



Australian
Human Rights
Commission

AX v

**Commonwealth of
Australia (DIBP)**

[2017] AusHRC 112

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**AX v Commonwealth of
Australia (Department of
Immigration and Border
Protection)**

[2017] AusHRC 112

Report into arbitrary detention

Australian Human Rights Commission 2017



**Australian
Human Rights
Commission**

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**Australian
Human Rights
Commission**

January 2017

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

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint against the Commonwealth of Australia, Department of Immigration and Border Protection (the department) made by Mr AX.

I have found that the failure to consider Mr AX's individual circumstances and suitability for less restrictive detention options, for a period of more than two years led to his detention being arbitrary and inconsistent with article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

I have also found that the Minister's decision on 29 September 2015, not to consider exercising his discretionary power under section 195A of the *Migration Act 1958* (Cth) to grant Mr AX a bridging visa was not necessary or proportionate, to the Commonwealth's legitimate aims of regulating immigration into Australia.

I have found that Mr AX's detention for a period of more than two and a half years, was arbitrary and inconsistent with his rights under article 9 of the ICCPR.

In light of my findings I recommended that the Commonwealth pay to Mr AX appropriate compensation in relation to this period of arbitrary detention.

The department provided a response to my findings and recommendations on 21 July 2016. I have set out the department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission (Commission) has conducted an inquiry into a complaint by Mr AX against the Commonwealth of Australia (Department of Immigration and Border Protection) (department), alleging a breach of his human rights. Namely, the right recognised by article 9 of the International Covenant on Civil and Political Rights (ICCPR).
2. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. In order to protect the privacy and human rights of the complainant, I have made directions that his identity not be disclosed in accordance with s 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). For the purposes of this report the complainant has been given the pseudonym 'AX'.
4. This is a report pursuant to section 11(1)(f)(ii) of the AHRC Act setting out the findings of the Commission in relation to Mr AX's complaint.

2 Summary of findings and recommendations

5. As a result of conducting this inquiry, I have found:
 - That the failure to consider Mr AX's individual circumstances and suitability for less restrictive detention options, for a period of more than two years – whether required by a policy decision of the Minister or whether resulting from a delay by the department to refer Mr AX's case to the Minister – led to his detention being arbitrary and inconsistent with article 9 of the ICCPR.
 - That the Minister's decision, on 29 September 2015, to not consider exercising his discretionary power under section 195A of the *Migration Act 1958* (Cth) (Migration Act) to grant Mr AX a bridging visa was not necessary or proportionate to the Commonwealth's aims of regulating immigration into Australia or protecting the Australian community, or to any other legitimate aim of the Commonwealth;
 - That Mr AX's detention, for a period of more than two and a half years, was arbitrary and inconsistent with his rights under article 9 of the ICCPR.
6. In light of these findings, I recommend that the Commonwealth pay an appropriate amount of compensation to Mr AX for his period of arbitrary detention, in accordance with the principles outlined in part 6.2 below.

3 Background

7. Mr AX is an Iraqi national who arrived on Christmas Island as an undocumented maritime arrival on 19 August 2013 and was detained under section 189(3) of the Migration Act.
8. On 19 July 2013, one month before Mr AX arrived in Australia, the then Prime Minister Kevin Rudd announced that people who arrive in Australia by boat after that date would be subject to offshore processing and had no prospect of being resettled in Australia.
9. After the federal election on 7 September 2013, this position was initially maintained by the incoming government.
10. On 18 February 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, issued Guidelines to the department in relation to the Minister's discretionary power under section 197AB of the Migration Act to make a residence determination (2014 Guidelines).¹ Section 10 of the 2014 Guidelines provided:

10 Cases generally not to be referred for my consideration under section 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 19 July 2013; ...

11. That is, the Minister had decided that, in the absence of exceptional reasons, people who were subject to removal to a regional processing country because they arrived after 19 July 2013 would not be eligible for community detention prior to their removal.
12. It appears that, as a result of this governmental policy, Mr AX was not referred by the department to the Minister for consideration of the exercise of his powers to grant a residence determination. In each of Mr AX's early monthly case reviews, it was noted that he 'arrived after July 19, 2013 and as a result has had no case progression under the Australian Government's "No Advantage" policy'. The department says that in these circumstances, he did not meet the guidelines for referral to the Minister.
13. On 25 September 2014, the then Minister for Immigration and Border Protection, the Hon Scott Morrison MP, announced that this position (i.e. the "No Advantage" policy) would change following the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (Asylum Legacy Caseload Bill). After the passage of that Bill, asylum seekers who arrived in Australia by boat on or prior to 31 December 2013 and who had not already been transferred to Nauru or Manus Island would have their claims for protection assessed in Australia. Mr AX fell into this category.

14. On 5 December 2014, the *Asylum Legacy Caseload Act 2014* was passed by Parliament and it received royal assent on 15 December 2014.
15. On 29 March 2015, the new Minister, the Hon Peter Dutton MP, issued replacement section 197AB Guidelines.² These Guidelines changed the arrival date of asylum seekers that was relevant for whether they were to be considered for a residence determination from 19 July 2013 to 1 January 2014.
16. The department has not referred Mr AX's case to the Minister for consideration of a residence determination under section 197AB of the Migration Act.
17. However, in September 2015, the department referred Mr AX's case (along with nine other detainees) to the Minister for consideration under section 195A of the Migration Act in relation to the grant of a General visa (Bridging visa). On 29 September 2015, the Minister decided not to consider intervening to grant Mr AX a Bridging visa.
18. On 10 October 2015, Mr AX was transferred to Wickham Point Alternative Place of Detention (APOD).

4 Legal Framework

4.1 Functions of the Commission

19. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, section 11(1)(f) gives the Commission the following functions:
 - to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
20. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.

4.2 What is an ‘act’ or ‘practice’?

21. The terms ‘act’ and ‘practice’ are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
22. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
23. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;³ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4.3 What is a ‘human right’?

24. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.⁴
25. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
26. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - (a) ‘detention’ includes immigration detention;⁵
 - (b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;⁶
 - (c) arbitrariness is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁷ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁸
27. In *Van Alphen v The Netherlands* the UN Human Rights Committee (UNHRC) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁹
28. The UNHRC has held in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party’s immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.¹⁰

29. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.¹¹

5 Assessment

5.1 Act or practice of the Commonwealth

30. Mr AX has been detained by the Commonwealth since 19 August 2013, pursuant to section 189(1) of the Migration Act, which requires the detention of unlawful non-citizens.
31. However, there are a number of discretionary powers that the Minister could have exercised in order to detain Mr AX in a manner less restrictive than in an immigration detention centre.
32. The Minister could have granted him a visa. Under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Migration Act.
33. The Minister could have made a residence determination. Section 197AB of the Migration Act provides:
- If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).
34. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.¹²

35. Accordingly, the Minister could have granted a visa to Mr AX, made a residence determination in relation to him under section 197AB of the Migration Act or could have approved Mr AX to reside in a place other than an immigration detention centre. Further, it was open to the Minister to exercise the power conferred by section 197AB subject to additional conditions: see section 197AB(2)(b) of the Migration Act.
36. The department has not referred Mr AX's case to the Minister for consideration of a residence determination under section 197AB of the Migration Act at any time during his period of detention.
37. The department first referred Mr AX's case to the Minister for the consideration of the exercise of his discretionary powers under section 195A of the Migration Act on 11 September 2015. On 29 September 2015, the Minister decided not to exercise his discretionary powers under section 195A of the Act.
38. I find that the failure by the department to refer Mr AX's case to the Minister for consideration of the exercise of his discretionary powers (set out at paragraph 35 above) until 11 September 2015 constitutes an 'act' within the definition of section 3 of the AHRC Act. I also find that the Minister's failure to exercise his discretionary powers to grant Mr AX a bridging visa constitutes an 'act' within the definition of section 3 of the AHRC Act. I consider both of these acts below.

5.2 Inconsistent with or contrary to human rights

39. Mr AX has been detained in an immigration detention centre for more than two and a half years, since 19 August 2013.
40. Under international law, detention must be necessary and proportionate to a legitimate aim of the Commonwealth in order to avoid being arbitrary.¹³
41. In Mr AX's case, it is necessary to consider whether his prolonged detention in a closed detention facility could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention.
 - (a) *Failure to consider Mr AX for less restrictive alternatives to detention*
42. Since at least 29 March 2015, it appears to have been open to the department to refer Mr AX's case to the Minister under section 197AB of the Migration Act for consideration of a residence determination.

43. On 29 March 2015, the Minister issued replacement section 197AB Guidelines (2015 Guidelines). The 2015 Guidelines provide as follows:

8 Cases to be referred for my consideration under section 197AB

... For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 1 January 2014 and to whom the following circumstances apply:

- unaccompanied minors.

...

I will also consider cases where:

- there are unique or exceptional circumstances;
- I personally request a specified detainee's case or cohort of people be referred to me to consider exercising my public interest power.

...

10 Cases generally not to be referred for my consideration under section 197AB

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 1 January 2014;
- where a person was transferred from an offshore processing centre to Australia for medical treatment or any other reason;
- where a person has had their asylum claims rejected at primary and review stages ('finally determined');
- where ASIO has issued an adverse security assessment which states that "ASIO assesses [the person] to be directly or indirectly a risk to security ...";
- where the continued presence of the person presents character issues that indicate that they may fail the character test under section 501 of the Act;
- where a person has been charged with an offence but is awaiting the outcome of the charges or is under active investigation by an agency responsible for law enforcement in Australia;
- where a person knowingly fails to provide information, or provide misleading information, about their identity (such as age, nationality, citizenship or ethnicity);
- where there is a real chance the person may not comply with the conditions specified in the determination (such as not residing at the specified address) or cause harm to the Australian community;
- where a person is in held detention and their removal is considered imminent (within three months from the time of consideration); and/or
- where a person is in held detention and a visa grant is considered imminent.

44. I note that Mr AX does not appear to fall into any of the circumstances detailed in Section 10 of the 2015 Guidelines. Mr AX had not been charged with any offences and by the time the 2015 Guidelines were issued:
- the People Smuggling and Allegations Team indicated he was no longer a person of interest;
 - the Australian Federal Police had declined to investigate the behavioural incident involving him which had occurred on 20 August 2014;
 - all behavioural incidents in relation to him were finalised; and
 - he had not been involved in any behavioural incidents for more than 7 months.
45. The 2015 Guidelines did not preclude Mr AX's case from being referred to the Minister.
46. In September 2015, Mr AX's case was referred to the Minister under section 195A of the Migration Act for consideration of a visa grant. I note that the Minister has issued Guidelines on the detention intervention power under section 195A and I understand that Mr AX would have been referred to the Minister due to meeting one or more of the criteria in section 4.1.1 of these Guidelines. I invited the department to clarify, in its response to my preliminary view:
- why it did not refer Mr AX's case to the Minister, for consideration of a visa grant under section 195A, at any time prior to 11 September 2015; and
 - why it did not refer Mr AX's case to the Minister for consideration of a residence determination in the preceding six months (i.e. since 29 March 2015).
47. In its response of 2 June 2016, the department stated:
- The section 195A submission provided to the Minister on 11 September 2015 refers to two behavioural issues that occurred during August 2014, in which Mr AX was aggressive and abusive towards officers. However, Mr AX has been involved in in excess of 80 incidents whilst in immigration detention, with more than 50 of those classed as 'Abusive/Aggressive Behaviour', 'Assault – Minor', or 'Disturbance – Minor'. While not classed as 'major' incidents, Mr AX's history of abusive and aggressive behaviour towards both staff and fellow detainees indicate that there is probability that he would not comply with conditions specified in the section 197AB determination, this lessens the likelihood of him being referred for consideration under section 197AB for a possible community detention placement.
48. These 'minor' incidents in detention were not included by the department in its submission to the Minister as to whether he should consider exercising his discretionary powers to grant Mr AX a bridging visa and release him into the community. Accordingly, the department must not have considered these 'minor' incidents relevant to the Minister's assessment or to whether Mr AX was likely to be a risk of harm to the Australian community if released from detention.

49. The department describes these ‘minor’ incidents as ‘[lessening] the likelihood of him being referred for consideration under section 197AB for a possible community detention placement’. However, ‘minor’ incidents in detention are not identified in the 2015 Guidelines as a reason not to refer individuals to the Minister for the consideration of a section 197AB residence determination.
50. I do note that the 2015 Guidelines state that, save for exceptional circumstances, the Minister would not expect the department to refer a person:
- where there is a real chance the person may not comply with the conditions specified in the determination (such as not residing at the specified address) or cause harm to the Australian community;
51. It is not clear how the ‘minor’ incidents of aggressive behaviour would lead the department to conclude that there was a ‘real chance’ that Mr AX may not comply with the conditions specified in the residence determination, such as not residing at the specified address. In any event, the department has not ever conducted this assessment of considering the individual circumstances of Mr AX’s case against the 2015 Guidelines.
52. In my view, since at least 29 March 2015, it appears to have been open to the department to refer Mr AX’s case to the Minister under section 197AB of the Migration Act for consideration of a residence determination. It was also open to the department to refer Mr AX’s case to the Minister under section 195A of the Migration Act for consideration of the grant of a bridging visa.
53. Whether required by a policy decision of the Minister or whether resulting from a delay by the department to refer Mr AX’s case to the Minister, I find that the failure to consider Mr AX’s individual circumstances and suitability for less restrictive detention options until September 2015 (a period of more than two years), resulted in his detention being arbitrary and inconsistent with article 9 of the ICCPR.
- (b) *Minister’s failure to consider exercising his discretionary power to grant Mr AX a Bridging visa*
54. On 29 September 2015, the Minister decided that he was not inclined to consider exercising his power under section 195A of the Migration Act in relation to Mr AX. The Minister was not required to give reasons for declining to exercise his discretionary power, however he agreed for the department to refer a further section 195A submission to him (no indication was given as to timeframe).

55. The department prepared written submissions for the Minister's consideration. These submissions, dated 11 September 2015, were attached to the Minister's decision and relevantly state:

Assessment and identification

...

9. Based on the information available at this time, departmental systems do not indicate any of the IMAs in this submission represent a direct or indirect risk to security. The Department will conduct further checking prior to referring a further s195A submission for your consideration.

10. The IMAs included in this submission have no known public health, identity, or significant behavioural (other than those detailed above) issues at this time.

Code of Behaviour

...

16. As outlined by the Code of Behaviour, an IMA must agree to abide by the Code of Behaviour in order for a BVE to be granted using your s195A intervention power. Should you be inclined to intervene in any of their cases, they will need to abide by the code before they are put to you on a further s195A submission.

56. In relation to Mr AX specifically, the department's 11 September 2015 submissions identify the following two behavioural issues that had occurred during his two-and-a-half-year period of detention:

v. On 11 August 2014, Mr [AX] became agitated and abusive towards Serco officers during an escorted physiotherapy appointment. It is alleged that Mr [AX] attempted to spit on the officers. No further action was taken and as such the matter is considered finalised.

vi. On 20 August 2014, Mr [AX] became agitated and violent towards the Serco Emergency Response Team (ERT) officers when they attended his compound to transfer him to another compound in preparation for his transfer to Christmas Island. Mr [AX] armed himself with a shower curtain rail and attempted to assault officers with it. The ERT officers applied the use of force to restrain Mr [AX] to prevent him from assaulting officers further. The matter was referred to the AFP who declined to investigate the matter further and the matter was considered finalised.

vii. Mr [AX] has not been involved in any other major behavioural incidents of concern whilst in immigration detention.

57. The submission also indicated that on 30 June 2014, Mr AX was named a person of interest to the People Smuggling and Allegations Team (PSAT) in relation to people smuggling allegations. On 17 February 2015, PSAT indicated that Mr AX was no longer of interest.

58. The Minister was not required to indicate his reasons for refusing to consider exercising his discretionary power, and accordingly it is unclear on what basis the Minister decided not to do so. This is particularly so, in light of the fact that the department's September 2015 submissions to the Minister state or indicate that:
- Mr AX has not been involved in any behavioural incidents for more than 12 months, since the two incidents in August 2014 which are considered finalised, and does not have any behavioural issues at this time;
 - Mr AX does not represent a direct or indirect risk to security;
 - The department proposes visa conditions regarding reporting and address notification;
 - The department proposes that Mr AX agree to abide by a Code of Behaviour prior to the Minister considering granting the visa;
 - The department has confirmed that Mr AX has no medical or welfare vulnerabilities that would prevent him from being placed in the community.
59. In light of the above, I find that the Minister's decision to not consider exercising his discretionary powers under section 195A of the Migration Act to grant Mr AX a Bridging visa was not necessary or proportionate to the Commonwealth's legitimate aims of regulating immigration into Australia or protecting the Australian community, or to any other legitimate aim of the Commonwealth.

6 Recommendations

6.1 Power to make recommendations

60. 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.¹⁴ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹⁵
61. The Commission may also recommend:¹⁶
- (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.

6.2 Consideration of Compensation

62. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
63. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.
64. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.
65. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is a lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary irrespective of legality.
66. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
67. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).¹⁷
68. In the case of *Fernando v Commonwealth of Australia (No 5)*,¹⁸ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁹
- ...the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.²⁰
69. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).²¹ In that case, at first instance,²² the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.

70. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor’s convictions were in relation to sexual offences against children, Mr Taylor was detained in a State prison under a ‘strict protection’ regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a ‘particularly harsh one’.
71. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.²³
72. On appeal, the New South Wales Court of Appeal considered that the award was low but in the acceptable range. The Court noted that ‘as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish’.²⁴
73. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth’s argument that Mr Fernando was only entitled to nominal damages,²⁵ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a State prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.²⁶ On appeal, the Full Federal Court noted that although ‘the primary judge’s assessment seems to us to be low’, it was not so low as to indicate error.²⁷

6.3 Recommendation that compensation be paid

74. I have found that Mr AX’s detention, for a period of more than two and a half years, was arbitrary and inconsistent with his right to liberty under article 9 of the ICCPR.
75. I consider that the Commonwealth should pay Mr AX an appropriate amount of compensation to reflect the loss of liberty caused by his detention, in line with the principles set out above.

7 The department's response to my recommendations

76. On 29 June 2016 I provided a notice to the Department of Immigration and Border Protection under section 29(2) of the AHRC Act setting out my findings and recommendations in relation to the complaint dealt with in this report.

77. By letter dated 21 July 2016 the department provided a response to my findings and recommendations. In this letter the department advised:

that Mr AX's case has been re-referred to the Minister for consideration of a Bridging visa. On 30 June 2016, the Minister indicated that he was inclined to consider intervening under section 195A of the Migration Act.

78. The department has noted my findings and provided the following response to my recommendation:

Response to Recommendation

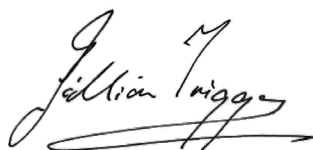
The Department advises that it will not be taking action in relation to this recommendation.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2005*. The *Legal Service Directions 2005* provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice.

The Department considers that Mr AX's detention was lawful and that the decisions and processes followed were appropriate having regard to his circumstances. On this basis, the Department is respectfully of the view that payment of compensation to Mr AX would not be appropriate in this case.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, Resource Management Guide No. 409 generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective administration on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of application of the Commonwealth legislation or policy. On the basis of the current information, the Department is not satisfied that there is a proper basis for the payment of discretionary compensation at this time.

79. I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a prominent flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission

January 2017

- 1 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 18 February 2014. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 2 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958*, 29 March 2015. The guidelines are incorporated into the Department's Procedures Advice Manual.
- 3 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 4 The ICCPR is referred to in the definition of 'human rights' in section 3(1) of the AHRC Act.
- 5 UN Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons (Article 9)*. See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 6 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) 308 [11.10].
- 7 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 8 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 9 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 10 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 11 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 [18].
- 12 *Migration Act 1958* (Cth), section 5.
- 13 *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 14 *Australian Human Rights Commission Act* s 29(2)(a).
- 15 *Australian Human Rights Commission Act* s 29(2)(b).
- 16 *Australian Human Rights Commission Act* s 29(2)(c).
- 17 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) [87].
- 18 [2013] FCA 901.
- 19 [2003] NSWSC 1212.
- 20 [2013] FCA 901 [121].
- 21 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 22 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 23 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 24 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 25 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 26 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
- 27 *Fernando v Commonwealth of Australia* [2014] FCAFC 181 [113].

Further Information

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