



Australian
Human Rights
Commission

Bam v
Commonwealth of
Australia (DIBP)

[2016] AusHRC 108

© Australian Human Rights Commission 2016.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication and endorses the use of the [Australian Governments Open Access and Licensing Framework](#) (AusGOAL).



All material presented in this publication is licensed under the **Creative Commons Attribution 4.0 International Licence**, with the exception of:

- the Commission's logo, any branding or trademarks; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

Please give attribution to:

© Australian Human Rights Commission 2016.

ISSN 1837-1183

Further information

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600
Email: communications@humanrights.gov.au.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

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

[2016] AusHRC 108

Report into arbitrary detention

Australian Human Rights Commission 2016



Contents

1	Introduction to this inquiry	2
2	Background	2
3	Legislative framework	4
	3.1 Functions of the Commission	4
	3.2 What is an 'act' or 'practice'?	4
	3.3 What is a human right?	4
4	Arbitrary detention	5
	4.1 Law	5
	4.2 Act or practice of the Commonwealth?	6
	4.3 The Department's reasons	7
	4.4 Finding	8
5	Recommendations	11
	5.1 Compensation	11
	5.2 Apology	14
6	The Department's response	14



Australian
Human Rights
Commission

October 2016

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 made by Mr Deepak Bam against the Commonwealth of Australia, Department of Immigration and Border Protection (the Department).

I have found that the Department's failure to refer Mr Bam's case to the Minister for consideration for a residence determination or a visa during the approximate three and a half years he was detained in the Villawood Immigration Detention Centre was arbitrary and contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

In light of my findings, I recommended that the Commonwealth pay to Mr Bam appropriate compensation in relation to his period of arbitrary detention. In addition, the Commonwealth should provide a formal written apology to Mr Bam in relation to this period of arbitrary detention.

By letter dated 30 June 2016 the Department provided a response to my findings and recommendations. I have set out the Department's response in part 6 of this report.

I enclose a copy of my report.

Yours sincerely,

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (the Commission) following an inquiry into a complaint by Mr Deepak Bam against the Commonwealth of Australia – (Department of Immigration and Border Protection) (the Department) alleging a breach of his human rights.
2. Mr Bam complains that his detention in the Villawood Immigration Detention Centre (VIDC) from 7 June 2012 to 26 November 2015 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
3. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. As a result of the inquiry, I find that the Department's failure to refer Mr Bam's case to the Minister to consider whether to grant Mr Bam a residence determination under section 197AB of the *Migration Act 1958* (Cth) (Migration Act) during the three and a half years he was detained was inconsistent with article 9 of the ICCPR.
5. I have recommended that:
 - The Commonwealth pay to Mr Bam appropriate compensation in relation to his period of arbitrary detention.
 - The Commonwealth provide a formal written apology to Mr Bam in relation to his period of arbitrary detention.

2 Background

6. Mr Bam is a Nepalese national who arrived in Australia on 22 October 2007 on a Vocational Education and Training Sector (TU-572) visa (student visa). The student visa was subject to conditions including 8101 (no work), 8202 (meet course requirements), 8516 (must maintain eligibility) and 8533 (inform provider of address).
7. On 1 November 2007, Mr Bam was granted a further student visa, which was valid until 3 May 2010. He was also granted permission to work.

8. On 3 May 2010, Mr Bam applied for a further student visa. He was granted an associated Bridging A visa while his student visa application was processed, which had condition 8105 imposed (limited work). On 4 June 2010, Mr Bam was granted a further student visa, which was valid until 14 May 2012 and subject to the conditions 8105 (limited work), 8202 (meet course requirements), 8516 (maintain eligibility), and 8533 (inform Provider of Address).
9. Mr Bam ceased studying in May 2011, which was in breach of his visa conditions. On 5 May 2012, his Confirmation of Enrolment (COE) was cancelled by the education provider for non-payment of fees. Mr Bam also changed address without notifying the Department. Mr Bam had been working part-time for a printing company and a binding company. Mr Bam's student visa expired on 14 May 2012.
10. Mr Bam claims that he presented himself to the Sydney Immigration Office on 7 June 2012. He claims that he was told to apply for a further student visa and was given a form to do this. The Department, however, has no record of him doing this. Later that day, Mr Bam was located by City Central Police for travelling without a train ticket. As Mr Bam did not have a valid visa at the time, he was taken to City Central Police Station where he was interviewed by departmental officers. Mr Bam was then detained under section 189(1) of the Migration Act and transferred to the VIDC.
11. On 2 July 2012, while in detention, Mr Bam applied for a protection visa. He later withdrew this application as he wished to proceed with a student visa application. On 2 August 2012, Mr Bam lodged another application for a protection visa.
12. He applied for an associated bridging visa E (BVE) on 3 August 2012. On 6 August 2012, the Department refused to grant Mr Bam a BVE because it was not satisfied that he would abide by conditions 8101 (no work), 8401 (reporting obligations), 8505 (live at specified address) and 8506 (notify change of address). On 16 August 2012, the Migration Review Tribunal affirmed the Department's decision to refuse Mr Bam a BVE.
13. On 23 August 2012, Mr Bam's second protection visa application was refused and Mr Bam appealed this decision to the Refugee Review Tribunal. On 7 January 2013, the Refugee Review Tribunal affirmed the Department's refusal to grant Mr Bam a protection visa. Mr Bam unsuccessfully challenged this decision before the Federal Circuit Court and the Federal Court.

14. On 24 September 2013, Mr Bam applied for another BVE. This application was refused on 26 September 2013. On 9 October 2013, the Migration Review Tribunal affirmed the Department's second refusal to grant Mr Bam a BVE.
15. On 14 July 2015, Mr Bam married while in detention.
16. Mr Bam was released from immigration detention on 26 November 2015 – after approximately three and a half years. He was initially released on a BVE on the condition that he lodge an application for a substantive visa within two weeks. Mr Bam lodged an application for a Partner visa on 8 December 2015 and was granted an associated BVE on the same day. Mr Bam now resides lawfully in the community.

3 Legislative framework

3.1 Functions of the Commission

17. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
18. 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.

3.2 What is an 'act' or 'practice'?

19. 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.
20. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
21. 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, that is, where the relevant act or practice is within the discretion of the Commonwealth.¹

3.3 What is a human right?

22. The phrase 'human rights' is defined by section 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.

23. 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.

4 Arbitrary detention

24. Mr Bam complains that he was in detention for too long. This raises for consideration whether his detention in the VIDC was 'arbitrary' in a manner inconsistent with article 9(1) of the ICCPR.

4.1 Law

25. 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;²

(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;³

(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;⁴ and

(d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵

26. 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.⁶

27. 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.⁷

28. The UNHRC has recently stated:

[a]sylum-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 absent particular reasons specific to the individual, such as an individualised likelihood of absconding, danger of crimes against others, or risk of acts against national security.⁸

4.2 Act or practice of the Commonwealth?

29. Mr Bam was detained in the VIDC pursuant to section 189(1) of the Migration Act. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. When Mr Bam was located by the police on 7 June 2012, he did not have a valid visa. Therefore, he was at that time an unlawful non-citizen and the Migration Act required that he be detained.

30. However, under section 197AB of the Migration Act, the Minister has the power to grant a residence determination which would have enabled Mr Bam to be detained in a less restrictive manner than in an immigration detention centre.

31. 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).

32. 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'.⁹

33. Throughout Mr Bam's three and a half year period of detention, the Department did not refer Mr Bam's case to the Minister for the consideration of his discretionary power under section 197AB of the Migration Act. The Department informed the Commission that it considered whether to refer Mr Bam's case to the Minister, however, on 28 April 2015, the Department assessed Mr Bam's case as not meeting the guidelines for referral.

34. I find that the Department's failure to refer Mr Bam's case to the Minister to consider whether to grant Mr Bam a residence determination under section 197AB of the Migration Act constitutes an act within the meaning of the AHRC Act.

4.3 The Department's reasons

35. When the Commission asked the Department the reason for Mr Bam's detention in an immigration detention centre, the Department responded on 30 July 2014 that:

Mr Bam, detained under section 189(1) of the Act as an unlawful non-citizen, was and remains accommodated in VIDC. Under section 196(1) of the Act, an unlawful non-citizen detained under s189 must be kept in immigration detention until they are removed, deported or granted a visa.

Mr Bam has not satisfied departmental and review tribunal delegates that he would comply with visa conditions if granted a further visa. Mr Bam has not presented with any significant health or welfare issues that cannot be addressed in the VIDC.

36. When the Commission asked the Department whether less restrictive detention options had been canvassed for Mr Bam, the Department responded:

Less restrictive options have been canvassed for Mr Bam but were not viable. Mr Bam has a history of non-compliance with his visa conditions. Mr Bam stated he ceased studying in May 2011, which was in breach of his visa conditions, and on 5 May 2012 his Confirmation of Enrolment (COE) was cancelled by the education provider for non-payment of fees. Mr Bam stated in his interview for a BVE on 6 August 2012, that he had no money and depended on borrowing money from others to support himself. The delegate therefore, was not satisfied that Mr Bam would comply with the 'no work' condition on this visa. The Migration Review Tribunal later affirmed this decision on 16 August 2012. Mr Bam lodged another BVE in September 2013 and a similar finding and Migration Review Tribunal affirmation was made.

37. On 19 November 2015, I issued a preliminary view to the Department stating that the Department's failure to refer Mr Bam's case to the Minister for consideration of his discretionary powers under section 197AB of the Migration Act for a period of nearly three and a half years was disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system and was inconsistent with the right to liberty recognised in article 9 of the ICCPR.

38. The Department responded to my preliminary view by stating that on 28 April 2015, it assessed Mr Bam's case against the "Guidelines on the Minister's Residency Determination Power under section 197AB and section 197AD of the Act". On this occasion, the Department determined that Mr Bam's case was not one that required referral to the Minister. The Guidelines the Department was referring to came into operation on 29 March 2015 and state that the Minister will consider single adults if they have any of the following circumstances:
- Disabilities or congenital illnesses requiring ongoing intervention;
 - Diagnosed Tuberculosis where supervision of medication dispensing is required;
 - Ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention;
 - Elderly detainees requiring ongoing intervention; or
 - Cases where there are unique or exceptional circumstances.
39. The Department informed the Commission that while the International Health and Medical Services advised that Mr Bam had been diagnosed with some physical and mental health issues; there was nothing indicating that he presented with any ongoing illnesses that required ongoing medical intervention.
40. Relevantly, the 2015 Guidelines also set out the types of cases which the Minister had indicated should generally not be referred for consideration under section 197AB of the Migration Act. These circumstances include where a person has had their asylum claims rejected at primary and review stages. The Department advised that as Mr Bam had had his applications for a Protection and Bridging visa refused and these decisions were upheld on merits review, he fell within the category of cases that would not be referred to the Minister for consideration under section 197AB of the Migration Act (unless there were exceptional reasons).

4.4 Finding

41. Having considered all the material before me, I am not satisfied that Mr Bam's detention in an immigration detention centre for a period of three and a half years was necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.

42. I acknowledge that both the Department and the Migration Review Tribunal had 'serious concerns' that Mr Bam would 'seek to remain concealed within the community if his protection visa application was not successful'.¹⁰ These concerns were based on the fact that Mr Bam had lived in Australia unlawfully for a period of time; had breached his visa conditions and had a very strong desire to not leave Australia. In my view, this individualised assessment of likelihood of Mr Bam absconding was an appropriate matter for the Department to consider in assessing whether to refer Mr Bam's case to the Minister for consideration of less restrictive alternatives to detention.
43. However, Mr Bam continued to challenge the visa decisions that went against him, and his detention became protracted. Accordingly, it was necessary for the Department to assess all the circumstances of Mr Bam's case and consider whether the deprivation of his liberty had become unreasonable or disproportionate to the Commonwealth's legitimate aim of managing individuals who may pose a flight risk.
44. While it is apparent that Mr Bam breached his visa conditions, this does not necessarily mean that Mr Bam represented a risk of absconding sufficient to detain Mr Bam in an immigration detention centre for a period of three and a half years. Mr Bam breached the study conditions on his student visa (by ceasing study and failing to pay course fees) and failed to notify the Department of a change of address. The Migration Review Tribunal also concluded that Mr Bam continued to work after his student visa expired. In my view, this conduct does not necessarily mean that he would be forever incapable of reporting to immigration officials or residing at a specified address.
45. The Migration Review Tribunal accepted that Mr Bam sought information about his situation and had visited the Department on the day he was located to obtain advice about a student visa application. This indicates a degree of willingness to co-operate with immigration procedures. Mr Bam married in July 2015 indicating there was financial and housing support available for him in the community from that time. Further, there is no evidence that Mr Bam posed a risk to the Australian community. I note that he had lived in the Australian community for almost 5 years without incident. While I note that Mr Bam did travel without a ticket on public transport, this offence is minor. I also understand that Mr Bam was not involved in any significant incidents whilst in detention.

46. The Department's submission in response to my preliminary view states that on 28 April 2015, it assessed Mr Bam's case against the 2015 Guidelines and found that his case fell within the category of cases that would not be referred to the Minister for his consideration of making a residence determination under section 197AB of the Migration Act because he had had his asylum claim rejected at primary and review stages.
47. However, it appears that there was scope to bring Mr Bam's case within the Guidelines for referral to the Minister for consideration of the exercise of his residence determination power.
48. The Guidelines on the Minister's Residency Determination Power under section 197AB and section 197AD of the Act in force up until 17 February 2014 did not state that cases where a person has had their asylum claims rejected at primary and review stages should not be referred to the Minister. This criteria was included in the Guidelines for the first time on 18 February 2014.
49. Furthermore, throughout the whole period of Mr Bam's detention, cases could still be referred to the Minister under the relevant Guidelines where there were 'unique or exceptional circumstances'. None of the Guidelines on the Minister's Residency Determination Power under section 197AB of the Migration Act in force during Mr Bam's detention define the phrase 'unique or exceptional circumstances', however this phrase is defined in similar guidelines relating to the Minister's power to grant visas in the public interest. In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
 - Circumstances that may bring Australia's obligations as a party to the ICCPR into consideration; and
 - The length of time the person has been present in Australia (including time spent in detention).
50. As stated above, I find that Mr Bam's detention in an immigration detention centre for a period of three and a half years for a breach of the conditions of his student visa was disproportionate to the Commonwealth's legitimate aim of managing individuals who may be a flight risk and ensuring the effective operation of Australia's migration system. In my view, the length of his detention and the lack of proportionality were relevant to an assessment of whether his case presented 'unique or exceptional circumstances' for the purposes of the Guidelines.
51. It is also apparent that Mr Bam was not released from detention for a period of four months following his marriage on 14 July 2015. In my view, his change in personal circumstances should have triggered an immediate re-consideration of whether Mr Bam's detention was still necessary.

52. I note that the Department informed the Commission that Mr Bam was ultimately released from detention on 26 November 2015 on a BVE after considering the length of time he had already spent in detention, his lack of criminal history or events of significance in detention, his intention to abide by all conditions set by the Department, that given his marriage he would not hide and that he has strong community support in respect of accommodation, food and other living requirements.
53. I find that the Department's failure to refer Mr Bam's case to the Minister to consider whether to grant Mr Bam a residence determination under section 197AB of the Migration Act during his period of detention was inconsistent with article 9 of the ICCPR.

5 Recommendations

54. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹¹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹² The Commission may also recommend:
- The payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - Other action to remedy or reduce the loss or damage suffered by a person.¹³

5.1 Compensation

55. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
56. 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.¹⁴
57. 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.¹⁵

(a) Compensation

58. I have been asked to consider compensation for Mr Bam being arbitrarily detained in contravention of article 9(1) of the ICCPR.
59. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful authority for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary, irrespective of legality.
60. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR. 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.
61. The principle 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).¹⁶
62. In the case of *Fernando v Commonwealth of Australia (No 5)*,¹⁷ 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*:¹⁸
- 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 recognised 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.¹⁹
63. 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).²⁰ In that case at first instance,²¹ 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.

64. 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'.
65. 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.²²
66. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.²³ Spigelman CJ also observed that:
- Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested". (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.²⁴
67. 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 the inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.²⁶

(b) Recommendation that compensation be paid

68. I have found that the Department's failure to refer Mr Bam's case to the Minister to consider whether to grant Mr Bam a residence determination under section 197AB of the Migration Act was inconsistent with article 9 of the ICCPR. As a result, Mr Bam's detention in the VIDC was arbitrary within the meaning of article 9(1) of the ICCPR.
69. I note Mr Bam had not been previously imprisoned in Australia and would have felt the disgrace and humiliation experienced by a person of good character.
70. I consider that the Commonwealth should pay to Mr Bam an appropriate amount of compensation to reflect the loss of liberty caused by his detention in accordance with the principles outlined above.

5.2 Apology

71. I also consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Bam. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁷

6 The Department's response

72. On 24 May 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.
73. By letter dated 30 June 2016 the Department provided the following response to my findings:

Response to Recommendation 1

The Department notes the finding and recommendation of the AHRC in this case.

The Department maintains that Mr Bam's immigration detention was lawful and carried out in accordance with applicable statutory procedure prescribed under the *Migration Act 1958*.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2005*. The *Legal Services 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 Bam's detention was lawful and that the decisions and processes were appropriate having regard to their circumstances. The Department therefore considers that there is no meaningful prospect of liability being established against the Commonwealth under Australian domestic law and, as such, no proper legal basis to consider a payment of compensation to Mr Bam.

Although there are limited circumstances in which the Government 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 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.

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

Response to Recommendation 2

The Department notes the recommendation of the AHRC in this case.

Given the Department's view that Mr Bam's detention was lawful and that decisions and processes were lawful having regard to their circumstances, the Commonwealth is not satisfied of the need for a formal written apology to be made to Mr Bam.

Accordingly, the Department advises the AHRC that it will not be taking action in relation to this recommendation.

74. I report accordingly to the Attorney-General.

Gillian Triggs
President
Australian Human Rights Commission
October 2016

Endnotes

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 2 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.
- 3 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 4 *Manga v Attorney-General* [2000] 2 NZLR 65 at [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.
- 5 *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.
- 6 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 7 *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.
- 8 *F.K.A.G. et al. v Australia*, Communication No 2094/2011 UN Doc CCPR/C/108/D/2094/2011.
- 9 *Migration Act 1958* (Cth), s 5.
- 10 MRT Case Number 1211722, 11 [49].
- 11 AHRC Act, s 29(2)(a).
- 12 AHRC Act, s 29(2)(b).
- 13 AHRC Act, s 29(2)(c).
- 14 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 15 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 16 *Cassel & 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].
- 17 [2013] FCA 901.
- 18 [2003] NSWSC 1212.
- 19 [2013] FCA 901, [121].
- 20 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 21 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 22 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140].
- 23 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 24 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 25 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] FCA901 [98]-[99].
- 26 *Fernando v Commonwealth of Australia* (No 5) [2013] FCA901, [139].
- 27 D Shelton, *Remedies in International Human Rights Law* (2000), 151.