

# the guardian

## Indigenous Australians locked in immigration detention believed to be entitled to payout due to 'negligence'

*First Nations Australians were deported to Papua New Guinea under 'aliens' power in constitution*



*Akee Charlie, a Torres Strait islander who the Australian Border Force says is a 'non-citizen non-alien'.*

*Aaron Smith  
Sat 5 Sep 2020*

The continuing incarceration of at least 20 people claiming to be of Aboriginal or Torres Strait Islander descent in immigration detention centres in Australia appears unlawful and they may be entitled to compensation, legal experts say.

A spokesperson from Australian Border Force said that so far only five "non-citizen non-aliens have been released from immigration detention".

Their release follows a high court ruling in February that New Zealand-born Brendan Thoms, a Gunggari native title holder, was not an alien and the commonwealth did not have power to deport him. He was released from detention in early February.

The three-part definition of Aboriginality accepted by the high court in the Mabo cases – biological descent, self-identification and recognition of identity by a First Nations group – put Indigenous Australians beyond the reach of the aliens power in the constitution.

The home affairs department secretary, Mike Pezzullo, told a Senate committee in March that another 23 cases were "under review".

Since then, three Torres Strait Islander men – Daniel Charlie, his cousin Akee Charlie and Daniel Gibuma – have been among those released after satisfying the department's tripartite test of Aboriginality.

However, none of them have been given any clear indication of their current legal status to live in Australia and say they have received little in the way of help to rehabilitate into society.

Akee Charlie spent more than five years in detention, including a year at Christmas Island. With no money, no identification, homeless and stateless, Charlie says he lives in fear every day since his release from Yongah Hill immigration detention centre in Western Australia in July.

“Many people in my situation are living in fear,” Charlie said. “When I walk around Cairns, I am in fear. I have no identification to prove who I am.”

Charlie, who is the grandson of George Mye, the prominent Torres Strait Islander who fought for the region’s autonomy, was given just \$100 and a plane ticket back to Cairns, no temporary accommodation, and no Medicare card or case worker to help him adjust back into the community.

“I saw one of my uncles the other day and he came up to me and shook my hand and said to me, what the government did, they were wrong to keep you boys in there, you are Torres Strait Islanders,” Charlie said.



*Akee Charlie spent five years at Yongah Hill, despite identifying as a Torres Strait islander man.*

A week before Charlie’s release last month, his younger brother died, and he also lost a son to suicide two years ago while in detention.

"When I lost my son, I wasn't there for him," he said. "I am still going through depression. He was only 21 and I still pray for him."

Charlie was born on the Papua New Guinea island of Daru in 1970, when it was still an Australian territory, and moved with his family as a young boy to the Torres Strait island of Erub.

After PNG's independence and changes to Australian legislation in 1975, thousands of PNG-born Australians had their citizenship revoked and were placed on permanent stay visas, often without their knowledge.

"I worked here, did school here, voted and paid tax," Charlie said. "I served as a reserve in the Sarpeyes regiment of the 51 battalion. We were born before 1975 in PNG so we are Australians by birth.

"But I did some silly things, which I regret now, assault and stuff."

In 2015, when Charlie was being released from Lotus Glen correctional centre after completing a five-month term, he was taken straight into detention.

"The day I was due to get out on parole and head back up to Darnley Island [Erub], immigration came and said they revoked my permanent PR visa under section 501, and took me straight to Yongah Hill, then out to Christmas Island, where I stayed for two years. They never told me where I was going, they just said pack your things. I only found out on the plane.

"I was given no access to legal advice. I didn't know what was happening, I had to work it out for myself. No one knew where I was, until I got a mobile phone after three months.

"People told me to get a lawyer but I'm not rich, I don't have any money.

Charlie was in the Christmas Island detention centre during the 2015 riots.

"There were fires and it burnt out the compound," he said. "I could feel the heat of the fire through the floor.

"I've seen people suicide themselves, I've seen people get burnt. Detention centres are not good places.

"I've seen very terrible things. It's worse than a prison – there's no end date and they play mind games with you."

Daniel Gibuma spent more than two years in detention while his brother in law, Jerry Dau, was deported to PNG in 2018, where he continues to live after six years in detention. Both men are registered native title holders.

Their lawyer, George Newhouse of the National Justice Project, said the government had "failed these men throughout their period of detention and after their release".

Those remaining in detention whose cases are still under review could be being held unlawfully, Newhouse said.

"If the men have been protesting about their detention on the basis that they were Aboriginal or Torres Strait Islander people, then the government had a duty to properly examine their claims and help them to navigate the complexity of the laws," Newhouse said.

"The condition that they now find themselves is a direct result of the government's negligence."

Newhouse said it was likely that compensation would flow to anyone who is held in detention after the high court case but compensation for cases from before that time "will depend very much on the individual circumstances".

Sydney University professor of public law Dr Mary Crock said the Citizenship Act should be amended "to make it clear that these people are entitled to all the rights of Australian citizens".



**Daniel Schiatlie:** 'I was born a citizen and have always been a citizen.' Photograph:

"In the light of the high court ruling we need to consider these people as first-class citizens rather than second-class citizens, as 'the belongers'," Crock said.

"If these people are traditional owners and are obviously Indigenous, then they should be seeking damages as they are absolutely entitled to compensation."

An ABF spokesperson said a non-citizen non-alien can apply for and be granted a visa or citizenship, if they meet the relevant statutory criteria.

But a citizenship law expert from the University of Canberra, Dr Kim Rubenstein, said that whether there was an ability for them to be granted a visa was murky.

“The regulation of this new class of non-citizen, non-alien is unclear and places these individuals in tricky situation,” Rubenstein said.

“The Migration Act regulates non-citizens, which these people currently are – but whether the government can give them visas, given visas are generally bestowed on aliens, [is] not straightforward,” Rubenstein said.

Akee Charlie’s cousin, Daniel Charlie, was also deported to PNG, where he was homeless and stateless for two years.

“I can’t get those years back now,” Charlie said. “As the courts are starting to bring things to light, they will have to give me back my citizenship. I was born a citizen and have always been a citizen.”