



Australian
Human Rights
Commission

MC and Hassan Ghanbari v Commonwealth of Australia (DIBP)

[2014] AusHRC 74

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**MC and Hassan Ghanbari v
Commonwealth of Australia
(Department of Immigration
and Border Protection)**

Report into arbitrary detention

[2014] AusHRC 74

Australian Human Rights Commission 2014



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Human Rights
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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) (AHRC Act) into the complaint made by Messrs MC and Hassan Ghanbari against the Commonwealth of Australia – Department of Immigration and Border Protection (the Department).

I have found that the detention of Mr MC and Mr Ghanbari in immigration detention centres was arbitrary within the meaning of article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). I recommended that the Commonwealth pay financial compensation to Mr MC in the amount of \$150,000 and Mr Ghanbari in the amount of \$100,000 and provide formal written apologies to Mr MC and Mr Ghanbari for the breach of their rights under article 9(1) of the ICCPR.

On 24 October 2013 I provided a notice to the Department under s 29(2)(a) of the AHRC Act setting out my findings.

By letters dated 1 and 5 May 2014, the Department provided a response to my findings and recommendations. I have set out this response in Part 8 of this report.

Please find enclosed 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 complaints lodged by Mr MC and Mr Hassan Ghanbari that their treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.
2. Mr MC has asked that he not be referred to by name in this report. I consider that the preservation of the anonymity of Mr MC is necessary to protect his privacy. Accordingly, I have given a direction pursuant to section 14(2) of the AHRC Act and have referred to him throughout the report as Mr MC.

2 Summary of findings and recommendations

3. I find that Mr MC's detention and Mr Ghanbari's detention in immigration detention centres was arbitrary within the meaning of article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
4. In light of my findings regarding the acts or practices of the Commonwealth, I make the following recommendations:
 - that the Commonwealth pay financial compensation to Mr MC in the amount of \$150,000 and Mr Ghanbari in the amount of \$100,000; and
 - that the Commonwealth provide formal written apologies to Mr MC and Mr Ghanbari for the breach of their rights under article 9(1) of the ICCPR.

3 The complaints

5. Mr MC is from Afghanistan and is of Hazara ethnic origin. Mr MC arrived on Christmas Island by boat on 2 February 2010 and was detained there. On 20 April 2010, Mr MC was transferred from Christmas Island to Northern Immigration Detention Centre, Darwin (NIDC). Mr MC was detained in Curtain Immigration Detention Centre, Graylands psychiatric hospital and Villawood Immigration Detention Centre before being placed in community detention on 29 August 2012. On 25 April 2011, an Independent Merits Review found Mr MC to be a refugee.
6. Mr Ghanbari claims to be a stateless Kurd from Iran. Mr Ghanbari arrived on Christmas Island on 26 February 2010 and was detained there. On 8 December 2010, Mr Ghanbari was transferred from Christmas Island to NIDC. From 20 March 2011 until 7 May 2011, Mr Ghanbari was detained in Maribyrnong Immigration Detention Centre, before being returned to NIDC. Mr Ghanbari was placed in community detention on 9 January 2012. Mr Ghanbari has been found not to be a refugee.
7. Mr MC and Mr Ghanbari claim that their detention in immigration detention centres was arbitrary within the meaning of article 9(1) of the ICCPR.

4 The Commission's human rights inquiry and complaints function

8. 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
9. 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.
10. 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

5 Forming my opinion

11. In forming my opinion as to whether an act or practice was inconsistent with or contrary to any human right I have carefully considered all of the information provided to me by the parties, including the Commonwealth's submissions dated 26 June 2013 in response to my preliminary view.

6 Assessment

12. Mr MC and Mr Ghanbari complain about being detained by the Commonwealth in immigration detention centres.

6.1 Act or practice of the Commonwealth?

13. After arriving on Christmas Island, Mr MC and Mr Ghanbari were detained pursuant to section 189(3) of the *Migration Act 1958* (Cth) (Migration Act). Section 189(3) of the Migration Act does not mandate the detention of unlawful non-citizens. I consider that the detaining officer's decision to detain Mr MC and Mr Ghanbari on Christmas Island was an act of the Commonwealth within the meaning of the AHRC Act.
14. After being transferred to mainland Australia, Mr MC and Mr Ghanbari were detained pursuant to section 189(1) of the Migration Act. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens.
15. Due to the operation of section 46A of the Migration Act, Messrs MC and Ghanbari could not make a valid application for a visa without the Minister 'lifting the bar' to allow them to do so. However, despite this limitation, there were a number of ways that the Minister could have intervened to detain Messrs MC and Ghanbari in a less restrictive manner.

16. Under section 197AB of the Migration Act, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination that particular persons are to reside at a specified place, instead of in immigration detention. The Minister made a residence determination in relation to Mr MC on 21 August 2012 and in relation to Mr Ghanbari on 21 December 2012.
17. 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.
18. 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.'³
19. Accordingly, from the time that Mr MC and Mr Ghanbari entered immigration detention, the Minister could have: made a residence determination in relation to Mr MC and Mr Ghanbari (as he ultimately did), granted a visa to Mr MC and Mr Ghanbari pursuant to section 195A of the Migration Act, or approved that Mr MC and Mr Ghanbari reside in a place other than an immigration detention centre pursuant to section 5 of the Migration Act.
20. I find that the Minister's failure to place Mr MC in a less restrictive form of detention until 29 August 2012, and Mr Ghanbari in a less restrictive form of detention until 9 January 2012, constitutes an act under the AHRC Act.

6.2 Inconsistent with or contrary to human rights

21. Mr MC was detained in immigration detention centres for over two years and Mr Ghanbari was detained in immigration detention centres for almost two years. Both men have now been placed in community detention.
22. It appears that in both cases, Mr MC and Mr Ghanbari's deteriorating mental health was a factor in the Minister's decision to make a residence determination. However, detention may be arbitrary within the meaning of article 9(1) of the ICCPR long before it impacts on an individual's physical or mental health.
23. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁴
24. There is no information before me to suggest that it was necessary to detain Messrs MC and Ghanbari in an immigration detention centre. Given that both men have now been placed in community detention, it is unclear why this did not occur at an earlier time. I note that community detention was available on Christmas Island in 2010.
25. Whilst it may be reasonable to detain for a short period in order to document entry, record protection claims and establish identity, the information before me suggests that the Commonwealth did not actively consider community detention for Mr MC until December 2011 and for Mr Ghanbari until June 2011.
26. The Commonwealth appears to suggest that Mr MC could not be placed in community detention because the security and identity checks necessary for him to be granted a Protection visa had not been completed. The Commonwealth also states that there was some information before it to suggest that Mr MC had been involved in people smuggling. However, I note that these factors were present in August 2012 and did not prevent Mr MC being placed in community detention.

27. In response to my preliminary view, the Commonwealth advised that the expanded community detention program was not announced until October 2010 and was not fully operational until January 2011. The Commonwealth states that community detention was expanded for the purpose of prioritising the transfer of children into the community and that single adult men were not eligible to be placed in the community unless they were assessed as particularly vulnerable.
28. Whilst it may not have been consistent with the Commonwealth's policy to place Mr MC and Mr Ghanbari in community detention until they were assessed as particularly vulnerable, this policy does not provide justification for prolonged detention in an immigration detention centre.
29. The Commonwealth also noted that Mr MC's request to be placed in community detention was delayed because he requested to be removed from Australia, but subsequently withdrew this request. Given Mr MC has been found to be refugee at the time that he requested to be returned to Afghanistan, it was likely that it would take the Commonwealth some time to assess whether it would breach Australia's non-refoulement obligations to return Mr MC to Afghanistan. Mr MC could have been placed in community detention while the Commonwealth undertook this assessment.
30. I find that the detention of Mr MC and Mr Ghanbari in immigration detention centres was arbitrary within the meaning of article 9 of the ICCPR.

7 Findings and recommendations

7.1 Power to make 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.⁵ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁶
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.⁷

7.2 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 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.
35. 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.

36. 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.
37. 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.
38. 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).⁸
39. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,⁹ 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*:¹⁰
- ...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.¹¹
40. 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).¹² In that case at first instance,¹³ 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.
41. 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'.
42. 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.¹⁴
43. 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.¹⁵ 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.¹⁶

44. 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,¹⁷ 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 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 \$265,000.¹⁸

7.3 Recommendation that compensation be paid for loss of liberty

45. I have found that Mr MC's and Mr Ghanbari's detention was arbitrary within the meaning of article 9(1) of the ICCPR.
46. Mr MC was detained for a period of about two and a half years in an immigration detention centre and Mr Ghanbari was detained for about 22 months in an immigration detention centre. There is no evidence before me as to whether Messrs MC and Ghanbari were aware of Australia's policy of detaining unauthorised maritime arrivals or in relation to the level of shock they experienced at being placed in immigration detention upon arrival in Australia.
47. There is also no evidence before me that the conditions of their detention in the immigration detention centres were particularly harsh¹⁹ or that Messrs MC and Ghanbari had any reason to fear for their lives or safety.²⁰
48. The information before me indicates that immigration detention had an adverse impact on the mental health of Messrs MC and Ghanbari and that the impact of detention on their mental health appears to have been a factor in the Minister's decision to make a residence determination in their favour. I take this factor into account in the quantum of compensation that I have recommended.
49. Mr Ghanbari states that during his almost two years in immigration detention he 'couldn't see the light at the end of the tunnel' and twice attempted to kill himself. He considers that the Commonwealth should pay compensation to him in the amount of \$1,200,000. I accept Mr Ghanbari's evidence in relation to the high levels of anxiety and stress he suffered during his detention, and its impact on his mental health, and have taken this into account in the quantum of compensation recommended.
50. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above, I consider that payment of compensation in the amount of \$150,000 to Mr MC and \$100,000 to Mr Ghanbari is appropriate.

7.4 Apology

51. In addition to compensation, I consider that it would be appropriate for the Commonwealth to provide a formal written apology to Mr MC and Mr Ghanbari for the breach of their 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.²¹

8 Response to findings and recommendations

52. On 24 October 2013, I provided a notice to the Department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to these complaints.
53. By letter dated 5 May 2014, the Department provided a response to my recommendation that the Commonwealth pay compensation to Mr MC in the amount of \$150,000:

The complainant was lawfully detained in accordance with the *Migration Act 1958* (Cth) and prevailing government policy. Further, the department's decision to accommodate the complainant within an Immigration Detention Centre was not arbitrary, as the complainant's detention at an Immigration Detention Centre was necessary to achieve the department's reasonable objective of managing Australia's borders by conducting the required identity, health and security checks, and was appropriate for managing his individual needs.

Numerous factors contributed to the department's decision to accommodate the complainant at an Immigration Detention Centre rather than placing him in community detention. As noted in the department's previous response to the Section 27 Notice, the complainant's initial referral for consideration for CD was delayed because he made a request for voluntary removal, a request which he subsequently withdrew. As also noted in the Department's previous submissions to the Commission, allegations of involvement in people smuggling activities had been made against the complainant which were being investigated. The complainant was also identified by his Case Manager as exhibiting signs of vulnerable, anti-social and destructive behaviours. The complainant's records indicate that while in immigration detention, he was involved in serious assault, self-harm (threatened and actual), voluntary starvation, major and minor disturbances, and abusive and aggressive behaviour.

The complainant's case was regularly reviewed by Case Management, and on each occasion his placement in an Immigration Detention Centre was found to be appropriate and proportionate to his particular needs. The complainant was kept informed of the status of his immigration process on a regular basis by Case Management.

With respect to the view that the Commonwealth acted inconsistently with or contrary to the law in relation to Article 9(1) of the International Covenant on Civil and Political Rights in the case of the complainant, the department continues to rely on the facts as presented in its previous submissions to the AHRC.

...

Given the department's view that the complainant's detention was lawful at all times and there is no evidence to the contrary, the department considers there is no meaningful prospect of liability under Australian domestic law and as such no proper basis to consider a payment of compensation.

54. With regard to the recommendation that the Commonwealth provide a formal written apology to Mr MC, the Department's response in the same letter was as follows:

The department reasserts its view that the complainant's detention within the detention network was lawful and not arbitrary, therefore there is no basis for compensation or provision of an apology, and no action will be taken with regard to these recommendations.

55. By letter dated 1 May 2014, the Department provided a response to my recommendation that the Commonwealth pay compensation to Mr Ghanbari in the amount of \$100,000:

Mr Ghanbari was lawfully detained in accordance with the *Migration Act 1958 (Cth)* and prevailing government policy. Further, the decision of the department to detain Mr Ghanbari in an Immigration Detention Centre was not arbitrary but appropriate to meet his individual needs. The decision was also consistent with the department's objective of managing Australia's borders by conducting the required identity, health and security checks.

Mr Ghanbari's detention at an Immigration Detention Centre was considered appropriate while inconsistencies regarding his claimed identity as a stateless Feyli Kurd were being resolved. Additionally, Mr Ghanbari has not been recognised as a refugee by the Australian Government following the exhaustion of the protection claims and associated appeals processes.

During his time in immigration detention, Mr Ghanbari's placement was reviewed by Case Management on twenty-seven separate occasions and it was consistently agreed that his accommodation, firstly at an Immigration Detention Centre, and subsequently in community detention was appropriate to his needs.

...

Given the department's view is that Mr Ghanbari's detention was lawful at all times and there is no evidence to the contrary, the department considers there is no meaningful prospect of liability under Australian domestic law and as such no proper basis to consider a payment of compensation.

56. With regard to the recommendation that the Commonwealth provide a formal written apology to Mr Ghanbari, the Department's response in the same letter was as follows:

The department reasserts its view that Mr Ghanbari's detention within the detention network was lawful and not arbitrary, therefore there is no basis for compensation or provision of an apology, and no action will be taken with regard to these recommendations.

57. 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 Human Rights and Equal Opportunity Commission, Burgess & Ors* (1997) 78 FCR 208.
 - 3 *Migration Act 1958* (Cth) s 5.
 - 4 *Van Alphen v Netherlands* Communication No 305/1988 UN doc CCPR/C/39/D/305/1988, *A v Australia* Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993, *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.
 - 5 AHRC Act s 29(2)(a).
 - 6 AHRC Act s 29(2)(b).
 - 7 AHRC Act s 29(2)(c).
 - 8 *Cassell & Co Ltd v Broome (No 1)* [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].
 - 9 [2013] FCA 901.
 - 10 [2003] NSWSC 1212.
 - 11 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 at [121].
 - 12 *Ruddock v Taylor* (2003) 58 NSWLR 269.
 - 13 *Taylor v Ruddock* (Unreported, NSW District Court, Murrell DCJ, 18 December 2002).
 - 14 *Taylor v Ruddock* (Unreported, NSW District Court, Murrell DCJ, 18 December 2002) [140].
 - 15 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 16 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 17 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
 - 18 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].
 - 19 Compare *Taylor v Ruddock* (Unreported, NSW District Court, Murrell DCJ, 18 December 2002).
 - 20 Compare *Nye v State of New South Wales* [2003] NSWSC 1212.
 - 21 Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2000) 151.

Further Information

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