



Australian
Human Rights
Commission

Mordechai v Commonwealth of Australia (DIBP)

[2014] AusHRC 76

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

Report into arbitrary detention

[2014] AusHRC 76

Australian Human Rights Commission 2014



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**Australian
Human Rights
Commission**

June 2014

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

Dear Attorney

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

I have found that the failure of the Department to provide Mr Mordechai with his required medications, over the course of approximately three days, was inconsistent with his right as a detained person to be treated with humanity and respect for his dignity, in breach of article 10(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 16 May 2014, the Department provided a response to my findings and recommendations. I have set out the Department's response in Part 9 of my 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

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings, following an inquiry by the Commission into a complaint lodged by Mr Moshe Mordechai.
2. Mr Mordechai alleges that his treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to his human rights under the *International Covenant on Civil and Political Rights* (ICCPR).

2 Summary of findings

3. I find that the failure of the Department to provide Mr Mordechai with his required medications, over the course of approximately three days, was inconsistent with his right as a detained person to be treated with humanity and respect for his dignity, in breach of article 10(1) of the ICCPR.

3 Recommendations

4. In light of my findings regarding the acts of the Commonwealth, I recommend that the Commonwealth pay compensation to Mr Mordechai in the amount of \$4,000.

4 The complaint by Mr Mordechai

5. Mr Mordechai lived in Australia from about 1999 on a range of visas. In early 2011, Mr Mordechai's visa expired and he was refused a further visa. Mr Mordechai has a number of medical conditions including epilepsy, diabetes, a mood disorder, high cholesterol and angina.
6. On 16 February 2011, Mr Mordechai was apprehended by Queensland police at his place of business, in Bundaberg, Queensland, for the purpose of being taken into immigration detention.
7. After being taken into custody, Mr Mordechai advised an officer of the Department of Immigration and Border Protection (Department) (as it is now called) that he has a number of medical conditions for which he requires regular medication.
8. Late on 16 February 2011, Mr Mordechai was taken from Bundaberg to Brisbane Immigration Transit Accommodation. On the afternoon of 17 February 2011, Mr Mordechai was transported by plane from Brisbane to Sydney and was thereafter detained in Villawood Immigration Detention Centre (VIDC).
9. Mr Mordechai claims that he did not receive medication that he requires to treat his medical conditions until 23 February 2011. Mr Mordechai claims that as a result of not having his medication, on or about 20 February 2011, he had a grand mal seizure during which he lost control of his bladder and bowel.

10. Mr Mordechai claims that the delay of the Commonwealth in supplying him with the medication that he requires for his medical conditions constituted a failure to treat him with humanity and with respect for the inherent dignity of the human person within the meaning of article 10(1) of the ICCPR.

5 The Commission's human rights inquiry and complaints function

11. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) provides that the Commission has a function to inquire into any act or practice that may be inconsistent with or contrary to any human right.¹
12. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that the reference to, or the doing of, an act includes the reference to the refusal or failure to do an act.
13. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.²

6 Act or practice of the Commonwealth?

14. Mr Mordechai complains about the delay in providing him with his medication.
15. I find that the acts of the officers who managed Mr Mordechai's health once he entered the custody of the Commonwealth constitute acts of the Commonwealth within the meaning of the AHRC Act.

7 Inconsistent with or contrary to human rights?

16. It is agreed that Mr Mordechai required a number of medications for his medical conditions, that he advised the Department of his need for medication on 16 February 2011 and that he did not have his medication on 17, 18 and 19 February 2011.
17. The Commonwealth claims that Mr Mordechai advised the Departmental officer with whom he spoke on 16 February 2011 that he would not need medication until 6.00pm on the evening of 17 February 2011. In contrast, Mr Mordechai claims that in response to a question from the Departmental officer as to whether he had any medication with him, he told the officer that he was almost out of medication and had an appointment with his doctor on 17 February 2011 to obtain a prescription for more medication.
18. Mr Mordechai claims that he was not provided with his medication until 23 February 2011. Conversely, the Commonwealth claims that Mr Mordechai was provided with a three day supply of all of his medications, aside from his angina tablets, on 20 February 2011 and was provided with a two week supply of his medication on 23 February 2011.

19. In support of this claim, the Commonwealth provides a copy of a medical chart for Mr Mordechai which indicates that he received a three day supply of Dilantin, Metformin and Zyprexa on 20 February 2011. I am satisfied that Mr Mordechai received most of his medications on 20 February 2011.
20. Article 10(1) of the ICCPR imposes a positive duty on State parties to prevent inhumane treatment of detained persons. This includes ensuring that persons are provided with appropriate medical care.
21. The Standard Minimum Rules for the Treatment of Prisoners (SMRs)³ state:
- 24 The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and taking all necessary measures...
- 25 (1) The medical officer shall have the care of the physical and mental health of prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
22. The Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment⁴ state:
- Principle 24
- A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided wherever necessary. This care and treatment shall be provided free of charge.
23. The UNHRC has invited States Parties to indicate in their reports the extent to which they are applying the SMRs and the Body of Principles.⁵ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.⁶
24. The Commonwealth advises that Mr Mordechai was required to take:
- Dilantin – a seizure prophylactic – three times a day;
 - Metformin – for diabetes – twice a day;
 - Lipitor – for high cholesterol – once a day;
 - Zyprexa – for a mood disorder – once a day; and
 - Anginine – for Angina – as he needed it.
25. Mr Mordechai has serious medical conditions for which he requires very regular medication. He disclosed these conditions to the Department and raised his need for medication soon after he entered the custody of the Commonwealth and repeatedly on the days that he was without medication.
26. I note that Mr Mordechai saw a doctor before he flew to Sydney, on 17 February 2011, and a nurse about two days after arriving at VIDC. However, given Mr Mordechai's early disclosure of his health conditions and need for regular medication, it is unclear why he was without medication for over three days. Each of the health professionals who saw Mr Mordechai noted that he had medical conditions for which he required medication.
27. In its response to my preliminary view, the Commonwealth has acknowledged that the available evidence suggests that Mr Mordechai recommenced medication for all his conditions on 20 February 2011, with the exception of his anti-angina medication, which was issued to Mr Mordechai on 23 February 2011. The Department has not offered an explanation for this delay in supplying to Mr Mordechai his required medication.

28. There is no information before me to suggest that Mr Mordechai has experienced any ongoing medical concerns as a result of not having his medication on 17, 18 and 19 February 2011. However, I note that Mr Mordechai is required to take Dilantin, a seizure prophylactic, three times per day and he was not able to take this medication for approximately three days. This tends to support Mr Mordechai's claim that he had a seizure on or about 20 February 2011.
29. I also note that Mr Mordechai appears to have experienced a level of distress as a result of the delay in being supplied with medication that he was required to take.
30. For the reasons outlined above, I find that the delay in providing Mr Mordechai with medication constituted a breach of article 10(1) of the ICCPR.

8 Recommendations

31. 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.⁷ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁸
32. 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.⁹

8.1 Consideration of compensation

33. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
34. However, in considering the assessment of a recommendation for compensation under section 35 of the *Human Rights and Equal Opportunity Act 1986* (Cth) (as the AHRC Act was then called) (relating to discrimination matters under Part II, Division 4), the Federal Court has indicated that tort principles for the assessment of damages should be applied.¹⁰ I am of the view that this is the appropriate approach to take to the present matter. As such, so far as is possible by a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.¹¹
35. Compensation for Mr Mordechai's distress and suffering would, in tort law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.¹²
36. In unlawful discrimination and sexual harassment cases, which involve a form of a breach of human rights, the courts whilst cautioning against too excessive an award for non-economic loss have also cautioned against awarding too low an amount.¹³ The courts have also emphasised that ultimately the amount awarded depends on the facts of each case and is a matter of judgment for the judicial officer hearing the matter.¹⁴ In *Hall v Sheiban*,¹⁵ a sexual harassment case, Wilcox J cited with approval the following statement of May LJ in *Alexander v Home Office*:¹⁶

As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution...For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.¹⁷

37. In determining the amount of compensation based on the facts of this complaint I do so bearing in mind the quite varied amounts that Australian courts have awarded for actions involving a breach of human rights.

8.2 Recommendation that compensation be paid

38. I have found that that the delay in providing Mr Mordechai with medication constituted a breach of article 10(1) of the ICCPR.
39. I consider that the Commonwealth should pay Mr Mordechai an amount of compensation to reflect the treatment he experienced by the Commonwealth in the period between 17 and 23 February 2011.
40. In reaching an appropriate figure, I have taken into consideration the following factors:
- Mr Mordechai was without any of his required medications for approximately three days and he was without his anti-angina medication for approximately six days;
 - Mr Mordechai had made the Department aware of his medication needs soon after he entered the custody of the Commonwealth;
 - Mr Mordechai experienced a level of distress during the period when he did not have access to his required medications;
 - Mr Mordechai has reported experiencing, on or about 20 February 2011, a grand mal seizure during which he lost control of his bladder and bowel. The evidence before me tends to support Mr Mordechai's claim that he had a seizure; and
 - there is no evidence to suggest that Mr Mordechai has experienced any ongoing medical concerns as a result of not having access to his medication.
41. Taking into account all of the above matters, I recommend that the Commonwealth pay \$4,000 in compensation to Mr Mordechai.
42. I note that I have taken into account the fact that on 22 January 2013, the Department sent a 'letter of regret' to Mr Mordechai in response to his complaint to the Commission. For this reason, I have not recommended that the Department provide an apology.

9 The Department's response to my conclusions and recommendation

43. On 10 March 2014, I provided a notice to the Department under s 29(2)(a) of the AHRC Act setting out my finding and recommendation in relation to this complaint.
44. By letter dated 16 May 2014, the Department provided the following response to my recommendation that the Commonwealth pay compensation to Mr Mordechai in the amount of \$4,000:

Not accepted.

The department notes the President's recommendations in regards to compensation payable to Mr Mordechai. The department regrets the short period of time in which Mr Mordechai did not have access to anti-epileptic medication. However, the Commonwealth maintains its position that Mr Mordechai was treated with humanity and respect for his dignity during his time in immigration detention, and in accordance with article 10(1) of the ICCPR.

As stated in its response of 31 October 2013, the department has reviewed its records (including medical records) and has been unable to identify any information to suggest that injury or harm was suffered by Mr Mordechai as a result of the delay in providing him his medication. The department has noted that Mr Mordechai was subject to clinical oversight on 19 and 20 February 2011 and that there were no records which supported Mr Mordechai's claim that he had a seizure on or about 20 February 2011.

...

The department therefore considers it is unable to pay compensation to Mr Mordechai on the basis of the information provided to date and the department advises that no further action will be taken in relation to this recommendation.

45. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

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- 1 Section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) defines human rights to include the rights recognised by the *International Covenant on Civil and Political Rights*.
 - 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 3 The Standard Minimum rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in resolutions 2858 of 1971 and 3144 of 1983. UN Doc A/COMF/611, Annex 1.
 - 4 The Body of Principles were adopted by the United Nations General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).
 - 5 UN Human Rights Committee, General Comment 21 (Replaces general comment 9 concerning humane treatment of persons deprived of liberty) (10 April 1992) at [5].
 - 6 UN Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3]; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3]. See also UN Human Rights Committee, *Concluding Observations on the United States*, UN Doc A/50/40 (3 October 1995) at [285] and [299].
 - 7 AHRC Act s 29(2)(a)
 - 8 AHRC Act s 29(2)(b).
 - 9 AHRC Act s 29(2)(c).
 - 10 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
 - 11 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
 - 12 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
 - 13 *Hall v Sheiban* (1989) 20 FCR 217, 256; *McAlister v SEQ Aboriginal Corporation* [2002] FMCA 109, [156]; *Phillis v Mandic* [2005] FMCA 330, [23]; *Rankilor v Jerome Pty Ltd* [2006] FMCA 922, [41]; *Gilroy v Angelov* [2000] FCA 1775, [105]; *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 20 FCR 217, [70].
 - 14 *Phillis v Mandic* [2005] FMCA 2, [79]; *Hall v Sheiban* (1989) 20 FCR 217, 256.
 - 15 (1989) 20 FCR 217, 256.
 - 16 [1988] 2 All ER 118.
 - 17 *Alexander v Home Office* [1988] 2 All ER 118.

Further Information

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