



Australian
Human Rights
Commission

Abdellatif v Commonwealth (DIBP)

[2014] AusHRC 70

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Abdellatif v Commonwealth (Department of Immigration and Border Protection)

Report into arbitrary detention
and the best interests of children

[2014] AusHRC 70

Australian Human Rights Commission 2014



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Commission**

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**Australian
Human Rights
Commission**

24 March 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the complaint made by Mr Sayed Abdellatif against the Commonwealth of Australia – Department of Immigration and Border Protection (the department) on behalf of himself, his wife and their six children.

I have found that the delay by the department in making a referral to the Minister for Immigration (the Minister) to consider whether to allow the family to make an application for a visa, after they were *prima facie* found to be owed protection obligations, resulted in their arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights* and in the case of the children article 37(b) of the *Convention on the Rights of the Child* (CRC).

The administrative detention of Mr Abdellatif and his family for more than 18 months after being found to be *prima facie* owed protection obligations, and for more than 10 months without a referral being made to the last three Ministers for Immigration to consider lifting the bar under s 46A, is not proportionate to the legitimate aim of ensuring the effective operation of Australia's migration system.

I also found that this decision was not made with the best interests of Mr Abdellatif's children as a primary consideration, contrary to article 3 of the CRC.

On 18 December 2013 I provided a notice to the department under s 29(2)(a) of the AHRC Act setting out my findings. I recommended that the department promptly finalise the submission to the Minister to consider lifting the bar under s 46A in relation to the application for protection by Mr Abdellatif and his family.

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By letter dated 4 February 2014 the department provided a response to my findings and recommendations. The department confirmed that a section 46A bar lift submission had been finalised and provided to the Minister's office. The submission requested the Minister's consideration of his non-delegable, non-compellable power to lift the section 46A(1) bar for Mr Abdellatif and his family. The Minister's office has sought further advice from the department in relation to the submission.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the left.

Gillian Triggs
President
Australian Human Rights Commission

1 Introduction

1. This is a report of the Australian Human Rights Commission's inquiry into a complaint lodged by Mr Sayed Abdellatif against the Commonwealth of Australia – Department of Immigration and Border Protection (the department) on behalf of himself, his wife and their six children (four daughters and two sons). The complainants allege a breach of their human rights under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR), and articles 3 and 37(b) of the *Convention on the Rights of the Child* (CRC) with respect to the children.
2. Mr Abdellatif has asked that he be referred to by name in this report, but that there be no references to the names of his wife and children. I consider that the preservation of the anonymity of his wife and children is necessary to protect their privacy. Accordingly, I have given a direction pursuant to section 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and have removed their names from this report.
3. I have considered two acts of the Commonwealth.
4. The first act is the refusal by the department to make a referral to the Minister for Immigration and Border Protection (the Minister) for consideration of community detention for the family under s 197AB of the *Migration Act 1958* (Cth) (Migration Act). One of the factors relevant to this consideration is an assessment of the Interpol Red Notice issued in relation to Mr Abdellatif. I note that the Inspector-General of Intelligence and Security has conducted an inquiry into the actions of Commonwealth agencies in relation to this case. In the course of the Commission's inquiry, I considered that the Inspector-General was in a better position to assess the interaction between the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP) and the department and to consider whether a referral for consideration of a residence determination ought to have been made. As a result, I decided not to continue to inquire into this act on the basis that the subject matter of the complaint could be more effectively dealt with by another statutory authority (AHRC Act s 20(2)(c)(vi)).
5. The second act is the significant delay, after the family was *prima facie* found to be owed protection obligations, in making a referral to the Minister for consideration of whether to lift the bar under s 46A of the Migration Act to allow the family to apply for relevant visas.
6. I find that the administrative detention of Mr Abdellatif for more than 18 months after being found to be *prima facie* owed protection obligations, and for more than 10 months without a referral being made to the last three Ministers for Immigration to consider lifting the bar under s 46A, is not proportionate to the legitimate aim of ensuring the effective operation of Australia's migration system (these periods of time relate to the time up to the Commission's notice to the department of its findings in December 2013). I do not consider that the delay in referral is justified in this case by the nature of the investigations described by the department in its submissions. I note that security and character checks would form part of the substantive assessment of Australia's protection obligations if the Minister lifted the bar under s 46A.
7. I also find that it is open to the department to progress the protection applications by other family members pending the receipt of character and security checks in relation to Mr Abdellatif. There is no suggestion that Mr Abdellatif's wife or her children were involved in any illegal activities abroad.
8. As a result, I find that this delay has resulted in a breach of article 9 of the ICCPR and, in relation to the children, breaches of articles 3 and 37(b) of the CRC.

2 Background

2.1 Initial processing

9. Mr Abdellatif, his wife and their six children arrived in Australia at Christmas Island by boat on 11 May 2012 and sought asylum. The family was transferred from Christmas Island to Inverbrackie Alternative Place of Detention in South Australia on 26 May 2012.
10. On 9 June 2012, the Abdellatif family was found to have *prima facie* claims to engage Australia's protection obligations and were 'screened in' to the refugee status determination process, although they were not notified of this decision until 25 October 2012.
11. In June 2012, the family's case manager initiated a referral to the Minister under s 197AB of the Migration Act for consideration of placement of the family into community detention. The department said that, due to the complexities involved in the case, the Community Detention Branch referred the case to the Complex Case Resolution Section (CCRS) on 31 July 2012.

2.2 Assessment of suitability for community detention

12. On 5 February 2013, the CCRS made an assessment against the Minister's s 197AB guidelines and determined that the Abdellatif family did not meet the guidelines for referral to the Minister for consideration of community detention. The basis for this finding was twofold. First, the department considered that Mr Adbellatif was not eligible for a community detention placement because it was advised by the AFP that he is the subject of an Interpol Red Notice. Secondly, the department said that it discussed a community detention placement with the rest of the family and they had advised that they did not wish to be separated. On this basis, no referral was made to the Minister for the consideration of the exercise of his powers under s 197AB.
13. The department says that it was initially advised by the AFP that there is an Interpol Red Notice in respect of Mr Abdellatif for his alleged involvement in a murder in Egypt. The department says that Mr Abdellatif and his wife reported that Mr Abdellatif was arrested and detained in the United Kingdom for his alleged involvement in terrorist activities. The department says that the AFP has no information to indicate that Mr Abdellatif's wife was involved in terrorist activities.
14. Mr Abdellatif denies that he was involved in a murder in Egypt or that he was involved in any terrorist activities. He says that he was a defendant in the "Returnees from Albania" trial in Egypt 1999 in which 107 people were charged (60 in absentia) with membership of the Islamist armed opposition group *al-Gihad*. Mr Adbellatif has provided the Commission with reports prepared by Amnesty International which allege that the trial violated fair trial guarantees under article 14 of the ICCPR and that prior to the trial defendants 'were interrogated over several months while held in unacknowledged incommunicado detention at departments of the State Security Investigation'.
15. As discussed in more detail below, the Interpol Red Notice was revised on 13 June 2013 and the allegation of murder was removed.
16. It appears that the refusal to consider community detention for Mr Abdellatif is on the basis of the disputed Interpol Red Notice. The Commission is not in a position to make findings about the veracity of the matters alleged in the Interpol Red Notice.

17. The department says that it has been advised by the AFP that the AFP is continuing to engage with Interpol regarding the Red Notice and the implications of its revision. Any further information obtained by the AFP will be provided to the department and considered as part of the assessment of Mr Abdellatif's claims and of Mr Abdellatif's character.
18. Significantly, no security concerns about a community detention placement were initially raised by ASIO. In the department's assessment of whether to make a referral to the Minister under s 197AB, it observed:

The Abdellatif family has not been referred to the external agency for a PIC4002 assessment, however the external agency is aware that they are being considered for a community detention placement, and have raised no objections on security grounds, noting that this is not an assessment in relation to the family being granted visas to remain in Australia.
19. This same departmental assessment included reference to the advice from the AFP about the Interpol Red Notice. It was not suggested that in ASIO's assessment of the security risks of a community detention placement that ASIO was not aware of the Interpol Red Notice.
20. However, I note that the Director-General of ASIO has said that the security clearance for community detention was the result of 'a clerical error or some other mistake that we subsequently identified'.¹
21. The department noted that as the family includes five minor children 'their placement in held immigration detention may not be appropriate, in line with the former Minister's announcement of October 2010'. This appears to be a reference to the announcement on 18 October 2010 by the then Prime Minister and the then Minister for Immigration and Citizenship that the government would partner with community organisations to transfer unaccompanied minors and families who are awaiting the outcome of their applications for asylum into community-based accommodation.
22. Mr Abdellatif, his wife and their four daughters have disclosed a history of torture and trauma. Only Mr Abdellatif has attended specialist counselling for this. Mr Abdellatif and two of the girls have been assessed as having a 'chronic health condition' and are receiving treatment. The other children have physical health issues for which they are receiving treatment.
23. In June 2013, the then Prime Minister asked the Inspector-General of Intelligence and Security to conduct an inquiry into the actions of Commonwealth agencies in relation to the conduct of Mr Abdellatif's case and to consider and make recommendations more generally on the management by Australian agencies of persons seeking asylum who present complex security issues. I understand that the Inspector-General has provided a copy of her classified report to the current Prime Minister and published an abridged version of this report.

2.3 Assessment of claims for protection

24. Despite being 'screened in' to the refugee status determination process, there have been significant delays in the substantive consideration of the claims for protection by Mr Abdellatif and his family. A departmental review on 11 December 2012 indicated that on 28 September 2012 a submission was sent to the then Minister the Hon Chris Bowen MP for him to consider lifting the bar under s 46A of the Migration Act to allow the family to make an application for protection visas. In a submission to the Commission dated 20 February 2013, the department said that the s 46A submission was not considered prior to Mr Bowen being replaced in this portfolio by the Hon Brendan O'Connor MP in early February 2013. At that time, the department said that 'due to the recent change of Minister and the many matters before him, Mr Abdellatif's case will be put to [Mr O'Connor] as soon as reasonably practicable'. It appears that this did not occur and that, prior to the Commission's notice to the department of its findings in this matter, a s 46A submission had not been put to any subsequent Minister.

25. The department says that submissions for former Minister Burke and former Minister O'Connor were drafted, and undergoing final clearances, when each Minister left the office of Minister for Immigration.
26. In a letter dated 20 September 2013, in response to questions asked by the Commission, the department said that a s 46A submission had been prepared for the current Minister, the Hon Scott Morrison MP, which took into account the revised Interpol Red Notice from the Egyptian authorities and was 'undergoing final clearances'.
27. In a letter dated 22 November 2013, in response to the Commission's preliminary views in this matter, the department said that a submission had been prepared for Minister Morrison's consideration but it appears from the context of the letter that this submission had still not been provided to him. This was more than a year after departmental documents indicated a submission had been first sent to Minister Bowen.
28. In relation to the issue of delay, the department says that since February 2013 a number of factors have contributed to the length of time taken to obtain relevant information to put to the Minister of the day. The Interpol Red Notice was revised on 13 June 2013 and the Egyptian authorities have foreshadowed a retrial once Mr Abdellatif is brought before the Public Prosecution Office. The department says that the revised notice indicates that Mr Abdellatif is now wanted for the following alleged offences:
 - being a member of an illegally formed extremist organisation; and
 - forging travel documents for the organisation's members to facilitate their movements to carry out terrorist operations.
29. Mr Abdellatif notes that on the Interpol website, the revised notice says that the charges are: 'membership in a terrorist group and providing forged travel documents'. He says that the additional description given by the department in the second bullet point above is not found in the description of the notice published by Interpol. He says that the original trial in 1999, which he says was unfair and occurred without his presence, did not include a charge of forging travel documents. He denies each of the charges in the former and revised Interpol notice.
30. The department says that the process of obtaining further information through the AFP has been complicated by the civil unrest in Egypt. Interpol Cairo advised the AFP that no further information would be provided unless extradition is under consideration. It is unclear from the department's submission what, if any, steps have been taken by it since it received this advice. The department notes that there is currently no extradition request. It says that if relevant information is not provided by Egyptian authorities 'a decision regarding Australia's protection obligations in respect of Mr Abdellatif will be made based on any information that is available at the time'.
31. The department says that prior to finalising a decision on any protection visa application, it would consult with the AFP again to determine whether any further information is available for consideration.
32. In April 2013, Mr Abdellatif informed the Commission that he and his family had been transferred from Inverbrackie to Villawood Immigration Detention Centre (VIDC). His family is currently detained in Sydney Immigration Residential Housing (SIRH) which is adjacent to VIDC.

3 Legislative Framework

3.1 Functions of the Commission

33. Section 11(1)(f) of the AHRC Act provides that it is a function of the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right.² This is a function to be performed by the President (AHRC Act s 8(6)).
34. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that a reference to, or the doing of, an act includes a reference to the refusal or failure to do an act.
35. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.³

4 Assessment

4.1 Act or practice of the Commonwealth

36. I consider that the following acts or omissions constitute an 'act' under the AHRC Act:
 - (a) the refusal by the department to make a referral to the Minister for consideration of community detention for the family under s 197AB of the Migration Act;
 - (b) the delay by the department in making a referral to the Minister to lift the bar under s 46A of the Migration Act after the family was *prima facie* found to be owed protection obligations.
37. I consider each of these acts in turn below.

4.2 Assessment of suitability for community detention

38. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens.
39. Under s 197AB of the Migration Act, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination that particular persons are to reside at a specified place, instead of in immigration detention.
40. The Minister for Immigration published guidelines on 1 September 2009 (which are still current) for the exercise of the ministerial power to make a residence determination under s 197AB of the Migration Act (Guidelines).
41. The Guidelines provide that the Minister will make a residence determination when he considers it to be in the public interest to do so, having regard to the Government's Key Immigration Detention Values, the circumstances of the individual and any risks associated with an immigration detainee living in the community (at [3.1.1]).

42. The Guidelines set out a number of factors that the Minister will take into account in exercising this power (at [3.1.2]). Several of these factors point strongly to the making of a residence determination in favour of Mr Abdellatif and his family.
43. First, the Guidelines provide that minors should only be detained as a measure of last resort and then only for the shortest practicable time and in the least restrictive form of detention available (at [6.1.1]). There is a statutory obligation in s 4AA of the Migration Act to only detain minors as a measure of last resort. This statutory obligation does not include a minor residing in community detention in accordance with a residence determination.
44. Secondly, all minors are to be identified for a residence determination as soon as they are detained and should be the subject of a submission to the Minister (at [6.1.2.]). Further, the principle of family unity is particularly important in the case of minors and residence determination plans are to have high regard to keeping the family together (at [6.1.3]).
45. Thirdly, cases of persons who may have experienced torture or trauma are to be referred to the Minister as soon as practicable (at [7.2.1]). These cases must be subject to the normal health, character and security checks, including a plan to mitigate any risks identified (at [7.2.3]).
46. However, another relevant consideration is the identification of security risks to the community and the development of strategies to mitigate those risks (at [5.1.1]). The Guidelines express a preference for the normal health, identity, character and security checks to be satisfied before a referral is made; although where significant risks associated with ongoing detention are identified, the Guidelines note that the Minister is prepared to consider persons where an assessment of risks and placement has been completed.
47. It appears that there are risks associated with the ongoing detention of this family group, particularly given that it contains minors and people who have a history of torture and trauma. It is not clear what follow up assessment has been made of the risks to the community of Mr Abdellatif's release into community detention following the initial clearance by ASIO.
48. As noted above, the Commission is unable to assess the veracity of the allegations against Mr Abdellatif which are the subject of the revised Interpol Red Notice. I note that the Inspector-General of Intelligence and Security has conducted an inquiry into the actions of Commonwealth agencies in relation to this case. In the course of the Commission's inquiry, I considered that the Inspector-General was in a better position to assess the interaction between ASIO, the AFP and the department and to consider whether a referral for consideration of a residence determination ought to have been made in the circumstances of this case. As a result, I decided not to continue to inquire into this act on the basis that the subject matter of the complaint could be more effectively dealt with by another statutory authority (AHRC Act s 20(2)(c)(vi)).

4.3 Assessment of claims for protection

49. The first stage in an assessment of whether Australia owes protection obligations to an 'unlawful maritime arrival' is entry screening.⁴ Entry screening involves a determination of whether a person may *prima facie* engage Australia's protection obligations under the *Convention on the Status of Refugees*.⁵ If an officer of the department 'screens in' an unlawful maritime arrival, that person's case is then entered into the Protection Obligations Determination process.
50. If there is a positive Protection Obligation Evaluation, then, after any other necessary checks (including health and character checks) are made, a submission will ordinarily be provided to the Minister for his consideration of whether to lift the s 46A(1) bar to allow a Protection (or other) visa application to be made.⁶

51. As noted above, the Abdellatif family was found to have *prima facie* claims to engage Australia's protection obligations and were 'screened in' to the Protection Obligations Determination process in June 2012. A submission was first forwarded to the Minister for his consideration of whether to lift the s 46A(1) bar on 28 September 2012. The material provided by the department suggests that this submission was the result of a positive Protection Obligation Evaluation.⁷ This submission was not considered by the then Minister by the time that he was replaced in the portfolio in February 2013.
52. Since that time, based on the information provided by the department, it appears that no further s 46A submission was given to any of the three subsequent Ministers for Immigration, prior to the Commission's notice of findings in this matter. This is despite submissions being prepared within the department and progressing through to the stage of requiring only 'final clearances'. At the time of the last submission by the department to the Commission, there had been a delay in making a subsequent referral of more than a year from the date that the first referral was made.
53. It appears from the submissions of the department that security and character checks for Mr Abdellatif are still outstanding. It appears that the reconsideration of security and character checks may relate in part to the admission by ASIO that it made a mistake in its initial security assessment of Mr Abdellatif, and in part to the need to consider the revised Interpol Red Notice following receipt of information that suggested that at least some of the allegations in the original notice could not be substantiated.
54. Mr Abdellatif and his family have been in detention since 11 May 2012. They claim that their detention is arbitrary in contravention of article 9 of the ICCPR (and article 37(b) of the CRC in relation to the children).
55. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁸ Detention should not continue beyond the period for which a State party can provide appropriate justification.⁹ The United Nations Human Rights Committee considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.¹⁰
56. In this matter, the department has pointed to problems in obtaining information from Egypt following the revision of the Interpol Red Notice. It has said that in determining whether Mr Abdellatif is a person to whom Australia owes protection obligations, part of the assessment will include character consideration (encompassing security issues) and that information sought from Egypt will be relevant to this consideration. However, the department notes that the Egyptian authorities have advised that they will not be providing further information unless an extradition request is under consideration. The department also says that no such request has been received from Egypt. It is unclear what, if any, steps the department has taken since receiving this advice.
57. In my view, the investigations that the department has described taking and the current status of those investigations does not provide a sufficient justification for the significant delay in providing a submission to the Minister in order to allow an application for protection to be made.
58. I also note that the department has indicated that it would continue to seek relevant information about Mr Abdellatif's character if the s 46A bar was lifted and that prior to finalising a decision on any protection visa application it would consult with the AFP again to determine whether any further information is available for consideration.

59. I find that the administrative detention of Mr Abdellatif for more than 18 months after being found to be *prima facie* owed protection obligations, and for more than 10 months without a referral being made to the last three Ministers for Immigration to consider lifting the bar under s 46A, is not proportionate to the legitimate aim of ensuring the effective operation of Australia's migration system. (These periods of time relate to the time up to the Commission's notice to the department of its findings in December 2013.) I do not consider that the delay in referral is justified in this case by the nature of the investigations described by the department. I note that security and character checks would form part of the substantive assessment of Australia's protection obligations if the Minister lifted the bar under s 46A.
60. On 21 October 2013, I provided the department with my preliminary view that there was no reason not to progress the applications by other family members for protection pending the receipt of character and security checks in relation to Mr Abdellatif. There is no suggestion that Mr Abdellatif's wife or their children were involved in any illegal activities abroad, so the factors pointed to by the department in relation to Mr Abdellatif do not apply to their circumstances.
61. In response, the department said that Mr Abdellatif and his wife were firmly of the view that they did not want the protection claims of family members to be considered separately. They said that Mr Abdellatif provided this view in writing to the department on 29 August 2013. The department subsequently provided a copy of this written request. It relevantly reads:
- I would dismiss any separated request for my daughter ... and united her with the family please.
62. It is unclear whether this is a request that the protection claims of that daughter not be considered separately from those of her family, or that she not be physically separated from her family, for example by granting her a residence determination so that she could leave the closed detention centre environment. It is clear that the family has asked not to be physically separated.
63. After receiving this document, an officer of the Commission discussed the issue with Mr Abdellatif. Mr Abdellatif reiterated that a primary concern of the family is that they are not separated. He said that they rejected a suggestion that the protection application for his eldest daughter be progressed separately from the family because they thought that this would lead to a separation of the family.
64. Mr Abdellatif confirmed to an officer of the Commission that he has no objection to the protection applications of his wife and children being processed prior to his application, provided that the family is not physically separated.
65. I note that it is open to the department to consider the protection claims of Mr Abdellatif's wife and their children without physically separating them from Mr Abdellatif. In any event, given that I have found that the delay in the processing of Mr Abdellatif's claims is unjustified, there is no need to separate his claim from those of the rest of his family.
66. In these circumstances, I find that there has been a breach of article 9 of the ICCPR in relation to the detention of each of the family members.

4.4 Articles 3 and 37(b) CRC – arbitrary detention and the best interests of the child

67. At the time of the complaint to the Commission, all six of the children of Mr Abdellatif and his wife were minors.
68. Article 37(b) of the CRC provides that detention of children should not be arbitrary, should be a measure of last resort, and should be for the shortest appropriate period of time.
69. The claims in relation to article 37(b) also engage article 3 of the CRC which requires that in any decision about the detention of a child their best interests must be a primary consideration. As noted above, s 4AA of the Migration Act confirms that children should only be detained as a measure of last resort.
70. I consider that it is in the best interests of Mr Abdellatif's children to be released with their parents into the community pursuant to a visa or a residence determination, potentially with conditions attached. It may be that these interests are outweighed by other considerations. In the present case, the countervailing considerations identified by the department are the Interpol Red Notice that has been issued in relation to Mr Abdellatif, and the insistence by the family that they are not separated.
71. While no security concerns were initially raised by ASIO in relation to the placement of the family into community detention, it appears that ASIO has since identified this as an error.
72. To the extent that the complaint relates to the assessment of whether the family should be placed in community detention, for the reasons set out above I consider that the Inspector-General is in a better position to assess the interaction between ASIO, the AFP and the department and to consider this issue. As a result, I decided not to continue to inquire into this act on the basis that the subject matter of the complaint could be more effectively dealt with by another statutory authority (AHRC Act s 20(2)(c)(vi)).
73. To the extent that the complaint relates to the assessment of the children's application for protection, for the reasons set out above I find that there has been a breach of articles 3 and 37(b) of the CRC.

4.5 Articles 17 and 23 of the ICCPR – interference with family

74. When the complaint was first received, the family was accommodated at Inverbrackie and were together. Following their transfer to VIDC, Mr Abdellatif has been physically separated from the rest of the family. It appears from letters written on his behalf to the department that he was initially accommodated in the higher security Stage 1 at VIDC and has now been moved to lower security Stage 3. His family is accommodated in SIRH which is adjacent to VIDC. Since this move, Mr Abdellatif has raised concerns about his separation from his family. Arguably, this raises issues under articles 17 and 23 of the ICCPR dealing with interference with family.
75. I consider that the placement of Mr Abdellatif and his family within the immigration detention network raises the same issues discussed in relation to community detention above. For the same reasons, I consider that the Inspector-General is in a better position to assess the interaction between ASIO, the AFP and the department and to consider whether the family should have been separated and whether Mr Abdellatif could also have been accommodated in SIRH. As a result, I have decided not to continue to inquire into this act on the basis that the subject matter of the complaint could be more effectively dealt with by another statutory authority (AHRC Act s 20(2)(c)(vi)).

5 Recommendations

76. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹¹ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹²
77. The Commission may also recommend:¹³
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice; and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.
78. In light of the findings made above, I recommend that the department promptly finalise the submission to the Minister to consider lifting the bar under s 46A in relation to the application for protection by Mr Abdellatif and his family.

6 The department's responses to my conclusions and recommendation

79. On 18 December 2013, I provided a notice to the department under s 29(2)(a) of the AHRC Act setting out my findings and recommendation in relation to the complaints dealt with in this report.
80. By letter dated 4 February 2014, the Secretary of the department provided the following response:
- Thank you for your letter of 18 December 2013, providing a notice of your findings in relation to the above complaint.
- Your notice includes the recommendation that my department promptly finalise the submission to the Minister to consider lifting the bar under s 46A in relation to the application for protection by Mr Abdellatif and his family.
- I confirm that a section 46A bar lift submission has been finalised by my department and provided to Minister Morrison's office. The submission requests Minister Morrison's consideration of his non-delegable, non-compellable power to lift the section 46A(1) bar for Mr Abdellatif and his family. The Minister's office has sought further advice from the department in relation to the submission.

81. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

24 March 2014

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- 1 Commonwealth, *Official Committee Hansard*, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 30 May 2013, p 101, Mr David Irvine, Director-General of Security, Australian Security Intelligence Organisation.
 - 2 Section 3(1) of the AHRC Act defines human rights to include the rights recognised by the ICCPR.
 - 3 See, *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 4 Department of Immigration and Border Protection, Protection Obligations Evaluation Manual at [4].
 - 5 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
 - 6 Department of Immigration and Border Protection, Protection Obligations Evaluation Manual at [40].
 - 7 The Six Month Senior Officer Review on 11 December 2012 said: 'On 28 September 2012, a submission was sent to the Minister for him to consider lifting the bar under section 46A of the *Migration Act 1958*'. A Case Review on 3 December 2012 said: 'the clients are now screened in and are on a sub with the Minister, for his consideration re lifting the s46a bar to allow a PV application to be submitted (since September 2012)'.
 - 8 *Van Alphen v Netherlands* Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988, *A v Australia* Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993, *C v Australia* No 900/1999 UN Doc CCPR/C/76/D/900/1999.
 - 9 *A v Australia* UN Doc CCPR/C/76/D/900/1993; *C v Australia* UN Doc CCPR/C/76/D/900/1999.
 - 10 UN Human Rights Committee, concluding observations on Switzerland, UN Doc CCPR/C/79/Add.70 (8 November 1996) at [15].
 - 11 AHRC Act s 29(2)(a).
 - 12 AHRC Act s 29(2)(b).
 - 13 AHRC Act s 29(2)(c).

Further Information

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