(a)(ii) @homeaffairs.gov.au>; Stephanie KOLOBARIC s. 22(1)(a)(ii) @homeaffairs.gov.au>; Michael WILLARD s. 22(1)(a)(ii) @homeaffairs.gov.au>; Tara CAVANAGH <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Michael THOMAS s. 22(1)(a)(ii) @homeaffairs.gov.au>; Sandra JEFFERY <s. 22(1)(a)(ii) @abf.gov.au>; Media Operations <media@homeaffairs.gov.au>; Michael BURKE <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Clare SHARP <s. 22(1)(a)(ii) @homeaffairs.gov.au>; Anton BOCKWINKEL s. 22(1)(a)(ii) @homeaffairs.gov.au>; Budhy TANDDO s. 22(1)(a)(ii) @abf.gov.au>

Subject: RE: NZYQ vs MICMA - Action Plan for potential release [SEC=PROTECTED, ACCESS=Personal-Privacy, ACCESS=Legal-Privilege]

Importance: High

~~**PROTECTED**~~
~~**Personal Privacy, Legal Privilege**~~

Dear s. 22(1)(a)(ii)

As requested by the Ministers this evening, please find attached the following documents:

- Action plan and plan on a page (operationalised this afternoon with s. 47F(1) released from detention at 16:48 today)
- NZYQ Dashboard – 23 October
- NZYQ Criminality ‘Snapshot’
- **Individuals identified as potentially Al Kateb affected with security considerations**
- Ministerial Intervention submission currently with the office of Minister Giles for Mr s. 47F(1) – this submission contain case background requested by Minister O’Neil
- The dynamic ‘Master List’ spreadsheet for people potentially affected by the NZYQ case

The document in yellow is a summary requested by s. 22(1)(a)(ii) pertaining to individuals with s. 33(a)(i) and I note this advice is subject to ongoing refinement and liaison with s. 33(a)

Of the cases in these lists, I note there are several ‘registerable persons’ including one individual s. 47F(1) s. 47F(1) and who is subject to a new s. 33(a)(i) which is ongoing and he requires a s. 33(a)(i) for all visa applications including temporary visas. The department will closely consider this individual’s health and referral needs prior to release.

****We note that as per standard practice, any disclose of information should be cleared with the Department, and privacy considerations considered****

Key contact details for Departmental staff involved in these plans are contained in the Action plan.

Please don't hesitate to let us know if you would like further information.

Regards
David

David Gavin
Assistant Secretary
Compliance and Community Protection Policy Branch
Immigration Policy Division, Immigration Group
Department of Home Affairs
P s. 22(1)(a)(ii) s. 22(1)(a)(ii)
E s. 22(1)(a) [@homeaffairs.gov.au](mailto:homeaffairs@homeaffairs.gov.au)

s. 22(1)(a)(ii)

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*



~~OFFICIAL - Sensitive~~
~~Personal privacy~~

NZYQ – Action Plan for potential release

Below are the steps, which are required pre, during and post hearing should the court order a release of Mr s. 47F(1) during the hearing of *NZYQ v Minister* - S28/2023, scheduled to be held 7-8 November 2023.

Pre Hearing

Legal

- Migration and Citizenship Litigation are managing this matter. The Legal team are s. 22(1)(a)(ii) s. 22(1)(a)(ii) and Marian Agbinya.
- As at 31 October, no request has been made for s. 47F(1) to attend court in person, and he is expected to be in immigration detention during the hearing (to be held 7/8 November).
NOTE: Should a request be made, action plan will need to be updated.
- s. 47E(d)
- s. 42(1), s. 47F(1)

Status Resolution

Ministerial Intervention

- Ministerial Intervention (MI) team are preparing a submission (MS23-002266) for the Minister to consider granting s. 47F(1) a BVR under regulation 2.25AA of the Regulations to regularise his status in the community, should the High Court order s. 47F(1) be released from detention as an unlawful non-citizen.
- The power under Regulation 2.25AA allows the Minister to grant a BVR to an eligible non-citizen who is an unlawful non-citizen where the Minister is satisfied removal of the individual is not reasonably practicable and that the individual will abide by all mandatory conditions imposed on the BVR.
- The submission is expected to be with the Minister's office on 3 November 2023 (pending Legal review and clearance) and will be discussed with the office on 6 November 2023 (by AS Status Resolution Branch).
- The Minister's office indicated on 9 October 2023 the preference would be for the Minister to consider the case on same day as the judgment being handed down and have advised the Minister can be available on this date. This will be raised with the office on 6 November 2023 (to confirm preferences and availability).
- A BVR allows a person access to social services including Medicare, and Special Benefit. Special benefit is available if the BVR holder is ineligible for any other income support payment and in financial hardship for reasons beyond their control, persons must also meet income and assets tests set by Services Australia.

~~Personal privacy~~
~~OFFICIAL - Sensitive~~

Released by the Department of Home Affairs
under the Freedom of Information Act 1982

SRSS Support

- In line with current policy for long-term detainees being released on Bridging Visas, the client is eligible for Status Resolution Support Services (SRSS); for an initial 12 weeks, and potentially extension for a further 12 weeks.
- SRSS Program Section will immediately notify the SRSS provider of the HCA outcome
- SRSS provider, s. 47F(1) [redacted] has been briefed about potential service delivery requirements if client released including:
 - s. 47F(1) [redacted]
 - [redacted]
 - [redacted]
 - [redacted]
- s. 47F(1) [redacted] including income support (Centrelink) and health including Medicare if eligible
- s. 47F(1) [redacted]
- s. 47F(1) will work with the client if released to identify additional welfare needs and provide support in accordance with contractual requirements
- The SRSS provider will not connect the client with any rehabilitation services in the community unless they are court mandated and/or in place; provider can assist client upon release to meet law enforcement reporting requirements.

Additionally, to support release and SRSS processes, the s. 47F(1) Status Resolution Officer will undertake the following actions:

- Request ImmiCard (Pre HC outcome).
 - Card ordered but if not received in time for release, an ImmiCard report will be provided to assist with essential registrations in the community.
- Notify client and local stakeholders (ABF, Serco, IHMS) as per local processes
 - Seek consent to disclose relevant information to SRSS provider.
 - Complete SRSS associated forms (1448 & 1450) along with 929 (change of contact details/address).
- Email referral to SRSS Operations (national office) to facilitate SRSS service provider support
 - Contact s. 47F(1) to coordinate transport needs. (Refer to community support)
- Request IHMS Health Discharge Summary and provide to client upon release
- s. 47F(1) [redacted]
- s. 47F(1) [redacted]

Detention Operations

- s. 47E(d), s. 47F(1) [redacted]
- s. 47E(d) [redacted]

Communications

- **Outstanding action:** Media Talking Points (TPs) to be developed – Media to lead s. 22(1)(a)(ii) [redacted] and s. 22(1)(a)(ii) [redacted]. Business areas to provide points to media for inclusion – Legal will lead on the court hearing, legal issues and potential release wording. Date for completion: TPs to be completed by 3 November.
- **Outstanding action:** Talking points are also required for staff in Status Resolution and Detention Operations – aim should be to support the officers who release s. 47F(1) [redacted] (should that transpire) but who also manage the remaining detainees who may hear of his release and have questions

about their own case. Staff TPs will be prepared based on the Media TP document.
Date for completion: week commencing 6 November.

Day of Hearing

Legal

- s. 47E(d) [redacted] Legal will notify stakeholders, particularly Ministerial Intervention (Status Resolution Branch), Detention Operations and Media as soon as possible, should the Court order s. 47F(1) [redacted] be released from immigration detention.

The following actions may occur concurrently, and are not presented in strict order:

Status Resolution

- s. 47C(1) [redacted]
- Status Resolution Support Programs Section and s. 47F(1) [redacted] Status Resolution Officer to enact post release support plan as agreed with SRSS service provider s. 47F(1) [redacted]

Detention Operations

- Status Resolution make the necessary arrangements s. 47E(d) [redacted] See above under SRSS Support.
- s. 47E(d) [redacted]

Post hearing

Status Resolution

- If the High Court makes orders requiring s. 47F(1) [redacted] to be released from detention, he will be released as an unlawful non-citizen.
- Refer to *Ministerial Intervention* section for post hearing planning arrangements with regard to potential visa grant consideration by the Minister (this section will be updated accordingly following engagement with the Minister's office on 6 November 2023).
- Continuation of SRSS program support will be based on client needs. Noting client is eligible for an initial 12 weeks support, which can be extended by another 12 weeks.

Legal

- Review judgement and determine next steps, in consultation with key stakeholders.

Clearance:

Sandra Jeffrey, A/g Deputy Commissioner, National Operations, Australian Border Force – 3/11/2023

Michael Thomas, First Assistant Secretary, Status Resolution and Visa Cancellation Division – 2/11/2023

David Gavin, A/g First Assistant Secretary, Immigration Policy Division – 3/11/2023

Key Contacts				
Branch	Position	Name	Email	Phone
Detention Operations	Commander Detention Operations	Budhy Tanddo	s. 22(1)(a)(ii) @abf.gov.au	s. 47F(1)
Detention Operations	s. 22(1)(a)(ii)	s. 47F(1) s. 47F(1)	s. 22(1)(a)(ii) @abf.gov.au	s. 47F(1)
Detention Operations		s. 47F(1) s. 47F(1)	s. 22(1)(a)(ii) @abf.gov.au	s. 47F(1)
National Removals		s. 47F(1)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Status Resolution (MI)		s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Status Resolution (MI)		s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Status Resolution (SRSS)		s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Status Resolution (SRSS)		s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Legal		Assistant Secretary	Marian Agbinya	s. 22(1)(a)(ii) @homeaffairs.gov.au
Legal	s. 22(1)(a)(ii)	s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)
Media		s. 22(1)(a)(ii)	s. 22(1)(a)(ii) @homeaffairs.gov.au	s. 47F(1)



NO request has been made for s. 47F(1) to attend court

Contacts

Legal

AS Marian Agbinya (*Migration & Citizenship Litigation*)

s. 22(1)(a)(ii) (Litigation D)

s. 22(1)(a)(ii) (Litigation D)

s. 22(1)(a)(ii) (Litigation D)

Detention Operations

CMDR Budhy Tanddo (*Detention Operations*)

s. 22(1)(a)(ii) (*Detention Management and Planning*)

s. 22(1)(a)(ii) (*Detention Health Operations*)

Detention Security (*Detention Management and Planning*)

Status Resolution Support Service (SRSS)

s. 22(1)(a)(ii) (*Resettlement and Support*)

s. 22(1)(a)(ii) (*Status Resolution Support Programs*)

s. 22(1)(a)(ii) (*Status Resolution Support Contracts*)

Ministerial Intervention

A/g AS s. 22(1)(a)(ii) (*Status Resolution*)

s. 22(1)(a)(ii) (*Ministerial Intervention ACT*)

Media

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 47F(1)

s. 22(1)(a)(ii) (*Detention Operations* s. 47F(1))

s. 22(1)(a)(ii) (*Detention Operations* s. 47F(1))

s. 22(1)(a)(ii) (*Status Resolution* s. 47F(1))

National Removals

C/SUPT s. 22(1)(a)(ii) (*National Removals*)

s. 47C(1)

Pre-Hearing

s. 47F(1)

Pre-Hearing Notification

Check with relevant stakeholders and law enforcement if there are any special conditions needed in the community or upon release.

s. 47E(d)

s. 47E(d)

SRSS Support Procedures

s. 47F(1) SRSS service provider s. 47F(1) briefed about potential service delivery requirements. s. 47F(1) SRO initiates on the day.

Accommodation s. 47F(1)

Transport provided s. 47F(1)

SRSS require advice from Detention Health, Detention Operations or Legal if there are legal constraints due to:

- character/behavioural
- parole conditions and reporting requirements

in order to source a suitable community placement/property.

Financial assistance (Centrelink)

Ongoing case worker (Welfare)

Health support (Medical care)

12 weeks support MIN

24 weeks support MAX

Logistics Setup

s. 47E(d)

C/SUPT Stubbs

Talking Points (TPs) for Stat Res and Det Ops staff to be provided to Media by 20OCT2023.

Stat Res & Det Ops

Media Talking Points (TPs) to be completed by w/c 30OCT2023

HA Media

Trial Day

s. 47C(1)

Some steps may occur concurrently upon notification

Court orders release

Legal to notify Department and ABF of court decision s. 47E(d)

Ministerial Intervention to engage with Minister's Office on submission

s. 47E(d)

SRSS to begin release processes

MI notify Legal, Detention Operations Media on Minister decision

s. 47C(1)



Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS23-002266
Date of Clearance: 06/11/2023

To Minister for Immigration, Citizenship and Multicultural Affairs
Subject Regulation 2.25AA visa grant consideration for ^{s. 47F(1)} [redacted] (^{s. 47F(1)} [redacted]) - Bridging (Removal Pending) (subclass 070) visa – Upcoming High Court hearing 7-8 November 2023

Timing *This submission has been prepared in the event of a loss in the High Court requiring ^{s. 47F(1)} [redacted] to be released from immigration detention. ^{s. 47F(1)} [redacted] is in held detention and has an ongoing High Court matter that is listed for a final hearing on 7-8 November 2023. If the High Court finds in favour of ^{s. 47F(1)} [redacted], it may make orders that he be released immediately from immigration detention as an unlawful non-citizen. Legal risks for the Commonwealth are addressed in this submission and in an email to both Portfolio Ministers' Offices (dated 22 August 2023). Should the Minister wish to consider exercising his powers under regulation 2.25AA of the Migration Regulations 1994, a decision is requested **after** any judgment of the High Court that ^{s. 47F(1)} [redacted] is required to be released from immigration detention.*

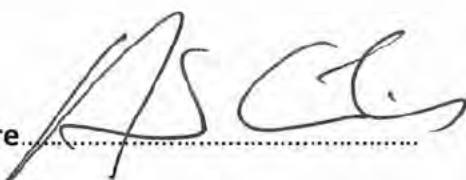
Recommendations

That you:

- note the contents of this brief; and
- agree that should the High Court order ^{s. 47F(1)} [redacted] release from immigration detention, that you agree to grant Mr ^{s. 47F(1)} [redacted] a Bridging R (Class WR) (Removal Pending) (subclass 070) visa (BVR) under regulation 2.25AA of the *Migration Regulations 1994* (the Regulations);
 - if you agree to grant a BVR, please specify a timeframe for reviewing ^{s. 47F(1)} [redacted] case;
- note if you decide not to grant a BVR to ^{s. 47F(1)} [redacted] under regulation 2.25AA, he will remain in the community as an unlawful non-citizen and unless his circumstances change will not be liable for any further period of detention under section 189 of the *Migration Act 1958* (the Act) noting the High Court's judgment.

noted / please discuss
 agreed / not agreed
 one year / two years / other _____ (please specify)
 noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature 

Date: 9/11/2023

Released by the Department of Home Affairs under the Freedom of Information Act 1982

Minister's Comments

Key Issues

1. The purpose of this submission is to update you on the status of the High Court proceeding concerning s. 47F(1) (pseudonym 'NZYQ' (case summary at **Attachment A**)), and, in the event the High Court orders his release from immigration detention, to enable you to grant s. 47F(1) a visa after his release from detention so as to regularise his immigration status.
2. On 7 February and 18 September 2023, you declined to consider intervening under sections 195A and 197AB of the Act with respect to s. 47F(1) (MS22-002200 and MS23-001295 refer).
3. Since your decision of 18 September 2023, s. 47F(1) proceedings in the High Court have been set down for hearing on 7-8 November 2023.
4. s. 47F(1) is seeking release from immigration detention. He also seeks a declaration from the Court to the effect that the provisions of the Act do not authorise the lawful detention of a person in circumstances where the person:
 - (a) at present, cannot be removed from Australia; and
 - (b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
5. In addition to the declaration related to the lawfulness of his detention, s. 47F(1) seeks a declaration that, where the factual circumstances at paragraph 4 exist, the provisions of the Act which require and authorise his detention are invalid.
6. To grant these orders, s. 47F(1) will ask the High Court to overrule its past decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*). By a 4:3 majority, the High Court in *Al-Kateb* held that detention of an individual under the Act remains lawful, even where their removal from Australia is not reasonably practicable at the present time, and there is no real likelihood or prospect of removal in the reasonably foreseeable future. In addition, at the level of constitutional validity, the majority held that the detention of an unlawful non-citizen for the purpose of removal remained consistent with Australia's system of government, even if that purpose of removal was not, and not likely to become, reasonably practicable in the foreseeable future.

Released by the Department of Home Affairs
under the Freedom of Information Act 1982

7. As previously outlined, the High Court decision in *Al-Kateb* is significant. s. 42(1)

s. 42(1)

8. s. 42(1)

s. 42(1)

Ongoing detention and removal prospects

9. s. 47F(1) immigration detention under section 189 of the Act is based on his status as an unlawful non-citizen and for the purpose of his removal from Australia. There is no power under the Act to detain s. 47F(1) based on his criminal history, or for the purpose of treating criminal risk or protecting the Australian community.

10. As a person with respect to whom a protection finding within the meaning of section 197C of the Act has been made in the course of considering a protection visa application, there is no power to involuntarily remove s. 47F(1) to the country in respect to which the protection finding has been made (Myanmar) and it is currently not reasonably practicable to effect his removal to a third country. The Australian Border Force (ABF) and the Department of Home Affairs (the Department) made enquiries with the Bangladesh High Commission and the Royal Embassy of Saudi Arabia as potential removal options based on information s. 47F(1) provided the Department about s. 47F(1) s. 47F(1) advised that that s. 47F(1) s. 47F(1), s. 47F(1)

11. s. 33(a)(iii)

s. 33(a)(iii)

Possible resettlement in the USA

12. The Department has approached authorities in the United States of America (USA) to pursue a resettlement pathway for s. 47F(1). This enquiry has been underway since 29 September 2023 and is ongoing. There is sufficient viability with this enquiry and evidence has been submitted to the High Court demonstrating potential removal prospects in respect of s. 47F(1). It will ultimately be for the High Court to determine whether this enquiry might equate to s. 47F(1) removal from Australia being 'reasonably practicable' in the foreseeable future, which is relevant to the claims he is making. It is difficult to predict when discussions with the USA may be finalised in respect of s. 47F(1) possible resettlement

Released by the Department of Home Affairs under the Freedom of Information Act 1982

Rehabilitation

13. ^{s. 47F(1)}

[Redacted]

Considerations for possible visa grant

14. If the High Court orders ^{s. 47F(1)} be released from immigration detention, his status would remain as an unlawful non citizen. As an unlawful non-citizen, ^{s. 47F(1)} would have no work rights and no access to social security support.

15. As an unauthorised maritime arrival (UMA), ^{s. 47F(1)} is prevented by the bar in subsection 46A(1) of the Act from making a valid visa application while he is in Australia as an unlawful non-citizen. ^{s. 47F(1)}

^{s. 47F(1)}

^{s. 47F(1)} however, he is still prevented by the subsection 46A(1) statutory bar from lodging a valid visa application.

16. ^{s. 42(1)}

[Redacted]

17. However, should the High Court order ^{s. 47F(1)} release from immigration detention, it is open to you to grant him a:

- Special purpose visa (SPV) under s 33 of the Act; or
- A Bridging R (Class WR) (Subclass 070 (Bridging (Removal Pending)) visa (BVR) under regulation 2.25AA of the Regulations.

18. You can grant ^{s. 47F(1)} a SPV by declaring, in writing, he is taken to have been granted a SPV. ^{s. 47F(1)} does not need to apply for a SPV and there are no specified criteria for the grant of a SPV. You could prescribe conditions which would apply to ^{s. 47F(1)} and the SPV could remain in force indefinitely, or until the end of a day on which the declaration is revoked (section 33(5)(b)(iv) of the Act). However, to grant a SPV you would need to cause to be laid before each House of Parliament a statement that sets out the declaration and reasons for making it (in accordance with section 33(6) of the Act).

Released by the Department of Home Affairs under the Freedom of Information Act 1982

19. Alternatively, you could consider granting s. 47F(1) a BVR under regulation 2.25AA of the Regulations. Regulation 2.25AA provides:

(1) *"This regulation applies to an eligible non-citizen if:*

- a) *the eligible non-citizen is an unlawful non-citizen; and*
- b) *section 195A of the Act is not available to the Minister in relation to the grant of a visa to the eligible non-citizen; and*
- c) *the Minister is satisfied that the eligible non-citizen's removal from Australia is not reasonably practicable at that time.*

(2) *Despite anything in Schedule 1, the Minister may grant the eligible non-citizen a Bridging R (Class WR) visa if the Minister is satisfied that, at the time of decision, the eligible non-citizen satisfies the criteria set out in clause 070.222 of Schedule 2."*

20. You can grant s. 47F(1) a BVR if satisfied he meets the criteria above. Some statements of fact are set out below to assist your consideration in this regard:

a) s. 47F(1) is an eligible non-citizen per section 72 of the Act who is also an unlawful non-citizen.

- As outlined at paragraph 15, s. 47F(1) is an 'eligible non-citizen' per section 72 of the Act as he was granted an HSTV in September 2014. He also does not hold a valid visa that is in effect and so he is therefore an unlawful non-citizen. In the event the High Court orders s. 47F(1) be released from immigration detention, he will be released as an unlawful non-citizen therefore, s. 47F(1) would meet this eligibility requirement.

b) Section 195A of the Act is not available in s. 47F(1) case as he is no longer in immigration detention.

- s. 42(1)

c) s. 47F(1) removal from Australia is not reasonably practicable at this time.

- An order from the High Court to release s. 47F(1) from immigration detention would likely be on the basis the High Court finds s. 47F(1):
 - a) at present, cannot be removed from Australia; and
 - b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
- While s. 47F(1); possible resettlement in the USA remains subject to ongoing consideration, if that issue has not been satisfactorily resolved at the time the High Court orders s. 47F(1) release from immigration detention, it is likely he would also meet this criterion. For this criterion to be satisfied, you will have to be satisfied about the reasonable practicability of his removal **at the time** you're deciding whether or not to grant s. 47F(1) a visa under reg 2.25AA.

d) At the time of decision, ^{s. 47F(1)} satisfies the criteria set out in clause 070.222 of Schedule 2 of the Regulations, being:

- That you are satisfied that, if the BVR is granted, ^{s. 47F(1)} will abide by the conditions to which the visa is subject.
 - As outlined at **Attachment C**, Division 070.6 of Schedule 2 to the Regulations provides that, there are 18 mandatory conditions that must be imposed on a BVR granted under regulation 2.25AA. These conditions broadly cover reporting and behavioural obligations while ^{s. 47F(1)} is residing in the community. The mandatory conditions also cover a number of restrictions related to possession of weapons and provisions related to national security matters, which must be imposed.

21. BVRs cease when you (or a delegate) give written notice to the visa holder that you are satisfied that the holder's removal is reasonably practicable or the visa holder has breached a visa condition. If such a notice is given, the person cannot seek merits review; however, they may seek judicial review of the decision. The visa could also be liable for cancellation grounds (including on the basis of character). It may be necessary to provide procedural fairness before cancelling the visa and/or the cancellation decision may attract merits and/or judicial review rights depending on the cancellation power used and whether the decision is made by a Minister or a delegate of the Minister.

Support services available to BVR holders

22. BVR holders have access to Medicare and Special Benefit income support payments through Services Australia, (with access to Special Benefit subject to them meeting other eligibility criteria specified by Services Australia including meeting the income and assets tests and demonstrating that they are in financial hardship for reasons beyond their control).

23. ^{s. 47F(1)} would also be eligible for transitional assistance through the Status Resolution Support Services Program (SRSS) program. This may include extended transitional support noting your decision in MS22-001485 to allow SRSS transitional support (SRSS Band 4) for up to 12 weeks with a possible extension of a further 12 weeks for long term detainees released from immigration detention. These arrangements assist individuals to transition to residing lawfully in the community by supporting them while they source their own accommodation and while they are seeking employment.

24. ^{s. 47F(1)}



Decline to grant a visa

25. Should the High Court order ^{s. 47F(1)} be released from immigration detention, and you decline to grant a visa, including a SPV, or a BVR under regulation 2.25AA of the Regulations ^{s. 47F(1)} would be released from detention into the community as an unlawful non-citizen.

Released by the Department of Home Affairs under the Freedom of Information Act 1982

26. If the High Court orders s. 47F(1) be released from immigration detention (and irrespective of whether you choose to grant a visa or not), he has indicated his s. 47F(1) s. 47F(1) are willing to provide accommodation and support to s. 47F(1) s. 47F(1) ss. 47F(1) s. 47F(1)

27. Should s. 47F(1) remain in the community as an unlawful non-citizen, he will be unable to seek employment and will not have access to Medicare or welfare payments through Services Australia. Australia's international obligations require that all persons in Australia have an adequate standard of living and s. 47F(1) may be eligible for SRSS support, which would be assessed on an as-needs basis.

Department's recommendation on preferred visa

28. s. 42(1) s. 42(1) The Department has explored the viability of the SPV option and considers it is not recommended in s. 47F(1) case noting there are limitations on s. 47F(1) ability to access both SRSS or Medicare and welfare payments through Services Australia as the holder of an SPV.

29. On balance, if you are inclined to grant s. 47F(1) a visa in the event the High Court orders he be released from immigration detention as an unlawful non-citizen, the Department considers it preferable to grant s. 47F(1) a BVR.

Background

30. Further, details regarding s. 47F(1) including immigration history, character, incidents in detention, health, identity, security, family/community links and removal availability is provided in the case summary at **Attachment A**.

Consultation – internal/external

31. Status Resolution Network, National Removals, International and Legal Group.

Consultation – A/g Secretary / A/g Deputy Secretary / ABF Commissioner

32. The A/g Secretary, A/g Deputy Secretary Immigration and ABF Commissioner were not consulted on this submission.

Client service implications

33. There are no client service implications.

Risks and Sensitivities

34. s. 42(1)

Released by the Department of Home Affairs under the Freedom of Information Act 1982

35. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

36. If you grant a BVR, ^{s. 47F(1)} [REDACTED] will be eligible to access Medicare and Special Benefit income support payments through Services Australia, (with access to Special Benefit subject to them meeting other eligibility criteria specified by Services Australia including meeting the income and assets tests and demonstrating that they are in financial hardship for reasons beyond their control). The Special Benefit payment is currently \$749.20 fortnightly (for a single person, over 22 years old).
37. The payments and services attached to a BVR differs to the support services programs and policy settings available to other asylum seekers and UMAs who are granted a Bridging E (subclass 050) visa (BVE) and released from immigration detention. These persons are not eligible for mainstream social services income support such as Special Benefit, and are instead eligible for income support paid by Services Australia on behalf of the Department through the SRSS program. SRSS income support is 89 per cent of the current Jobseeker/Special Benefit rate currently \$666.79 fortnightly (for a single person, over 22 years old). Additionally UMAs granted a BVE are eligible for Medicare; however, non-UMAs granted a BVE are not eligible for Medicare. Where an asylum seeker holding a BVE is not eligible for Medicare, the Department may fund general health and medical services equivalent to what an Australian citizen or permanent resident would receive under Medicare via the SRSS program.

38. ^{s. 47C(1)} [REDACTED]

Attachments

Attachment A Case summary

Attachment B MS23-001295 – Minister signed

Attachment C BVR mandatory conditions – Regulation 2.25AA

Authorising Officer
Cleared by:
s. 22(1)(a)(ii)
A/g Assistant Secretary Status Resolution Branch
Date: 06/11/2023
Ph: s. 22(1)(a)(ii)

Contact Officer s. 22(1)(a)(ii), A/g Assistant Secretary, Status Resolution Branch, Ph: s. 22(1)(a)(ii)

- CC Minister for Home Affairs and Minister for Cyber Security
- A/g Secretary
- A/g Deputy Secretary Immigration
- Assistant Commissioner, Detention and National Removals
- Group Manager Legal
- A/g First Assistant Secretary, Immigration Policy
- Commander, National Immigration Detention
- Senior Director, Status Resolution Network
- Chief Superintendent, National Removals
- Director, Status Resolution NSW
- Director, Status Resolution Support Programs Section
- Superintendent, Detention Health
- Status Resolution Officers NSW

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Possible resettlement in the USA

The Department has approached authorities in the United States of America (USA) to pursue a resettlement pathway for s. 47F(1). This enquiry has been underway since 29 September 2023 and is ongoing. There is sufficient viability with this enquiry and evidence has been submitted to the High Court demonstrating potential removal prospects in respect of s. 47F(1). It will ultimately be for the High Court to determine whether this enquiry might equate to s. 47F(1) removal from Australia being 'reasonably practicable' in the foreseeable future, which is relevant to the claims he is making. It is difficult to predict when discussions with the USA may be finalised in respect of s. 47F(1) possible resettlement.

Litigation:

s. 47F(1) seeks to raise the correctness of the High Court's decision in *Al-Kateb v Godwin* (2004) (*Al-Kateb*) and either distinguish his case from *Al-Kateb* or have *Al-Kateb* overruled, so as to secure an order for his release from detention.

s. 47F(1) says that his detention is not authorised under the Act, or alternatively under the Constitution, in circumstances where at present he cannot be removed from Australia and there is no real likelihood or prospect of his removal in the reasonably foreseeable future. The Commonwealth is represented by the Australian Government Solicitor's Constitutional Litigation Unit, who in turn are briefing the Solicitor General and a team of senior and junior counsel ahead of the hearing.

The case is listed for hearing in the High Court on 7-8 November 2023.

Risks

s. 42(1)





Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS23-001295
Date of Clearance: 27/08/2023

To Minister for Immigration, Citizenship and Multicultural Affairs
Subject Possible Ministerial Intervention under sections 195A and 197AB of the *Migration Act 1958* in relation to s. 47F(1) [redacted]

Timing The Department seeks a decision no later than 30 September 2023. s. 47F(1) [redacted] is in held detention and has an ongoing High Court matter that may be listed for a final hearing in November 2023. s. 42(1) [redacted]
s. 42(1) [redacted]

Should the Minister wish to intervene, please arrange a suitable time with the Department for the signing to take place, **at the latest before 2pm on a week day**, so that s. 47F(1) [redacted] can be released on the same day the decision is made to avoid a circumstance of inappropriate detention.

Recommendations

That you:

- note the case summary at s. 47F(1) [redacted]
- s. 42(1), s. 47F(1) [redacted]
s. 42(1) [redacted]
- indicate whether you wish to intervene under section 195A of the *Migration Act 1958* (the Act) to grant s. 47F(1) [redacted] a Humanitarian Stay (Temporary) (subclass 449) visa (HSTV) valid for seven days and a Bridging E (subclass 050) visa (BVE);
 - if you wish to grant a BVE, please indicate the time period applicable for the grant;
 - if you agree to exercise your power, please sign the section 195A documentation at s. 22(1)(a)(ii) [redacted]

noted/ please discuss
noted/ please discuss
intervene / decline to intervene
six months / 12 months / other _____
(please specify)
signed / not signed

AND

- indicate whether you wish to exercise your power under subsection 46A(2) of the Act to lift the subsection 46A(1) bar for an indefinite period to allow s. 47F(1) [redacted] to lodge BVE applications;
 - if you agree to exercise your power, please sign the section 195A documentation at s. 22(1)(a)(ii) [redacted]

intervene / decline to intervene
signed / not signed

OR

5. indicate whether you wish to intervene under section 195A of the Act to grant s. 47F(1) a Bridging (Removal Pending) (subclass 070) visa (BVR);

intervene /
decline to intervene

- if you agree to exercise your power, please sign the section 195A decision documentation at s. 22(1)(a)(ii)

signed / not signed

- if you agree to grant a BVR, please specify a timeframe for reviewing s. 47F(1) case;

one year / two years /

other

(please specify)

- if you agree to grant a BVR, please specify the discretionary conditions to be imposed, by circling the relevant conditions in s. 22(1)(a)(ii)

specified / not specified

AND

6. indicate whether you wish to have s. 47F(1) referred to you for consideration to lift the sections 46A and 48B statutory bars to allow a further protection visa application;

refer / not refer

OR

7. indicate whether you wish to consider intervening under section 197AB of the Act to make a residence determination to allow s. 47F(1) to reside in the community at a specified address;

consider / not consider

- if agreed to consider intervening under section 197AB of the Act, the Department of Home Affairs (the Department) will refer a submission for your final decision;

8. should you decide to grant s. 47F(1) a visa or make a residence determination, indicate whether you wish for the Department to inform s. 47F(1) of your expectation that he should make every effort to engage in rehabilitation, including attending his sex offender's rehabilitation program;

yes / no

9. s. 42(1), s. 47F(1)

noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature.....

Date: 12/9/2023

Minister's Comments

Key Issues

1. On 14 November 2022, you signed MS22-002407 – *Detention Status Resolution Review*, agreeing to the Department of Home Affairs (the Department) referring detainees in identified cohorts for your consideration under sections 195A or 197AB of the Act.
2. On 7 February 2023, you declined to consider intervening under sections 195A and 197AB of the Act with respect to s. 47F(1) (MS22-002200 refers).
3. The purpose of this submission is to present you with new information regarding this case, which is detailed below. This submission also attaches expert opinions regarding s. 47F(1) risk to others (community protection risk) - s. 47F(1) s. 47F(1).
4. Since your decision of 7 February 2023, the Detention Health Services provider, International Health and Medical Services (IHMS), has arranged s. 47F(1) participation in sex offender rehabilitation treatment. s. 47C(1), s. 47F(1) s. 47C(1), s. 47F(1)

5.

Litigation

6. s. 47F(1) has commenced a proceeding in the original jurisdiction of the High Court seeking his release from immigration detention. He also seeks a declaration from the Court to the effect that the provisions of the Act do not authorise the lawful detention of a person in circumstances where the person:
 - (a) at present, cannot be removed from Australia; and
 - (b) as a matter of reasonable practicability is unlikely to be removed in the foreseeable future (or there is no real likelihood or prospect of the person being removed in the reasonably foreseeable future).
7. In addition to the declaration related to the lawfulness of his detention, s. 47F(1) seeks a declaration that, where the factual circumstances at paragraph 6 exist, the provisions of the Act which require and authorise his detention are invalid.

8. The matter is to be set down for hearing at a time *not before* the November 2023 High Court sittings. To grant these orders, ^{s. 47F(1)} [REDACTED] will ask the High Court to overrule its past decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 (*Al-Kateb*). By a 4:3 majority, the High Court in *Al-Kateb* held that detention of an individual under the Act remains lawful, even where their removal from Australia is not reasonably practicable at the present time, and there is no real likelihood or prospect of removal in the reasonably foreseeable future. In addition, at the level of constitutional validity, the majority held that the detention of an unlawful non-citizen for the purpose of removal remained consistent with Australia's system of government, even if that purpose of removal was not, and not likely to become, reasonably practicable in the foreseeable future.

9. ^{s. 42(1), s. 47F(1)} [REDACTED]

10. [REDACTED]

11. ^{s. 42(1), s. 47F(1)} [REDACTED]

Ongoing detention and removal prospects

12. ^{s. 47F(1)} [REDACTED] was convicted of one child sex offence and served three years and four months full-time custodial imprisonment (from a total five years sentence).^s [REDACTED]
^{s. 47C(1), s. 47F(1)} [REDACTED]

13. ^{s. 47C(1), s. 47F(1)} [REDACTED]

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

s. 42(1), s. 47F(1)

Background

28. s. 47F(1) is a stateless person who arrived as a UMA and was detained under subsection 189(3) of the Act. He was released from held immigration detention on 6 July 2013 following a residence determination made under section 197AB of the Act by the then Minister. On 18 September 2014, s. 47F(1) was granted a BVE and released from immigration detention.
29. On 9 January 2015, s. 47F(1) was arrested and charged with one count of *sexual intercourse with a person aged between 10 and 14 years*, contrary to subsection 66C(1) of the *Crimes Act 1900* (NSW). One week later, s. 47F(1) BVE was cancelled pursuant to subsection 116(1)(g) of the Act and regulation 2.43(1)(p)(ii) of the *Migration Regulations 1994*. Upon his release from criminal custody on 8 May 2018, s. 47F(1) was detained under subsection 189(1) of the Act and has remained in held immigration detention since.
30. The Department has summarised aspects of opinions given by clinical and forensic psychologists, which address s. 47F(1) prospects of rehabilitation and recidivism at s. 47F(1) s. 47F(1).
31. Further, details regarding s. 47F(1) including immigration history, character, incidents in detention, health, identity, security, family/community links and removal availability is provided in the case summary at s. 22(1)(a)(ii).

Options for future management

s. 47C(1), s. 47F(1)

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*

Released by the Department of Home Affairs
under the *Freedom of Information Act 1982*



60. s. 42(1), s. 47F(1)



61. s. 42(1), s. 47F(1)



Consultation – internal/external

62. Status Resolution Network, Detention Operations, National Removals, Humanitarian Program Operations, Migration and Citizenship Litigation, Migration and Citizenship Law and Compliance and Community Protection Policy.

Consultation – Secretary/Associate Secretary/ABF Commissioner

63. The Secretary was not consulted on this submission.

64. The Associate Secretary was not consulted on this submission.

65. The ABF Commissioner was not consulted on this submission.

Client service implications

66. There are no client service implications.

Sensitivities

67. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

Financial/systems/legislation/deregulation/media implications

68. The Department is unable to provide specific details regarding the financial implications of managing an individual, either in the community or in detention. The Department notes that the costs will be highly dependent on the individual circumstances, including the level of support required. However, in the 2021-22 financial year, the average cost of managing a person:

- in held detention was \$421,674
- in Residence Determination was \$59,565
- on a Bridging E visa in the community was \$2,585.

Attachments

s. 47F(1)

s. 22(1)(a)(ii)

s. 47F(1)

Authorising Officer

Cleared by:

s. 22(1)(a)(ii)

A/g Assistant Secretary
Status Resolution Branch

Date: 27/08/2023

Ph: s. 22(1)(a)(ii)

Contact Officer s. 22(1)(a)(ii), A/g Assistant Secretary, Status Resolution Branch, Ph: s. 22(1)(a)(ii)

CC Minister for Home Affairs, Minister for Cyber Security
Secretary
Associate Secretary
Assistant Commissioner, Detention and National Removals
First Assistant Secretary, Immigration Policy
First Assistant Secretary, Status Resolution and Visa Cancellation
Commander, National Immigration Detention
Assistant Secretary, Humanitarian Program Operations Branch
Assistant Secretary, Migration and Citizenship Litigation Branch
Assistant Secretary, Detention Policy
Senior Director, Status Resolution Network
Director, Status Resolution NSW
Superintendent, Detention Health
Director, Detention Litigation Section
Director, Status Resolution Support Programs Section
Status Resolution Officers in NSW