



Australian
Human Rights
Commission

Bakhtiari v Commonwealth of Australia (DIBP)

[2016] AusHRC 109

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

[2016] AusHRC 109

Report into arbitrary detention

Australian Human Rights Commission 2016



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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 Amir Hossein Bakhtiari against the Commonwealth of Australia, Department of Immigration and Border Protection (Department).

I have found that the Department's delay in referring Mr Bakhtiari's case to the Minister for consideration of less restrictive alternatives to detention, for a period of 16 months, to be arbitrary and inconsistent with Mr Bakhtiari's rights under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

I have also found that the Minister's decision, on 25 March 2015, not to consider exercising his discretionary powers under section 197AB of the *Migration Act 1958* (Cth) to allow Mr Bakhtiari to be detained in a less restrictive manner was not reasonable, necessary or proportionate to the Commonwealth's legitimate aims.

I have found that Mr Bakhtiari's detention at Villawood Immigration Detention Centre from 27 November 2013 to 1 April 2016 was arbitrary and inconsistent with his rights under article 9 of the ICCPR.

In light of my findings I recommended that the Commonwealth pay to Mr Bakhtiari appropriate compensation in relation to this period of arbitrary detention. I also recommend that the Commonwealth provide a formal written apology to Mr Bakhtiari.

The Department provided a response to my findings and recommendations on 15 July 2016. I have set out the Department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr Amir Hossein Bakhtiari against the Commonwealth of Australia (Department of Immigration and Border Protection) (Department), alleging a breach of his human rights. Namely, the right recognised by article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
2. This inquiry has been undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. This is a report pursuant to section 11(1)(f)(ii) of the AHRC Act setting out the findings of the Commission in relation to Mr Bakhtiari's complaint.

2 Summary of findings and recommendations

4. As a result of conducting this inquiry, I have found:
 - The Department's delay in referring Mr Bakhtiari's case to the Minister to consider less restrictive alternatives to detention, for a period of 16 months, to be arbitrary and inconsistent with Mr Bakhtiari's rights under article 9 of the ICCPR;
 - That the Minister's decision, on 25 March 2015, to not consider exercising his discretionary powers under section 197AB of the *Migration Act 1958* (Cth) (Migration Act) to allow Mr Bakhtiari to be detained in a less restrictive manner was not reasonable, necessary or proportionate to the Commonwealth's legitimate aims of regulating immigration into Australia or protecting the Australian community, or to any other legitimate aim of the Commonwealth;
 - That Mr Bakhtiari's detention at Villawood Immigration Detention Centre from 27 November 2013 to 1 April 2016 was arbitrary and inconsistent with his rights under article 9 of the ICCPR.
5. In light of these findings, I recommend that the Commonwealth pay an appropriate amount of compensation to Mr Bakhtiari for his period of arbitrary detention, in accordance with the principles outlined in part 6.2 below. I also recommend that the Commonwealth apologise to Mr Bakhtiari.

3 Background

6. Mr Bakhtiari is an Iranian national who arrived on Christmas Island as an undocumented maritime arrival on 18 March 2013 and was detained under section 189(3) of the Migration Act. On 10 April 2013, he was 'screened in' for assessment of his protection claims and was transferred to Wickham Point Immigration Detention Centre on the mainland.
7. On 16 May 2013, Mr Bakhtiari was granted a Temporary Humanitarian visa and a Bridging visa. At the time of Mr Bakhtiari's release into the community, in Sydney, the Department appointed a case manager for him, whose role was assisting Mr Bakhtiari integrate into the community.
8. On 12 August 2013, Mr Bakhtiari's behaviour in the community came to the attention of police, and he was admitted to Hornsby Adult Mental Health Inpatient Service. A 'Consult Note' taken on 12 August 2013 by Auburn Community Health Centre states that there were reports of Mr Bakhtiari acting oddly and doing unusual things such as climbing trees.
9. Mr Bakhtiari stayed as an inpatient at the Hornsby Mental Health Unit for almost 3 months. During this time, he was diagnosed with schizophrenia and commenced treatment for it.
10. Mr Bakhtiari was discharged from Hornsby Mental Health Unit on or about 30 October 2013. His discharge address was accommodation in Auburn, which had been arranged for him by his case manager from Settlement Services International (SSI).
11. At the conclusion of Mr Bakhtiari's term as an inpatient at Hornsby Mental Health Unit, his treating psychiatrist made an application under section 51 of the *Mental Health Act 2007* (NSW) for a community treatment order (CTO) to be made in respect of Mr Bakhtiari. That application was heard by the Mental Health Review Tribunal (MHRT) on 6 November 2013. The MHRT granted the application, making a CTO for a 6-month period, in accordance with the treatment plan submitted by Mr Bakhtiari's psychiatrist.
12. Mr Bakhtiari's Bridging visa expired on 16 November 2013, and he became an unlawful non-citizen. On 27 November 2013, he presented to the Department and was detained under section 189(1) of the Migration Act. He was subsequently transferred to Villawood Immigration Detention Centre (VIDC).

13. Three further CTOs have been made by the MHRT with respect to Mr Bakhtiari, for the following periods:
 - A CTO made on 1 May 2014, expiring 30 October 2014;
 - ACTO made on or about 30 October 2014, expiring 26 January 2015; and
 - ACTO made sometime after 26 January 2015, expiring 29 July 2015.
14. Mr Bakhtiari was detained at VIDC from 27 November 2013 to 1 April 2016. The Minister advised that he reconsidered Mr Bakhtiari's case on 24 March 2016, and agreed to place him in the community. Mr Bakhtiari was released from detention on 1 April 2016. Mr Bakhtiari's human rights complaint is in relation to his detention at VIDC for this period of time.

4 Legal Framework

4.1 Functions of the Commission

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

4.2 What is an ‘act’ or ‘practice’?

17. 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.
18. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
19. 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;¹ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

4.3 What is a ‘human right’?

20. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.²
21. 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.
22. 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;³
 - (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;⁴
 - (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;⁵ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶
23. 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.⁷

24. 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.⁸
25. 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.⁹

5 Assessment

5.1 Act or practice of the Commonwealth

26. Mr Bakhtiari was detained by the Commonwealth from 27 November 2013 to 1 April 2016, pursuant to section 189(1) of the Migration Act, which requires the detention of unlawful non-citizens.
27. However, there are a number of powers that the Minister could have exercised so that Mr Bakhtiari was detained in a less restrictive manner than in an immigration detention centre.
28. The Minister could have granted him a visa. Under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Migration Act.
29. The Minister could have made a residence determination. Section 197AB of the Migration Act provides:

If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).
30. 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'.¹⁰

31. Accordingly, the Minister could have granted a visa to Mr Bakhtiari, made a residence determination in relation to him under section 197AB of the Migration Act or could have approved that Mr Bakhtiari reside in a place other than an immigration detention centre. Further, it was open to the Minister to exercise the power conferred by section 197AB subject to additional conditions: see section 197AB(2)(b) of the Migration Act.
32. The Department first referred Mr Bakhtiari's case to the Minister for the consideration of the exercise of his discretionary powers under section 197AB of the Migration Act on 18 March 2015. On 26 March 2015, the Minister decided to not consider exercising his discretionary powers under section 197AB of the Act.
33. I find that the failure by the Department to refer Mr Bakhtiari's case to the Minister for consideration of the exercise of those discretionary powers until 18 March 2015 constitutes an 'act' within the definition of section 3 of the AHRC Act. I also find that the Minister's failure to consider exercising his discretionary powers to allow Mr Bakhtiari to be detained in a less restrictive manner constitutes an 'act' within the definition of section 3 of the AHRC Act. I consider both of these acts below.

5.2 Inconsistent with or contrary to human rights

34. Mr Bakhtiari was detained in an immigration detention centre for approximately two years and four months, from 27 November 2013 to 1 April 2016.
35. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.¹¹
36. In Mr Bakhtiari's case, it is necessary to consider whether his prolonged detention in a closed detention facility could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention.
37. It is evident from the documentation provided by the Department that Mr Bakhtiari's mental health has been a key factor in the Department's consideration and review of his detention. Below I consider:
 - Assessments of Mr Bakhtiari by mental health professionals, including his suitability for community detention or a Bridging visa; and
 - The Department's consideration of less restrictive detention options or a Bridging visa for Mr Bakhtiari, by reference to the assessments of mental health professionals.

(a) Assessments of Mr Bakhtiari's suitability for community placement by mental health professionals

38. Since being detained on 27 November 2013, Mr Bakhtiari has been assessed by several mental health professionals in relation to his suitability for less restrictive detention or placement in the community on a Bridging visa.
39. On each of those occasions, placement in the community in supported accommodation, with case management and mental health support, was either:
- Contemplated as a feasible option or 'plan'; or
 - Expressly recommended.
40. On 18 December 2013, shortly after being detained, Mr Bakhtiari had a mental health assessment with a Psychiatrist, who noted the following:
- Problems:
Diagnosis of schizophrenia
Lack of insight
Non-compliance with medication
Significant behavioural problems ...
Unable to live independently in the community at this stage ...
- Plan:
Needs occupational therapist assessment to find out what kind of supportive accommodation is suitable for him.
He may need a long-term rehabilitation to gain living skills prior to return to the community.
Follow up in 4 weeks
41. On 17 January 2014, Mr Bakhtiari had a follow up consultation with a Psychiatrist, who noted the following:
- Impression:
Can't live independently in our community due to his poor social and living skills, his mental health illness and cognitive impairment
Vulnerable for neglect and exploitation, also can put others in risk
- Plan:
CTO should continue
Needs OT [occupational therapist] assessment and cognitive assessment
Will need MH [mental health] support for close monitoring, case management and supported accommodation on discharge to the community
Follow up in 8 weeks

42. Mr Bakhtiari does not appear to have had a further psychiatric consultation until April 2014. On 4 April 2014, a Psychiatrist assessed Mr Bakhtiari and noted the following:

Needs to stay on Community Treatment Order to reassure that he received medication ...

Needs assistance for daily tasks (can't live independently)

Impression:

Chronic schizophrenia with cognitive impairment ...

Needs support to live in the community

Plan:

Needs neurocognitive test and OT [occupational therapist] assessment

I recommend close monitoring by MHS [mental health services] and assertive case management in the community if he can live in a supported accommodation instead of staying in a stressful environment of DC [detention centre]

43. On 14 May 2014, Mr Bakhtiari had a neuropsychological assessment by a Psychiatrist. The report of this assessment, dated 28 May 2014, states that 'the purpose of the current assessment was to delineate Mr Bakhtiari's cognitive capabilities and to provide an opinion regarding his needs and the potential level of support required for him to transfer to community-based living'.

44. International Health and Medical Services (IHMS) Clinical Records of 22 August 2014, by a primary health nurse, state the following:

Completing a SNHA [Special Needs Health Assessment] for CD [community detention] placement

Escalated to Dr [redacted]

Is detainee suitable for BVE? MD [medical doctor] advised there are no medical issues that would stop this man from being granted a BVE. However, he cannot just be released without any support. Given his mental health issues we need to make sure that appropriate hand over to Mental Health Service is done to ensure this detainee receives appropriate ongoing treatment and mental health management/care as needed.

45. On 19 September 2014, a Consultant Psychiatrist and Psychotherapist conducted an Independent Psychiatric Examination of Mr Bakhtiari, due to his detention (at that point) having lasted longer than 18 months. The Psychiatrist's report states:

Risk Assessment:

Risk of harm to self: currently low

Risk of harm to others: currently low

From the history provided it sounded as though Mr Bakhtiari was disorganised living in the community prior to his admission to Hornsby Hospital. Therefore I would be concerned about his risk of harm to self through neglect, homelessness, disorganisation and possibly exploitation if he is released into the community without appropriate supports.

Treatment recommendations:

Mr Bakhtiari should remain linked in with the mental health service at VIDC. Dr [redacted] recommended that Mr Bakhtiari should receive a cognitive assessment and occupational therapy assessment. ...

Mr Bakhtiari is likely to need significant assistance from a social worker or case-worker familiar with mental health problems to help him navigate the immigration process. If he is discharged into community detention he will need close follow-up from a community mental health team.

46. IHMS Clinical Records of 10 October 2014, by a Psychiatrist, state:

Mr Bakhtiari has been stable in terms of his mental state and his self care has improved over the last few months. His case manager considering community detention and has requested me to add a letter supporting his request.

Plan:

I will write a letter to recommend community detention with MH support and follow up for future of Mr Bakhtiari who suffers from a chronic mental illness.

47. The medical records outlined above indicate that at all times since Mr Bakhtiari's detention in November 2013, supported accommodation in the community was contemplated or 'planned' by his treating doctors, subject to cognitive and occupational therapy assessments being done and appropriate supported accommodation being located. These doctors considered that Mr Bakhtiari could reside in the community with appropriate support from mental health services.

48. Moreover, I note that the Department has been on notice:

- Since his return to detention in November 2013, that Mr Bakhtiari had a diagnosis of schizophrenia; and
- Since at least 4 April 2014, that a Psychiatrist had recommended Mr Bakhtiari be placed in supported accommodation in the community, with close monitoring by mental health services and assertive case management, instead of staying in the stressful environment of a detention centre.

(b) Department's consideration of Mr Bakhtiari's case for less restrictive detention or a bridging visa

49. The Department states that Mr Bakhtiari has been considered for referral to the Minister to consider exercising his power to make a residence determination (under section 197AB of the Migration Act), or to consider exercising his power to grant a visa (under section 195A of the Migration Act), on the following occasions:

- On 3 December 2013, a Ministerial Intervention referral for community detention under section 197AB of the Migration Act was initiated. On 9 December 2013, the Community Detention Branch of the Department assessed this request as not meeting the guidelines for referral to the Minister (Referral 1).
- On 18 February 2014, a second section 197AB referral was initiated. On 23 May 2014, the Community Detention Branch of the Department assessed this request as not meeting the guidelines for referral to the Minister (Referral 2).
- On 14 August 2014, a referral for a BVE under section 195A of the Migration Act was initiated. On 17 September 2014, Mr Bakhtiari's case was assessed by the Department as not meeting the section 195A guidelines for referral to the Minister (Referral 3).
- On 19 November 2014, a further section 197AB referral was initiated. This referral was assessed as meeting the section 197AB guidelines for referral to the Minister. Subsequently, a submission was referred to the Minister on 18 March 2015 (Referral 4). On 26 March 2015, the Minister decided that he was not inclined to consider exercising his power under section 197AB but he 'will further consider this matter in 6 months'.

50. In relation to Referral 1, the Commission has been provided with a copy of the IHMS Special Needs Health Assessment, dated 6 December 2013 and a copy of the Department's 9 December 2013 assessment of Mr Bakhtiari against the section 197AB Ministerial Guidelines. The assessment of Mr Bakhtiari, by a member of the Community Detention Referrals and Placements Section, Community Detention Branch, states (in its entirety):

This client does not have sufficient physical or mental health vulnerabilities under the guidelines for referral to the Minister under s197AB.

Accordingly, the referral is not accepted.

51. The guidelines in question were former Minister Brendan O'Connor's guidelines, issued on 30 May 2013. Relevantly, sections 7 and 8 of those guidelines state:

7. PUBLIC INTEREST

...I will generally only consider the exercise of my public interest power in cases referred by the department for my consideration and which meet the circumstances in Section 8 *Cases to be referred for my consideration*.

8. CASES TO BE REFERRED FOR MY CONSIDERATION

...priority cases that are to be referred to me are specified persons as follows:

- » unaccompanied minors; or
- » minor children or their accompanying immediate family members who have the following circumstances:

...

- ongoing illnesses requiring significant and ongoing medical intervention;
- diagnosed mental illness

I will also consider adults who are not part of a family with minor children, if they have any of the circumstances mentioned above.

52. Since Mr Bakhtiari's return to detention in November 2013, the Department was seized of information that he had a diagnosis of chronic schizophrenia, meaning he had a 'diagnosed mental illness' for the purposes of the guidelines. The Department was also aware that Mr Bakhtiari had been hospitalised for approximately a 3 month period, in the preceding 4 months and was subject to a CTO. Accordingly, it was evident that his illness was ongoing and required significant and continuous medical intervention.
53. In this context, it is unclear on what basis the Department concluded that Mr Bakhtiari did not have 'sufficient ... mental health vulnerabilities under the guidelines'. I find that Mr Bakhtiari's circumstances in December 2013 satisfied the requirements under the guidelines for referral to the Minister.
54. In relation to Referral 2, the Commission has been provided with a copy of the IHMS Special Needs Health Assessment (date redacted) and a copy of the Department's 23 May 2014 assessment of Mr Bakhtiari against the section 197AB Ministerial Guidelines. The assessment of Mr Bakhtiari, by a member of the Community Detention Referrals and Placements Section, Community Detention Branch, states (in its entirety):

We have received further medical information about this client. Though this client has some mental health vulnerabilities they are not sufficient to meet the Guidelines on the Minister's Community Detention power under section 197AB of the Act. IHMS advise "There is no clinical evidence that Mr Bakhtiari's health conditions are likely to be exacerbated by remaining in a detention centre environment." Section eight of the Ministerial guidelines signed by Minister Morrison on 18 February 2014 refers.

Accordingly the referral for this client has not been accepted.

55. The IHMS Special Needs Health Assessment, annexed to the Department's assessment, relevantly states:

Mr Bakhtiari has a long history of mental health issues including history of Torture and Trauma (T&T) for which he declined counselling. He was diagnosed by a Psychiatrist with chronic paranoid schizophrenia with dominant negative cognitive symptoms and obsessional traits with compulsive behaviours ... Mr Bakhtiari would benefit from a case manager and specialist mental health treatment in the community to further assess and treatment (sic) of his psychological problems. He will require mental health support for close monitoring.

...

Due to Mr Bakhtiari's mental health problems, required treatment and ongoing monitoring, he would benefit from a Metropolitan area so he can have access to all of the required specialists as clinically indicated.

56. As stated in the above assessment, the applicable guidelines were guidelines issued by former Minister Scott Morrison. Section 8 of those guidelines identified cases to be referred for his consideration under section 197AB and is in similar terms to Minister O'Connor's guidelines. It states:

... I will also consider other families and single adults if they have any of the following circumstances:

...

» Ongoing illnesses, including mental health illnesses, requiring ongoing medical intervention.

57. Contrary to the inference which appears to be drawn in the Department's assessment, section 8 of the guidelines does not state that detainees should be referred to the Minister 'where there is clinical evidence that health conditions are likely to be exacerbated by remaining in a detention environment'. Rather, section 8 states that the Minister will consider single adults with ongoing mental health illnesses, requiring ongoing medical intervention.

58. In light of the fact that the IHMS Special Needs Health Assessment expressly acknowledges that Mr Bakhtiari has a mental illness requiring ongoing medical intervention, it is unclear on what basis the Department concluded that Mr Bakhtiari's 'mental health vulnerabilities are not sufficient to meet the Guidelines'. I find that in May 2014, Mr Bakhtiari's circumstances satisfied the requirements under the guidelines for referral to the Minister.
59. In relation to Referral 4, I note that although this referral was initiated on 19 November 2014, a submission to the Minister to consider exercising his power under section 197AB of the Migration Act was not referred to the Minister until 18 March 2015. By this time, Mr Bakhtiari had been held in closed detention for 16 months.
60. I find that the Department's failure to refer Mr Bakhtiari's case to the Minister for the consideration of the exercise of his discretionary powers for a period of 16 months was not proportionate to ensuring the effective operation of Australia's migration system, or to any other legitimate aim of the Commonwealth. The Department has not sought to explain the delay in referring Mr Bakhtiari's case to the Minister to consider less restrictive alternatives to closed detention, save as to say that his 'mental health vulnerabilities are not sufficient to meet the Guidelines'. I disagree with this assessment. I find that Mr Bakhtiari's case met the guidelines for referral to the Minister to consider exercising his powers under section 197AB in December 2013.
61. I find that the Department's delay in referring Mr Bakhtiari's case to the Minister to consider less restrictive alternatives to detention for a period of 16 months resulted in Mr Bakhtiari's detention being arbitrary and inconsistent with article 9 of the ICCPR.
62. In its response to my preliminary view, the Department stated that it agrees with my findings that Mr Bakhtiari met the Guidelines for referral to the Minister when it considered Mr Bakhtiari's circumstances in December 2013 and again in May 2014. The Department stated:

The Department has reviewed the circumstances of this case and has determined that Mr Bakhtiari did meet the Minister's Guidelines dated 30 May 2013 and 18 February 2014 for referral to the Minister.

I would like to note that the Department's processes have been improved in the intervening period and this case has resulted in a further review of decision recording as it relates to Residence Determination referrals.

(c) ***Minister's failure to exercise his discretionary powers to allow Mr Bakhtiari to be detained in a less restrictive manner***

63. On 25 March 2015, the Minister decided that he was not inclined to consider exercising his power under section 197AB of the Migration Act in relation to Mr Bakhtiari. The Minister was not required to give reasons and did not give reasons for declining to exercise his discretionary powers, however he made the following written comments:

I will further consider this matter in 6 months if Mr Bakhtiari has complied with his medication / medical management and provided there has been no further instance of violence / assault etc.

64. These written comments suggest that compliance with medication and instances of violence may have been factors relevant to the Minister's decision.
65. The Department prepared written submissions for the Minister's consideration. These submissions, dated 18 March 2015, were attached to the Minister's decision and relevantly state:

Key Issues

The department's health service provider International Health and Medical Services (IHMS) have advised that Mr BAKHTIARI has been diagnosed with chronic paranoid schizophrenia. His mental health has significantly improved in recent months, due to his compliance with antipsychotic medication, though he requires ongoing support and intervention.

Mr BAKHTIARI's risk to the Australian community is considered to be low. Should he be released into community detention, he will be monitored and any risks will be mitigated through supervised accommodation and regular review with medical specialists.

...

Behaviour

11. . Since arriving in Australia, Mr BAKHTIARI has been involved in a number of significant behavioural incidents. These incidents include three minor assaults where detention staff were required to intervene and use force to break up an argument or physical altercation, two instances of abusive, aggressive behaviour and instances of erratic behaviour both in held detention and whilst living in the community. Prior to his return to held detention, Mr BAKHTIARI had a history of non-compliance with medication, poor social and living skills and lack of insight into his illness.

12. Mr BAKHTIARI's departmental case manager has confirmed that since his return to held detention he has been engaging well with departmental officers and attends appointments as required. He is polite, courteous and calm during interactions. The department's case management advise they have seen a significant improvement in Mr BAKHTIARI's appearance and attitude.

13. Should Mr BAKHTIARI be placed in community detention, any risk to the community will be closely monitored through his current CTO and regular appointments with medical specialists. IHMS have recommended that Mr BAKHTIARI be placed into supervised accommodation where an onsite staff member is available to help with activities of daily living ...

Security

14. The department has not received advice from the external agency that there are any security concerns regarding Mr BAKHTIARI's placement in community detention.

15. There is no information currently before the department that suggests that Mr BAKHTIARI would pose a threat to the Australian community if placed in the community.

66. The Department's submission to the Minister attached an IHMS Special Needs Health Assessment dated 27 November 2014. This assessment stated, relevantly:

Mr Bakhtiari's latest Psychiatrist review was on 15 Oct 2014. No risks were identified and the Psychiatrist recommended Mr Bakhtiari return to the community under Community Detention with the continuation of his CTO, assertive case management and mental health follow up.

67. It is unclear why the Minister decided to not consider exercising his discretion to make a residence determination in relation to Mr Bakhtiari. This is particularly so, in light of the fact that the Department's submissions to the Minister state:

- Mr Bakhtiari is compliant with his medication.
- That for a period of 16 months (since his return to closed detention), Mr Bakhtiari has been engaging well with department officers and attending appointments. He is polite, courteous and calm. There has been a significant improvement in his attitude.
- There is no information before the Department that Mr Bakhtiari would pose a threat to the Australian community if placed in the community.
- Should Mr Bakhtiari be placed in community detention, any risk to the community will be closely monitored and any risks will be mitigated through his current CTO and regular appointments with medical specialists.
- Mr Bakhtiari's Psychiatrist recommended Mr Bakhtiari return to the community with the continuation of his CTO, assertive case management and mental health follow up.
- There are no security concerns regarding Mr Bakhtiari's placement in the community.

68. In light of the above, I find that the Minister's decision to not consider exercising his discretionary powers under section 197AB of the Migration Act to allow Mr Bakhtiari to be detained in a less restrictive manner was not reasonable, necessary or proportionate to the Commonwealth's legitimate aims of regulating immigration into Australia or protecting the Australian community, or to any other legitimate aim of the Commonwealth.
69. I find that Mr Bakhtiari's detention at VIDC from 27 November 2013 to 1 April 2016 was arbitrary and inconsistent with his rights under article 9 of the ICCPR.

6 Recommendations

6.1 Power to make recommendations

70. 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.¹² The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹³
71. The Commission may also recommend:¹⁴
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice; and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.

6.2 Consideration of Compensation

72. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
73. 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.
74. 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.

75. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is a lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary irrespective of legality.
76. 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.
77. 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).¹⁵
78. In the case of *Fernando v Commonwealth of Australia (No 5)*,¹⁶ 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*:¹⁷
- ...the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.¹⁸
79. 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).¹⁹ In that case, at first instance,²⁰ 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.
80. 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'.

81. 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.²¹
82. On appeal, the New South Wales Court of Appeal considered that the award was low but in the acceptable range. The Court noted that ‘as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish’.²²
83. 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,²³ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.²⁴ On appeal, the Full Federal Court noted that although ‘the primary judge’s assessment seems to us to be low’, it was not so low as to indicate error.²⁵

6.3 Recommendation that compensation be paid

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

6.4 Apology

86. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Bakhtiari 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.²⁶

7 The Department's response to my recommendations

87. On 7 June 2016 I provided a notice to the Department of Immigration and Border Protection under section 29(2) of the AHRC Act setting out my findings and recommendations in relation to the complaint dealt with in this report.
88. By letter dated 15 July 2016 the Department provided the following response to my findings and recommendations:

Response to Recommendation 1

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

The Department maintains that Mr Bakhtiari'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 Bakhtiari's detention was lawful. 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 Bakhtiari.

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 Bakhtiari's detention was lawful, the Commonwealth is not satisfied of the need for a formal written apology.

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

89. I do note that in its response to my preliminary view in this matter, the Department stated that it agreed with my findings that Mr Bakhtiari met the Guidelines for referral to the Minister when it considered Mr Bakhtiari's circumstances in December 2013 and again in May 2014. The Department stated:

The Department has reviewed the circumstances of this case and has determined that Mr Bakhtiari did meet the Minister's Guidelines dated 30 May 2013 and 18 February 2014 for referral to the Minister.

I would like to note that the Department's processes have been improved in the intervening period and this case has resulted in a further review of decision recording as it relates to Residence Determination referrals.

90. I report accordingly to the Attorney-General.

Gillian Triggs
President
Australian Human Rights Commission
October 2016

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 2 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 3 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.
- 4 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) 308 [11.10].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 6 *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.
- 7 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 8 *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.
- 9 *F.K.A.G. et al. v Australia*, Communication No 2094/2011 UN Doc CCPR/C/108/D/2094/2011.
- 10 *Migration Act 1958* (Cth) s 5.
- 11 *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 12 *Australian Human Rights Commission Act* s29(2)(a).
- 13 *Australian Human Rights Commission Act* s29(2)(b).
- 14 *Australian Human Rights Commission Act* s29(2)(c).
- 15 *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].
- 16 [2013] FCA 901.
- 17 [2003] NSWSC 1212.
- 18 [2013] FCA 901 [121].
- 19 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 20 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 21 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ))[140].
- 22 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 23 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 24 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].
- 25 *Fernando v Commonwealth of Australia* [2014] FCAFC 181 [113].
- 26 D Shelton, *Remedies in International Human Rights Law* (2000), 151.