



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

2011

Mr Toro-Martinez
Commonwealth of
Australia (Department
of Immigration and
Citizenship)

.....

[2011] AusHRC 44

© Australian Human Rights Commission June 2011.

This work is protected by copyright. Apart from any use permitted under the *Copyright Act 1968* (Cth), no part may be used or reproduced by any process without prior written permission from the Australian Human Rights Commission. Enquiries should be addressed to Communications Unit at: communications@humanrights.gov.au

ISSN 1837-1183

This publication can be found in electronic format on the Australian Human Rights Commission's website at: www.humanrights.gov.au/human_rights.

For further information about the Australian Human Rights Commission, please visit: www.humanrights.gov.au or email: communications@humanrights.gov.au.

You can also write to:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Design and layout

Jo Clark

Printing

Breakout Design Print Web

2011

Mr Toro-Martinez v Commonwealth of Australia (Department of Immigration and Citizenship)



Report into arbitrary detention, the right of
people in detention to protection of the family
and freedom from arbitrary interference with
the family

[2011] AusHRC 44



**Australian
Human Rights
Commission**

everyone, everywhere, everyday



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

May 2011

The Hon Robert McClelland MP
Attorney General
Parliament House
Canberra ACT 2600

Dear Attorney

I attach my report of an inquiry into the complaint made pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) by Mr Toro-Martinez.

I have found that the acts and practices of the Commonwealth breached Mr Toro-Martinez's right not to be subject to arbitrary detention and his right to protection of and freedom from arbitrary interference with his family. These fundamental human rights are protected by articles 9(1), 17(1) and 23(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 19 April 2011 the Department of Immigration and Citizenship provided the following response to my findings and recommendations:

The Department's response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr Toro-Martinez

1. *That payment of compensation in the amount of \$100,000 is appropriate*

While we note your findings, in the Department's view Mr Toro-Martinez has been and continues to be detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention has not been and is not arbitrary.

Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney, NSW 1042
Telephone: 02 9284 9600 Facsimile: 02 9284 9611
Website: www.humanrights.gov.au

2. That it is appropriate that the Commonwealth provide a formal written apology to Mr Toro-Martinez for the breaches of his human rights identified in the report

The Department disagrees with this recommendation.

While there was a period of time between Mr Toro-Martinez making his request for community detention in March 2009 and the Minister's intervention in September 2009, this is not an unreasonable period of time given the complexity of the case. There is no obligation to consider a request for community detention and any residence determinations are made at the discretion of the Minister who takes a range of considerations into account. There is no formal application process for community detention.

The Department advises the Commission that there will be no action taken with regard to this recommendation.

3. That the guidelines to the Minister's residence determination power should be amended

The Department notes your recommendations regarding the guidelines for the Minister's residence determination power. Your comments will be taken into account in any future consideration that may be given to amending the section 197AB Ministerial guidelines.

Yours sincerely



Catherine Branson
President
Australian Human Rights Commission

Contents

1	Introduction	1
2	Summary	3
3	The complaint by Mr Toro-Martinez	5
	3.1 Background	5
	3.2 Findings of Fact	5
4	The Commission's human rights and inquiry and complaints function	7
	4.1 The Commission can inquire into acts or practices of the Commonwealth	7
	4.2 'Human rights' relevant to this complaint	8
	(a) Article 9(1) of the ICCPR	8
	(b) Article 17(1) and 23(1) of the ICCPR	10
5	Forming my opinion	11
6	Arbitrary detention	13
7	Interference with and protection of the family	15
8	Findings and recommendations	17
	8.1 Power to make recommendations	17
	8.2 Consideration of compensation	17
	8.3 Recommendation that compensation be paid	18
	8.4 Apology	19
	8.5 Policy	20
9	DIAC's response to the recommendations	21
	Appendix 1: Functions of the Commission	23

1 Introduction

1. This is a report of my inquiry into a complaint of breach of human rights made to the Australian Human Rights Commission (the Commission) by Mr Toro-Martinez. The complaint is made against the Commonwealth of Australia, Department of Immigration and Citizenship (DIAC).
2. This inquiry was undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. I have found that the failure by the Commonwealth from 6 November 2008 until 1 September 2009 to place Mr Toro-Martinez in a less restrictive form of detention than Villawood Immigration Detention Centre (VIDC) amounts to a breach of his right not to be arbitrarily detained.
4. I have also found that the failure to place Mr Toro-Martinez in a less restrictive form of detention amounted to arbitrary interference with his family and interfered with his right to protection of the family.

2 Summary

5. In 1989 Mr Toro-Martinez was granted a Transitional Permanent Visa. In November 1999 Mr Toro-Martinez was convicted of being knowingly concerned with the importation of a trafficable quantity of cocaine. He was sentenced to three years and six months imprisonment, which was increased on appeal to a period of six years imprisonment. In February 2002 Mr Toro-Martinez was convicted of being knowingly concerned in the importation of a commercial quantity of cocaine and was sentenced to 12 years and six months imprisonment.
6. In November 2001 Mr Toro-Martinez's visa was cancelled pursuant to s 501 of the *Migration Act 1958* (Cth) (Migration Act). In March 2007 the cancellation of Mr Toro-Martinez's visa was found to be affected by the decision in *Sales v Minister for Immigration and Multicultural Affairs*¹ and his visa was reinstated. Following amendments made to the Migration Act in March 2008, Mr Toro-Martinez's visa was again cancelled pursuant to s 501 of the Migration Act.
7. On 8 June 2008 Mr Toro-Martinez was released from prison and detained in VIDC. On 24 July 2008 Mr Toro-Martinez was found to be affected by the decision in *Sales v Minister for Immigration and Citizenship*² (Sales 2) and was released from VIDC. On 6 November 2008 Mr Toro-Martinez again became an unlawful non-citizen as a result of a change to the Migration Act and was returned to detention.
8. On 10 February 2009 Mr Toro-Martinez submitted a request to the 'DIAC Manager' at VIDC to be placed in community detention. On 23 March 2009 Mr Toro-Martinez wrote to the Minister and requested that he be placed in community detention. On 15 April 2009 DIAC acknowledged Mr Toro-Martinez's request and stated that the Minister had referred the request to DIAC for consideration. On 2 September 2009 Mr Toro-Martinez was placed in community detention.
9. I have found that Mr Toro-Martinez's detention during the almost 10 month period from 6 November 2008 to 1 September 2009 was arbitrary in breach of his right under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) not to be arbitrarily detained.

10. The Commonwealth had been aware for a substantial period of time that it was likely that Mr Toro-Martinez would enter the custody of DIAC at the conclusion of his non-parole period in June 2008. In addition, the Commonwealth had a further six weeks to consider how Mr Toro-Martinez might be detained in the least restrictive manner when he was first in DIAC custody from 8 June to 24 July 2008. I consider it was unreasonable for the Commonwealth to take nine months to place Mr Toro-Martinez in a less restrictive form of detention after he was returned to VIDC in November 2008.
11. Further, the Commonwealth claims that there was evidence before it that Mr Toro-Martinez was a threat to the community. I am not satisfied that the evidence to which the Commonwealth refers raises particularly complex considerations. There was evidence before the Minister to suggest that Mr Toro-Martinez did not pose a risk to the community; an individual who was considered to be a danger to the community would not have been granted parole and Mr Toro-Martinez resided in the community after being released from VIDC on 24 July 2008 without incident.
12. I have also found that the failure to place Mr Toro-Martinez in a less restrictive form of detention amounted to arbitrary interference with his family and with his entitlement to protection of the family in breach of articles 17(1) and 23(1) of the ICCPR.
13. As a result of his detention in VIDC, Mr Toro-Martinez was separated from his partner with whom he had only recently reunited after a long period of separation during his imprisonment. I have found that Mr Toro-Martinez's detention at VIDC from 6 November 2008 to 1 September 2009 was arbitrary. In these circumstances, I also find that the interference with Mr Toro-Martinez's family occasioned by his detention was arbitrary.
14. I have recommended that Mr Toro-Martinez be paid a total of \$100 000 in compensation and that the Commonwealth apologise to Mr Toro-Martinez. I also recommended amendments to the guidelines relating to the Minister's residence determination power, including:
 - to provide that unless DIAC is satisfied that a person in an immigration detention facility is a flight risk or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, DIAC should refer all persons to the Minister for consideration of making a residence determination as soon as practicable and in no circumstances any later than 90 days after the individual is placed in an immigration detention facility;
 - to provide expressly that the existence of a criminal record is insufficient evidence of itself that an individual poses an unacceptable risk to the Australian community.

3 The complaint by Mr Toro-Martinez

3.1 Background

15. On or about 25 April 2009 Mr Toro-Martinez made a complaint to the Commission. On 29 September 2009 the Commonwealth provided a response to the complaint.
16. Mr Toro-Martinez and the Commonwealth have also had the opportunity to respond to my tentative view dated 17 August 2010. Mr Toro-Martinez provided further submissions dated 21 September 2010 and the Commonwealth provided further submissions dated 25 October 2010.
17. Mr Toro-Martinez and the Commonwealth have also had the opportunity to respond to the Notice of my inquiry into the complaint.
18. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
19. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

3.2 Findings of Fact

20. I consider the following statements about the circumstances which have given rise to Mr Toro-Martinez's complaint to be uncontentious.
21. In 1989 Mr Toro-Martinez was granted a Transitional Permanent Visa.
22. On 26 November 1999 Mr Toro-Martinez was convicted of being knowingly concerned with the importation of a trafficable quantity of cocaine and sentenced to three years and six months imprisonment. On 7 June 2000 Mr Toro-Martinez's sentence was increased on appeal to a period of six years imprisonment.
23. On 29 November 2001 Mr Toro-Martinez's Transitional Permanent Visa was cancelled pursuant to s 501 of the Migration Act.

24. On 25 February 2002 Mr Toro-Martinez was convicted of being knowingly concerned in the importation of a commercial quantity of cocaine and was sentenced to 12 years and six months imprisonment.
25. On 13 March 2007 the cancellation of Mr Toro-Martinez's visa was found to be affected by the decision in *Sales v Minister for Immigration and Multicultural Affairs*³ and his visa was reinstated. On 10 March 2008 amendments were made to the Migration Act which affected Mr Toro-Martinez and his visa was again cancelled pursuant to s 501 of the Migration Act.
26. On 8 June 2008 Mr Toro-Martinez was released from prison and detained in VIDC.
27. On 24 July 2008 Mr Toro-Martinez was found to be affected by the decision in *Sales v Minister for Immigration and Citizenship*⁴ (Sales 2) and was released from VIDC.
28. On 6 November 2008 Mr Toro-Martinez was returned to detention as he again became an unlawful non-citizen as a result of the change in the law effected by the *Migration Legislation Amendment Act (No 1) 2008* (Cth) (Migration Amendment Act).
29. On 10 February 2009 Mr Toro-Martinez submitted a request to the 'DIAC Manager' at VIDC to be placed in community detention.
30. On 23 March 2009 Mr Toro-Martinez wrote to the Minister and requested that he be placed in community detention.
31. On 15 April 2009 Ms Alison Larkins, First Assistant Secretary, Compliance and Case Resolution Division, DIAC, acknowledged Mr Toro-Martinez's request to be placed in community detention and stated that the Minister had referred the request to DIAC for consideration.
32. On 2 September 2009 Mr Toro-Martinez was placed in community detention.

4 The Commission's human rights and inquiry and complaints function

- 33. Section 11(1)(f) of the AHRC Act gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.
- 34. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

4.1 The Commission can inquire into acts or practices of the Commonwealth

- 35. The expressions '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 under an enactment.
- 36. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.
- 37. An 'act' or 'practice' only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or its agents.
- 38. As a judge of the Federal Court in *Secretary, Department of Defence v HREOC, Burgess & Ors* (Burgess),⁵ I found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, its officers or agents and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission's human rights inquiry jurisdiction.⁶
- 39. Mr Toro-Martinez was detained in VIDC for the second time on 6 November 2008. He was detained as an unlawful non-citizen as a result of the change in the law effected by the Migration Amendment Act. He was released from VIDC when he was transferred to a residential determination accommodation arrangement on 2 September 2009.
- 40. Section 189 of the Migration Act requires the detention of unlawful non-citizens. Mr Toro-Martinez was an unlawful non-citizen and as such was required to be detained. However, the Migration Act did not require that Mr Toro-Martinez be detained in an immigration detention facility.

41. Section 197AB of the Migration Act states:
- 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).
42. 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’.⁷
43. In the period 6 November 2008 to 1 September 2009 the Minister could have approved that Mr Toro-Martinez reside in a place other than VIDC or could have made a residence determination in relation to Mr Toro-Martinez under s 197AB of the Migration Act, as he ultimately did in September 2009.
44. I consider that the Minister’s failure to place Mr Toro-Martinez in a less restrictive form of detention in the period 6 November 2008 until 1 September 2009 constitutes an act under the AHRC Act.

4.2 ‘Human rights’ relevant to this complaint

45. The expression ‘human rights’ is defined in s 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.
46. The articles of the ICCPR that are of particular relevance to this complaint are:
- Article 9(1) (prohibition on arbitrary detention);
 - Article 17(1) (prohibition against arbitrary interference with family); and article 23 (protection of family).

(a) Article 9(1) of the ICCPR

47. 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.
48. The requirement that detention not be ‘arbitrary’ is separate and distinct from the requirement that detention be lawful. In *Van Alphen v The Netherlands*,⁸ the United Nations Human Rights Committee (UNHRC) said:
- [A]rbitrariness is not to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.⁹
49. A similar view was expressed in *A v Australia*¹⁰ in which the UNHRC said:
- [T]he Committee recalls that the notion of ‘arbitrariness’ must not be equated with ‘against the law’ but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of

proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.¹¹

50. In *Kwok v Australia*¹² the UNHRC said:

With respect to the claim that the author was arbitrarily detained, in terms of article 9, paragraph 1, prior to her release into community detention, the Committee recalls its jurisprudence that, in order to avoid characterization of arbitrariness, detention should not continue beyond the period for which the State can provide appropriate justification. In the present case, the author's detention as an unlawful non-citizen continued, in mandatory terms, for four years until she was released into community detention. While the State party has advanced general reasons to justify the author's detention, the Committee observes that it has not advanced grounds particular to her case which would justify her continued detention for such a prolonged period. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends.¹³

51. In *MIMIA v Al Masri*,¹⁴ the Full Federal Court stated that article 9(1) requires that arbitrariness is not to be equated with 'against the law' but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust.¹⁵

52. This broad view of arbitrariness has also been applied in the case of *Manga v Attorney-General*,¹⁶ where Hammond J concluded that:

The essence of the position taken in the tribunals, the case law, and the juristic commentaries is that under [the ICCPR] all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability and proportionality.

It has also been convincingly demonstrated that the reason for the use of the word 'arbitrary' in the drafting of the international covenant was to ensure that both 'illegal' and 'unjust' acts are caught. The (failed) attempts to delete the word 'arbitrary' in the evolution of art 9(1), and replace with the word 'illegal' are well documented.¹⁷

53. In another New Zealand case dealing with arbitrary arrest and detention, *Neilsen v Attorney-General*,¹⁸ it was held that:

An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.¹⁹

54. In the context of the European Convention on Human Rights, a broad view has also been taken as to the scope of the term arbitrary. The European Court of Human Rights has held that:

[I]t is a fundamental principle that no detention which is arbitrary can be compatible with [article] 5(1) and the notion of 'arbitrariness' in [article] 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.²⁰

55. The Court further held that 'one general principle established in the case law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities'.²¹

(b) Articles 17(1) and 23(1) of the ICCPR

56. I have considered whether Mr Toro-Martinez’s continued detention in VIDC has interfered with his family pursuant to articles 17 and 23 of the ICCPR.
57. Article 17(1) of the ICCPR provides:
No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
58. Article 23(1) provides:
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
59. Professor Manfred Nowak has noted that:
[T]he significance of Art. 23(1) lies in the protected existence of the institution “family”, whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.²²
60. For the reasons set out in Australian Human Rights Commission Report 39²³ I consider that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of article 23(1).
61. In its General Comment on a 17(1), the UNHRC confirmed that a lawful interference with a person’s family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.²⁴
62. It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness.²⁵ In relation to the meaning of ‘reasonableness’, the UNHRC stated in *Toonen v Australia*:²⁶
The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁷
63. The relevant issue is whether there was an arbitrary interference with Mr Toro-Martinez’s family life. There is no clear guidance in the jurisprudence of the UNHRC as to whether a particular threshold is required in establishing that an act or practice constitutes an ‘interference’ with a person’s family.

5 Forming my opinion

64. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have carefully considered all of the information provided to me by both of the parties, including the submissions received from the parties in response to my tentative view.

6 Arbitrary detention

65. Mr Toro-Martinez claims that his detention in VIDC from 6 November 2008 until 1 September 2009 was arbitrary.
66. The Commonwealth disagrees that Mr Toro-Martinez's detention was arbitrary. It claims that determining whether a detainee should be placed in community detention involves a delicate balancing of competing considerations. The Commonwealth also states that the law places a considerable responsibility for the safety of the Australian community on the Minister and DIAC when considering a request to be placed in community detention.
67. The Commonwealth claims that given these factors and having regard to the processes in place for referring requests to be placed in community detention to the Minister, it was not unreasonable for the Commonwealth to take over 9 months to place Mr Toro-Martinez in community detention. Accordingly, the Commonwealth claims that Mr Toro-Martinez's detention during this period was not arbitrary.
68. Mr Toro-Martinez was first convicted of criminal offences in 1999 and his visa was cancelled pursuant to s 501 of the Migration Act in November 2001. Notwithstanding that there was some uncertainty about Mr Toro-Martinez's immigration status between March 2007 and March 2008 as a result of the *Sales* decision, the Commonwealth had been aware for a substantial period of time that it was likely that Mr Toro-Martinez would enter the custody of DIAC at the conclusion of his non-parole period in June 2008.
69. In addition, the Commonwealth had a further six weeks to consider how Mr Toro-Martinez might be detained in the least restrictive manner when he was first in the custody of DIAC from 8 June 2008 until 24 July 2008. Given these circumstances, I consider that it was unreasonable for the Commonwealth to take nine months to place Mr Toro-Martinez in a less restrictive form of detention after he was returned to VIDC in November 2008.
70. The Commonwealth claims that assessing whether Mr Toro-Martinez should be placed in community detention took some time because there was evidence before the Minister and DIAC which suggested that Mr Toro-Martinez was a threat to the community. The Commonwealth refers to comments made when Mr Toro-Martinez was sentenced such as that Mr Toro-Martinez had 'absolutely no regard to the harm that dissemination of cocaine causes to the community ...' and that 'there is absolutely no contrition and his prospects for rehabilitation appear bleak.'²⁸

71. Mr Toro-Martinez was convicted of several serious criminal offences. The remarks referred to above were made in the context of sentencing him for these crimes and were made at least seven years before the Minister came to consider Mr Toro-Martinez's request to be placed in community detention.
72. The Commonwealth also refers to the Psychological Report for the Pre-Release Leave Committee which is dated 18 March 2008 and was written at the request of the Classification Coordinator at Cessnock Correctional Centre. This report states that 'there is credible evidence of reform and rehabilitation' but that '(t)he effect of that evidence is weakened, however, by his refusal, for no acceptable reason, to accept responsibility for his major offence'. The report further states '(t)he period covered by his criminal activity was short, but it occurred when he was a man of mature age old enough to know better. The offences were also of a planned and calculated nature motivated by financial gain'.
73. Whilst this report expresses some reservations about the extent to which Mr Toro-Martinez has been rehabilitated, it did not prevent Mr Toro-Martinez from being granted parole at the conclusion of his nonparole period. An individual who was considered to be a danger to the community would not have been granted parole.
74. Further, there was evidence before the Minister which suggested that Mr Toro-Martinez did not pose a risk to the community. After being released from VIDC on 24 July 2008 Mr Toro-Martinez resided in the community without incident. In addition, when the law changed and he was required to return to VIDC, he did so voluntarily.
75. It was also open to the Commonwealth to place Mr Toro-Martinez in community detention subject to conditions such as a curfew or reporting requirements. It is unclear why any concerns that the Commonwealth had about the potential risk that Mr Toro-Martinez might have posed to the community would not have been mitigated by the imposition of such conditions.
76. I am not satisfied that the evidence to which the Commonwealth refers in relation to Mr Toro-Martinez's potential threat to the community raises particularly complex considerations. Further, information such as the remarks of the judges that sentenced Mr Toro-Martinez had been available to the Commonwealth for a number of years.
77. It was not reasonable for the Commonwealth to take over nine months to place Mr Toro-Martinez in community detention considering that it had known for a substantial period of time that it was likely that Mr Toro-Martinez would be entering the custody of DIAC in June 2008. The Commonwealth also had the six week period from 8 June 2008 to 24 July 2008 when Mr Toro-Martinez was first placed in VIDC to determine how he could be least restrictively detained. Accordingly, I find that Mr Toro-Martinez's detention during the almost 10 month period from 6 November 2008 to 1 September 2009 was arbitrary in breach of article 9 of the ICCPR.

7 Interference with and protection of the family

78. It is also claimed that Mr Toro-Martinez's detention in VIDC interfered with his family. Mr Toro-Martinez advises that whilst he was detained in VIDC he was separated from his partner (who is now his wife) and his adult daughter.
79. The Commonwealth claims that the time taken to resolve the complex balance between Mr Toro-Martinez's rights regarding his familial relationships with Australian citizens on one hand and his serious criminal history on the other, was legitimate and justifiable.
80. In considering whether any interference with Mr Toro-Martinez's family was arbitrary, I must consider whether it was reasonable, and proportionate to DIAC's legitimate aim of ensuring that non-citizens who pose a risk to the community are not released into the community.
81. As a result of his detention in VIDC on 6 November 2008 Mr Toro-Martinez was again separated from his partner from whom he had been separated for approximately 10 years whilst he was in prison. Mr Toro-Martinez lived with his partner in the three months that he was released from VIDC as a result of the *Sales 2* decision. The effect of detaining him in VIDC on 6 November 2008 was to again separate him from his partner with whom he had only recently reunited after a long period of separation.
82. I have found that Mr Toro-Martinez's second period of detention at VIDC for the almost 10 month period from 6 November 2008 until 1 September 2009 was arbitrary. I have found that it was unreasonable for the Commonwealth to take nine months to resolve its concerns about the potential risk posed to the community by Mr Toro-Martinez given that it was on notice that Mr Toro-Martinez would enter the custody of DIAC in June 2008 and when it had had Mr Toro-Martinez's first period in VIDC (from 8 June 2008 to 24 July 2008) to determine how to detain Mr Toro-Martinez in the least restrictive manner.
83. In these circumstances, I also find that the interference with Mr Toro-Martinez's family occasioned by his detention was arbitrary.

8 Findings and recommendations

8.1 Power to make recommendations

84. 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.²⁹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.³⁰
85. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.³¹

8.2 Consideration of compensation

86. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
87. However, in considering the assessment of a recommendation for compensation under s 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.³²
88. 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.³³
89. 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 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.
90. 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.

91. 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).³⁴
92. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case.
93. In *Taylor v Ruddock*,³⁵ the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in New South Wales prisons.
94. Although the award of the District Court was ultimately set aside by the High Court, it provides a useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.
95. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him \$50 000 for the first period of 161 days and \$60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of \$110 000.
96. In awarding Mr Taylor \$110 000 the District Court 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.³⁶
97. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.³⁷ The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.³⁸
98. In *Goldie v Commonwealth of Australia & Ors (No 2)*³⁹ Mr Goldie was awarded damages of \$22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.
99. In *Spautz v Butterworth*⁴⁰ Mr Spautz was awarded \$75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement.
100. In Australian Human Rights Commission Report 41⁴¹ I recommended that the Commonwealth should pay the complainant \$90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention.

8.3 Recommendation that compensation be paid

101. I have found that on 6 November 2008, rather than being placed in VIDC, Mr Toro-Martinez should have been allowed to remain in the community in community detention. The failure to place Mr Toro-Martinez in community detention on 6 November 2008 was inconsistent with his right not to be arbitrarily detained in breach of article 9 (1) of the ICCPR. It has also interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

102. In submissions made on behalf of Mr Toro-Martinez on the issue of compensation, it is submitted that because of the breaches of article 17 and 23, the appropriate quantum in this case would be higher than the amount that I recommended in Australian Human Rights Commission Report 41.⁴²
103. These submissions state:
- Compensation should be awarded in an amount greater than that awarded in El Masri, given the lengthier detention, Mr Toro-Martinez's reformed character, and the additional breaches of Articles 17 and 23 of the ICCPR. The interference with Mr Toro-Martinez's family was particularly acute where he had finally been reunited with his then fiancé, now wife, having been separated for 10 years, only then to be re-detained a mere 3 months later.
104. DIAC contended that it was not appropriate for me to apply a 'daily rate' to determine a recommendation for compensation. DIAC noted that in common law proceedings, the quantum of damages for matters such as pain and suffering is tested on the basis of submissions from both parties on these issues.
105. I consider that the Commonwealth should pay to Mr Toro-Martinez an amount of compensation to reflect the loss of liberty caused by his detention at VIDC, rather than in community detention, and the consequent interference with his family. Had Mr Toro-Martinez been placed in community detention on 6 November 2008 it is likely that he would have experienced some curtailment of his liberty as a result of the imposition of conditions on which he would be allowed to reside in the community. I have taken this into account when assessing his compensation.
106. I have also taken into account the fact that Mr Toro-Martinez's detention in VIDC followed directly from a lengthy period of imprisonment within the New South Wales Correctional system. In this regard, I note the statement in *Ruddock v Taylor*, that 'as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish'.⁴³
107. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of \$100 000 is appropriate.

8.4 Apology

108. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Toro-Martinez for the breaches of his human rights. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.⁴⁴

8.5 Policy

109. I consider that the guidelines relating to the Minister's residence determination power should be amended to provide that unless DIAC is satisfied that a person in an immigration detention facility is a flight risk or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, DIAC should refer all persons to the Minister for consideration of making a residence determination. DIAC should make the referral as soon as practicable, and in no circumstances any later than 90 days, after the individual is placed in an immigration detention facility.
110. I consider that the guidelines should require that a decision by DIAC not to refer a person to the Minister for consideration of making a residence determination should be a decision that is made after an individualised assessment of the person's circumstances and based on reliable and documented evidence. The guidelines should expressly provide that the existence of a criminal record is insufficient evidence of itself that an individual poses an unacceptable risk to the Australian community.

9 DIAC's response to the recommendations

111. On 29 March 2011 I provided a Notice under s 29(2)(1) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr Toro-Martinez against the Commonwealth (DIAC).
112. By letter dated 19 April 2011 the Department of Immigration and Citizenship provided the following response to my findings and recommendations:

The Department's response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr Toro-Martinez

1. That payment of compensation in the amount of \$100,000 is appropriate

While we note your findings, in the Department's view Mr Toro-Martinez has been and continues to be detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention has not been and is not arbitrary.

Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.

2. That it is appropriate that the Commonwealth provide a formal written apology to Mr Toro-Martinez for the breaches of his human rights identified in the report

The Department disagrees with this recommendation.

While there was a period of time between Mr Toro-Martinez making his request for community detention in March 2009 and the Minister's intervention in September 2009, this is not an unreasonable period of time given the complexity of the case. There is no obligation to consider a request for community detention and any residence determinations are made at the discretion of the Minister who takes a range of considerations into account. There is no formal application process for community detention.

The Department advises the Commission that there will be no action taken with regard to this recommendation.

3. That the guidelines to the Minister's residence determination power should be amended

The Department notes your recommendations regarding the guidelines for the Minister's residence determination power. Your comments will be taken into account in any future consideration that may be given to amending the section 197AB Ministerial guidelines.

113. I report accordingly to the Attorney-General.



Catherine Branson
President
Australian Human Rights Commission
May 2011

Appendix 1

.....

Functions of the Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the AHRC Act. Part II Divisions 2 and 3 of the AHRC Act confer functions on the Commission in relation to human rights. In particular, section 11(1)(f) of the AHRC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the AHRC Act.

Section 11(1)(f) of the AHRC Act states:

- (1) The functions of the Commission are:
 - ...
 - (f) 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.

Section 3 of the AHRC Act defines an ‘act’ or ‘practice’ as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in section 11(1)(f) of the AHRC Act upon the Attorney-General’s request, when a complaint is made in writing or when the Commission regards it desirable to do so (section 20(1) of the AHRC Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in section 10A of the AHRC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the AHRC Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Attorney-General until it has given the respondent to the complaint an opportunity to make written and/or oral submissions in relation to the complaint (section 27 of the AHRC Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (section 29(2)(a) of the AHRC Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (sections 29(2)(b) and (c) of the AHRC Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (sections 29(2)(d) and (e) of the AHRC Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with section 46 of the AHRC Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (section 20(2) of the AHRC Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (section 20(2)(c)(v) of the AHRC Act).

1 [2006] FCA 1807.
2 [2008] FCAFC 132.
3 [2006] FCA 1807.
4 [2008] FCAFC 132.
5 (1997) 78 FCR 208.
6 Ibid [215].
7 *Migration Act 1958* (Cth), s 5.
8 Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.
9 Ibid [5.8].
10 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.
11 Ibid [9.2].
12 Communication No 1442/2005, UN Doc CCPR/C/97/D/144/2005.
13 Ibid [9.3].
14 (2003) 126 FCR 54.
15 Ibid [152].
16 [2000] 2 NZLR 65.
17 Ibid [40], [41], references listed at [41], [42].
18 [2001] 3 NZLR 433.
19 Ibid [34].
20 *Saadi v United Kingdom* [2008] ECHR 80, [67].
21 Ibid [69].
22 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, (2nd ed, 2005) 518.
23 Australian Human Rights Commission, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2007] AusHRC 39, [80]-[88].
24 United Nations Human Rights Committee, General Comment 16 (Thirty-second session, 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), [4].
25 S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004), 482-3.
26 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992.
27 Ibid [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
28 The Department's Response on behalf of the Commonwealth of Australia to the AHRC's Tentative Views on the case of Mr Alejandro Toro-Martinez, received by the Commission on 25 October 2010.
29 AHRC Act s 29(2)(a).
30 AHRC Act s 29(2)(b).
31 AHRC Act s 29(2)(c).
32 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
33 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
34 *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].
35 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
36 Ibid, [140].
37 [2003] NSWCA 262 [49]-[50].
38 Ibid, [49].
39 [2004] FCA 156.
40 (1996) 41 NSWLR 1 (Clarke JA).
41 [2009] AusHRC 41 at para 376.
42 Ibid.
43 (2003) 58 NSWLR 269 [49].
44 D Shelton, *Remedies in International Human Rights Law*, (2000), 151.

Further Information

Australian Human Rights Commission

Level 3 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the Australian Human Rights Commission visit our website at: www.humanrights.gov.au

To order more publications from the Australian Human Rights Commission download a Publication Order Form at: www.humanrights.gov.au/about/publications/index.html
or call: (02) 9284 9600, fax: (02) 9284 9611
or e-mail: publications@humanrights.gov.au

*Mr Toro-Martinez v
Commonwealth of Australia
(Department of Immigration
and Citizenship)*

[2011] AusHRC 44

.....



**Australian
Human Rights
Commission**

everyone, everywhere, everyday