



Australian  
Human Rights  
Commission

---

**MG v**

---

**Commonwealth of  
Australia (DIBP)**

---

[2014] AusHRC 86

---

© Australian Human Rights Commission 2014.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

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

**Design and layout** Dancinggirl Designs

**Printing** Masterprint Pty Limited

#### **Electronic format**

This publication can be found in electronic format on the website of the Australian Human Rights Commission:  
[www.humanrights.gov.au/publications/index.html](http://www.humanrights.gov.au/publications/index.html).

#### **Contact details**

For further information about the Australian Human Rights Commission, please visit [www.humanrights.gov.au](http://www.humanrights.gov.au) or email [communications@humanrights.gov.au](mailto:communications@humanrights.gov.au). You can also write to:

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

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

Report into arbitrary detention

[2014] AusHRC 86

**Australian Human Rights Commission 2014**



**Australian  
Human Rights  
Commission**

# Contents

1	Introduction	2
2	Summary of complaint, findings and recommendations	2
2.1	Relevant acts and practices under the AHRC Act	2
2.2	Detention in BIDF and VIDC	2
2.3	Recommendations	3
3	Background	3
4	Legislative framework	4
4.1	Functions of the Commission	4
4.2	What is an ‘act’ or ‘practice’?	5
4.3	What is a ‘human right’?	6
5	Arbitrary detention	7
5.1	Complainant’s submissions	7
5.2	Commonwealth’s submissions	8
5.3	Consideration	9
5.4	Article 2 of the ICCPR	11
6	Recommendations	11
6.1	Power to make recommendations	11
6.2	MG’s submissions	12
6.3	Consideration	12
6.4	Recommendation that compensation be paid	14
6.5	Apology	15
7	Department’s response to recommendations	15



**Australian  
Human Rights  
Commission**

---

July 2014

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 MG. MG was held in immigration detention for a period of 42 months.

I have found that the acts and practices of the Commonwealth resulted in arbitrary detention contrary to article 9(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 14 April 2014 the Department of Immigration and Border Protection provided responses to my findings and recommendations. I have set out the responses of the Department in part 7 of my 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

---

**Australian Human Rights Commission**

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

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: [www.humanrights.gov.au](http://www.humanrights.gov.au)

# 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 MG that his treatment by the Commonwealth of Australia – Department of Immigration and Border Protection involved acts or practices inconsistent with or contrary to human rights.
2. MG was detained in various immigration detention facilities for over 42 months. On 8 May 2009 the Commonwealth removed MG from Australia and returned him to the United States of America.
3. MG claimed that his detention was in violation of his rights under articles 2 and 9 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup> For the reasons given in this report, I have found that an act of the Commonwealth violated article 9 of the ICCPR.
4. MG also claimed that his detention was in violation of his rights under articles 17 and 23 of the ICCPR, and his son's rights under articles 17, 23 and 24 of the ICCPR and articles 2, 5, 9 and 10 of the *Convention on the Rights of the Child* (CRC).<sup>2</sup> For reasons already provided to MG and the Commonwealth, I have found that those complaints have not been substantiated. Those complaints and findings do not form part of this report.
5. MG also complained of a number of other breaches of the ICCPR, and in particular articles 13 and 14. For reasons previously given to MG, I decided not to inquire further into those aspects of his complaint.
6. MG requested that his and his son's names not be disclosed. For that reason I have removed their names from this report and referred to MG by a pseudonym. I have also made a direction under section 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) that MG's name not be disclosed.

## 2 Summary of complaint, findings and recommendations

### 2.1 Relevant acts and practices under the AHRC Act

7. I have found that the Commonwealth's failure to place MG in a less restrictive form of detention was an 'act' for the purposes of the AHRC Act. The Minister could have placed MG in community detention or in a place other than an immigration detention centre but did not do so.

### 2.2 Detention in BIDF and VIDC

8. I have found that the prolonged detention of MG in Baxter Immigration Detention Facility (BIDF) and Villawood Immigration Detention Centre (VIDC) was not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia.
9. For this reason, I have found that the failure to place MG in community detention or some other less restrictive form of detention after his visa was cancelled was inconsistent with the prohibition of arbitrary detention in article 9 of the ICCPR.

## 2.3 Recommendations

10. I have recommended that the Commonwealth pay MG compensation in the amount of \$300,000 and issue him an apology.

# 3 Background

11. The following facts were not disputed:

- (a) MG entered Australia on or about 21 April 1996 on a tourist visa. That visa expired on 21 July 1996.
- (b) MG applied for a combined spouse visa on 7 September 1999 and was granted a permanent spouse visa on 24 September 2001.
- (c) On 13 November 2003 MG pleaded guilty to, and was convicted of, the following offences:
  - (i) three counts of dishonestly obtaining advantage from the Commonwealth (for which he was sentenced on each count to three and a half years' imprisonment with a non-parole period of eighteen months)
  - (ii) five counts of attempting to obtain financial advantage (for which he was sentenced on each count to three and a half years' imprisonment)
  - (iii) one count of attempting to destroy evidence (for which he was given a cumulative sentence of one month's imprisonment)
  - (iv) one count of opening a false account (for which he was sentenced to one and a half years' imprisonment)
  - (v) five counts of operating a false account (for which he was sentenced on each count to one and a half years' imprisonment)
  - (vi) four counts of dishonestly obtaining credit (for which he was sentenced on each count to six years' imprisonment).
- (d) The four convictions for dishonestly obtaining credit were later set aside on appeal on the basis that the person who had presented the indictment was not authorised to do so.
- (e) The conduct to which the above convictions related took place between 1998 and 2002. MG obtained \$644,390.65 by way of that conduct, although about half of that amount was subsequently recovered from him.
- (f) On 7 October 2004, MG was released from prison into the community, following an assessment by the Queensland Community Corrections Board that he was eligible for such release. The Board assessed MG to be a 'low risk'.
- (g) On 2 June 2005, MG's spouse visa was cancelled on character grounds, pursuant to section 501 of the *Migration Act 1958* (Cth).
- (h) On 20 October 2005, MG was apprehended by the Commonwealth and placed in immigration detention in Queensland. The next day he was transferred to the BDF in South Australia.

- (i) MG appealed the decision to cancel his visa to the Administrative Appeals Tribunal (AAT). The AAT affirmed the decision on 12 January 2006. MG appealed from this decision to the Federal Court. The Commonwealth conceded that appeal and the matter was remitted to the AAT for a fresh hearing.
- (j) On 28 February 2007, the AAT again affirmed the decision to cancel MG's visa.
- (k) MG lodged an application in the Federal Court for judicial review of the AAT's decision. The Federal Court dismissed that application on 20 November 2007.
- (l) MG appealed to the Full Court of the Federal Court. That appeal was dismissed on 5 September 2008.
- (m) MG sought special leave to appeal to the High Court. The High Court declined to grant leave on 11 February 2009.
- (n) In January 2009, MG commenced fresh proceedings in the Federal Court seeking to challenge the decision to cancel his visa. Those proceedings were dismissed on 27 March 2009. MG sought leave to appeal this decision to the Full Federal Court. Leave was refused on 8 May 2009.
- (o) Meanwhile, on 9 September 2008, MG had lodged an application for a protection visa. That application was refused on 8 October 2008. That decision was affirmed by the Refugee Review Tribunal on 23 December 2008.
- (p) On 8 May 2009, MG was removed from Australia by the Commonwealth, and returned to the United States.
- (q) MG was detained at the BDF from 21 October 2005 until 20 August 2007, when he was moved to the VIDC. He was detained there until his removal from Australia.
- (r) On 20 July 2005, MG's son was born. At that time, MG was estranged from his son's mother. MG subsequently consented to orders in the Federal Magistrates Court granting him 2 hours' access to his son per fortnight. At all relevant times, MG's son was resident with his mother in Queensland.

## 4 Legislative framework

### 4.1 Functions of the Commission

12. 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.

13. 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 is inconsistent with or contrary to any human right.
14. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

## 4.2 What is an ‘act’ or ‘practice’?

15. 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.
16. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
17. 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;<sup>3</sup> that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.
18. MG was first detained in immigration detention on 20 October 2005. His detention continued until he was removed from Australia on 8 May 2009.
19. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. After the cancellation of his visa on 2 June 2005, MG became an unlawful non-citizen and as such was required to be detained. However, the Migration Act did not require that MG be detained in an immigration detention facility.
20. Section 197AB(1) of the Migration Act states:

If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a **residence determination**) to the effect that one or more specified persons to whom this Subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of **immigration detention** in subsection 5(1).
21. 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’.<sup>4</sup>
22. The Commonwealth claims that MG’s immigration detention was lawful under section 189 of the Migration Act. It states that MG could only have been placed in community detention if the Minister had made a residence determination to that effect. The Minister considered making a residence determination and declined to do so.
23. I am satisfied that the Minister could have made a residence determination in relation to MG under section 197AB of the Migration Act, but did not do so. I find that the failure by the Minister to place MG in a less restrictive form of detention amounted to an ‘act’ under the AHRC Act.

### 4.3 What is a 'human right'?

24. The rights and freedoms recognised by the ICCPR are 'human rights' within the meaning of the AHRC Act.<sup>5</sup> The following articles of the ICCPR are relevant to the act that I have identified above.

#### (a) Article 2 of the ICCPR

25. Article 2 of the ICCPR provides:

- (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
- (3) Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

26. Article 2 of the ICCPR is an 'umbrella clause'.<sup>6</sup> A violation of article 2 will necessarily occur in the context of one or more of the substantive rights contained in the ICCPR (though not necessarily in the context of a breach of one of those rights).<sup>7</sup>

#### (b) Article 9(1) of the ICCPR

27. 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. ...

28. 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<sup>8</sup>
- (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<sup>9</sup>

- (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<sup>10</sup>
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>11</sup>

29. In *Van Alphen v The Netherlands* the UN Human Rights Committee (HRC) 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.<sup>12</sup> Similarly, the HRC considered that detention during the processing of asylum claims for periods of three months in Switzerland was ‘considerably in excess of what is necessary’.<sup>13</sup>
30. The HRC has held in several cases 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.<sup>14</sup>
31. The United Nations Working Group on Arbitrary Detention has expressed the view that the use of administrative detention for national security purposes is not compatible with international human rights law where detention continues for long periods or for an unlimited period without effective judicial oversight.<sup>15</sup> A similar view has been expressed by the HRC, which has said:<sup>16</sup>
- if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ... information of the reasons must be given ... and court control of the detention must be available ... as well as compensation in the case of a breach ... .
32. The Working Group emphasised that people who are administratively detained must have access to judicial review of the substantive justification of detention as well as sufficiently frequent review of the ongoing circumstances in which they are detained, in accordance with the rights recognised under article 9(4) of the ICCPR.<sup>17</sup>
33. A short period of administrative detention for the purposes of developing a more durable solution to a person’s immigration status may be a reasonable and appropriate response by the Commonwealth. However, detention for immigration purposes without reasonable prospect of removal may contravene article 9(1) of the ICCPR.<sup>18</sup>

## 5 Arbitrary detention

### 5.1 Complainant’s submissions

34. MG claimed that his detention in BDF and VIDC was arbitrary within the meaning of article 9(1) of the ICCPR. He made a number of submissions in support of that claim.
35. MG submitted that it was not mandatory under Australian law for him to be detained in an immigration detention facility. He submitted that under section 197AB of the Migration Act, the Minister could have made a residence determination allowing him to be placed in community detention. Such a placement would, he said, have been a ‘less invasive’ way for the Commonwealth to achieve its ends.

36. MG made a number of submissions to the effect that there was no justification for the Commonwealth to detain him in an immigration detention facility. He argued that he would not have posed a significant risk to the community if he had been placed in a less restrictive place of detention. He gave the following reasons:
- (a) his crimes were non-violent
  - (b) drug tests had shown he had overcome his drug addiction (which he claimed had led to his offending), lowering his chance of committing any further criminal offences if released into the community
  - (c) he lived in the community without incident for 12 months following his release from gaol before he was placed in immigration detention. He had committed no offences in that time
  - (d) he had been assessed as 'low risk' by the Queensland Community Corrections Board before he was released into the community in 2004. MG submitted that the Board was better placed than the Department of Immigration and Citizenship (as it then was – it has subsequently been redesignated the Department of Immigration and Border Protection) (the Department) or the Minister to make an accurate assessment of any risk he would pose in the community
  - (e) MG submitted that the Department did not in fact make any meaningful attempt to assess the level of risk he would have posed if placed in a less restrictive form of detention
  - (f) MG submitted that any risk he had posed of re-offending had been 'mitigated' by the prison term he had served.
37. MG submitted that he was not a 'flight risk' as he was a party to court proceedings in the Family Court, seeking orders allowing him access to his son.
38. MG submitted that even if placing him in a less restrictive form of detention would have posed some risk to the community, his detention for approximately 42 months in BDF and VIDC was disproportionate to that risk and the seriousness of his criminal conduct, and was unjust.
39. MG made further submissions arguing that the acts or practices of the Commonwealth were in contravention of his rights under article 9(1) of the ICCPR in a number of other ways. For reasons already provided to the parties, I have not made findings that these acts and practices were inconsistent with or contrary to MG's human rights. These matters do not form part of this report.

## 5.2 Commonwealth's submissions

40. The Department submitted that MG's spouse visa was cancelled under section 501 of the Migration Act. At that time he became an unlawful non-citizen, and was required to be detained pursuant to section 189 of the Migration Act.
41. The Department submitted that it initiated requests that MG be considered for community detention under section 197AB of the Migration Act on a number of occasions. It also initiated requests that MG be considered for the grant of a discretionary visa under section 195A of that Act. The Department submits that the Minister's relevant intervention powers are personal, discretionary and non-compellable.
42. The Minister considered exercising his discretionary powers under section 197AB, and declined to intervene. It was therefore necessary under law to detain MG in an immigration detention facility.

43. The Department submitted that the decision to cancel MG's visa and his subsequent detention were proportionate and reasonable responses to MG's criminal history. It further submitted that it does not consider lawful immigration detention to constitute a breach of article 9 of the ICCPR. In MG's case, the Department claimed his detention was proportionate to the government's aim of removing him from Australia.

## 5.3 Consideration

### (a) Failure to place in less restrictive place of detention

44. MG was placed in immigration detention on 20 October 2005. He was not released until he was removed from Australia and returned to the United States on 8 May 2009.
45. The Commonwealth advises that it was obliged to detain MG in an immigration detention facility unless the Minister exercised one of his non-compellable, discretionary powers to grant MG a visa or to make a residence determination allowing MG to be placed in community detention. The Minister considered exercising those powers on a number of occasions but did not do so.
46. It appears that the Department considered making, or did make, a submission to the Minister concerning the exercise of his discretionary powers with respect to MG on at least six occasions. Some of these instances were initiated at the request of MG. Some were initiated by the Department. Others still were initiated at the request of third parties.
47. It appears that the first consideration of MG under section 197AB of the Migration Act was initiated on or about 4 January 2007. That was some fourteen months after MG was first placed in immigration detention. I find that that delay in considering MG for placement in community detention was not consistent with his right not to be arbitrarily detained.
48. As the Commonwealth has submitted, it appears that the Minister considered exercising his discretion under section 197AB on or about 21 March 2007, and declined to do so.
49. In considering whether MG's detention in BIDE and VIDC was arbitrary, I am required to consider whether detention in an immigration detention centre was proportionate to a legitimate aim of the Commonwealth.
50. The Commonwealth's submissions to me have not addressed the rationale for MG's detention in BIDE and VIDC. They are limited to the submission that MG was required by law to be so detained in the absence of any exercise by the Minister of one of his discretionary powers.
51. Further, the Minister did not give reasons for declining to exercise his discretionary power under section 197AB. However, the Department did prepare written submissions for the Minister's consideration.
52. In the Department's submission to the Minister dated 'March 2007', the Department lists the following factors as relevant to the exercise of the Minister's discretion under section 197AB:
- (a) MG's criminal history
  - (b) the finding of the AAT that MG presented a risk of recidivism.

53. In submissions to the Minister made at various times during MG's detention in relation to the potential exercise of a number of discretionary powers, the Department referred to the following factors which could have been relevant to the Commonwealth's decision not to place MG in a less restrictive place of detention:
- (a) the frequency and nature of MG's criminal offending
  - (b) MG's behaviour while in immigration detention, including 'property damage, fighting, and abusive/aggressive behaviour (including assault)'
  - (c) the AAT's assessment that MG presented an appreciable risk of recidivism
  - (d) false statements said to have been made by MG to the Commonwealth in relation to the cancellation of his visa.
54. I consider that the risk MG may have posed to the community if placed in community detention was a relevant factor the Commonwealth was entitled to consider. So too was any risk of MG absconding to avoid deportation. The mitigation of any such risks, coming under the aegis of the more general objective of regulating immigration, was a legitimate aim of the Commonwealth. However I find that MG's detention in BDF and VIDC was not proportionate to that aim. That is because I find that any risk that MG might have posed to the community could have been mitigated in a less invasive manner.
55. I note that MG has been convicted of a number of criminal offences. However, I do not consider that MG's criminal record of itself was a sufficient basis on which to justify the deprivation of his liberty in an immigration detention centre.
56. MG served the sentences imposed in relation to his convictions. The Queensland Community Corrections Board assessed that MG was eligible for release into the community. It has not been disputed by the Commonwealth that the Board assessed MG to pose a 'low risk' if released. MG then lived in the community for some months before he was placed in immigration detention. The Commonwealth has not alleged that MG manifested any threat to the community in that time.
57. The Commonwealth has referred to MG's behaviour while in immigration detention. However it has provided no detail of specific incidents and no explanation of how these incidents are said to show that MG would have posed a risk to the community if released from detention in immigration detention facilities. It is clear from the Commonwealth's submissions that no criminal charges were laid over these alleged incidents.
58. Further, the Commonwealth could have placed MG in community detention subject to conditions, such as reporting requirements, travel restrictions or a curfew, to allay any concerns it had about the risk that MG posed to the community, or any risk he posed of absconding. The power to impose conditions on any residence determination is explicitly granted by section 197AB(2)(b) of the Migration Act.
59. It is unclear why the Minister considered that any risk that MG posed to the community could not be mitigated in the ways identified above. That is particularly so given that on 10 December 2008 the Department, in a submission to the Minister, recommended that MG be considered for the discretionary grant of a temporary visa under section 195A of the Migration Act. It appears that the Department proposed that MG be granted a temporary bridging visa subject to conditions.

60. In light of the above, I find that MG's detention in BIDF and VIDC was not reasonable, necessary or proportionate to the Commonwealth's legitimate aims of regulating immigration into Australia or protecting the Australian community from non-citizens who pose an unacceptable risk to the Australian community, or to any other legitimate aim of the Commonwealth. I consider that any reasonable concerns that the Commonwealth had about the risk that MG posed to the community could have been addressed by imposing conditions on his placement in community detention.
61. For these reasons, I find that MG's detention in BIDF and VIDC was arbitrary in breach of article 9(1) of the ICCPR.

## 5.4 Article 2 of the ICCPR

62. MG has also complained that his detention in BIDF and VIDC was inconsistent with article 2 of the ICCPR.
63. There appear to be a number of aspects to MG's complaint under article 2. Some of those relate to matters which are not the subject of the present inquiry.
64. As noted above, article 2 has an accessory character.<sup>19</sup> To the extent that MG's complaint under article 2 relates to the arbitrary nature of his detention in BIDF and VIDC, that aspect of his complaint is sufficiently addressed in my consideration of a breach of article 9 (above).
65. MG also claimed that the Commonwealth discriminated against him in violation of article 2. The alleged basis of that discrimination is not entirely clear. As I read his submissions, he claims that he was discriminated against on the basis of his detention, being '*circumstances the state party itself had imposed*'. That is, he claims he was discriminated against on account of his status as a person in immigration detention, or on account of the consequences of that status. MG has provided no submissions or evidence that support this allegation of discrimination.
66. MG has identified no status relevant to article 2 on which it is said the Commonwealth discriminated against him. I find that MG's complaint of discrimination under article 2 has not been substantiated.

# 6 Recommendations

## 6.1 Power to make recommendations

67. 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.<sup>20</sup> The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.<sup>21</sup>
68. The Commission may also recommend:
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
  - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>22</sup>

## 6.2 MG's submissions

69. MG asked the Commission to make the following recommendations:
- (a) that the Commonwealth grant MG a permanent residence visa, or, in the alternative, that MG be 'treated as the lawful holder of a permanent resident subclass 820 Spousal visa'
  - (b) that the Commonwealth provide for MG:
    - (i) an airfare from Washington DC to Brisbane
    - (ii) '12 months' of suitable housing in or near Brisbane'
    - (iii) 'a liveable stipend or other support for food, transport, etc and counselling costs' for himself and his son
  - (c) that the Commonwealth pay MG financial compensation for his loss of liberty while in immigration detention, in the amount of \$1,500 per day of detention
  - (d) that the Commonwealth pay MG financial compensation for lost wages while in immigration detention, in the amount of \$1,600 per week
  - (e) that the Commonwealth make a payment of \$4,250 to the 'Child Support Agency' on account of child support payments MG was unable to make while in immigration detention.

## 6.3 Consideration

70. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
71. 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.<sup>23</sup>
72. 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.<sup>24</sup>
73. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary, irrespective of legality.
74. 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.
75. 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).<sup>25</sup>

76. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,<sup>26</sup> 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*:<sup>27</sup>
- ...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.<sup>28</sup>
77. 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).<sup>29</sup> In that case at first instance,<sup>30</sup> 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.
78. 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'.
79. 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.<sup>31</sup>
80. 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.<sup>32</sup> 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.<sup>33</sup>
81. 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,<sup>34</sup> 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.<sup>35</sup>

## 6.4 Recommendation that compensation be paid

### (a) Arbitrary detention

82. I have found that MG's detention in VIDC and BIDF was arbitrary for the purposes of article 9(1). MG was detained for 1293 days.
83. I consider that the Commonwealth should pay to MG an amount of compensation to reflect the loss of liberty caused by his detention at VIDC and the consequent interference with his family but, contrary to MG's submission, I have not assessed the quantum of that compensation by utilising a strict 'daily rate'.
84. I have taken into account the fact that had MG been transferred to community detention, he still would have suffered some curtailment of liberty. I have also taken into account the fact that MG had had some experience of detention following his convictions, and the statement of the Court of Appeal in *Ruddock v Taylor*, that the effect of false imprisonment on a person progressively diminishes with time.
85. There is no evidence before me to suggest that the circumstances surrounding MG being taken into detention were particularly shocking, that the conditions of that detention were particularly harsh, or that MG feared for his safety while detained.
86. 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 \$300,000 is appropriate. I therefore recommend that the Commonwealth pay MG that amount.

### (b) Other recommendations sought by MG

87. I do not make the other recommendations sought by MG.
88. As noted in the discussion above, recommendations for compensation should be made to put a person in the position they would have been in absent particular wrongful conduct. There must be a nexus between the conduct complained of and the compensatory measure recommended to rectify it.
89. I have found that the Commonwealth's conduct in keeping MG detained in Immigration Detention facilities for an extended period was in breach of article 9(1). I have recommended that MG be paid financial compensation on account of that breach.
90. My findings in this report do not include findings that the decisions to cancel MG's visa and to remove him from Australia were in violation of his human rights. It is therefore not appropriate for me to make any recommendation that he be granted a visa or that arrangements be made for his return to Australia.

91. I have found that MG's detention was arbitrary because he could have been placed in a less restrictive form of detention. It appears that at the time MG was taken into immigration detention, he was, as a result of the cancellation of his spouse visa, an unlawful non-citizen for the purposes of the Migration Act, and therefore not entitled to undertake paid employment. As noted above, I have decided not to inquire into the cancellation of MG's visa. I therefore consider that it is not appropriate for me to recommend the payment of compensation for MG's loss of income while in immigration detention.
92. It appears that MG's request that I make a recommendation that the Commonwealth make a payment to the 'Child Support Agency' is made because he was unable to work while in immigration detention, and therefore unable to make child support payments himself. As I have decided that it is not appropriate for me to make any recommendation with respect to loss of income, I have decided not to make a recommendation with respect to MG's child support payments.

## 6.5 Apology

93. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to MG 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.<sup>36</sup>

# 7 Department's response to recommendations

94. On 25 February 2014, I provided a Notice under section 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by MG against the Commonwealth.
95. By letter dated 14 April 2014, the Department responded to the findings and recommendations contained in this report. These responses are reproduced below.

### **The Department's response on behalf of the Commonwealth of Australia to the final findings and recommendations of the Australian Human Rights Commission with regard to [MG]**

#### **Finding 1**

*That the prolonged detention of [MG] in Baxter Immigration Detention Facility (BIDF) and Villawood Immigration Detention Centre (VIDC) was not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia.*

#### **Finding 2**

*That the failure to place [MG] in community detention or some other less restrictive form of detention after his visa was cancelled was inconsistent with the prohibition of arbitrary detention in Article 9 of the International Covenant on Civil and Political Rights.*

### **DIBP response**

The Department notes findings 1 and 2 of the AHRC in this case.

The Department reaffirms its position that [MG's] detention was in accordance with law and it was not manifestly unpredictable or indefinite. The Department maintains that [MG's] visa cancellation and consequent detention was a reasonable, lawful and proportionate response to his criminal convictions and his detention was proportionate to the Australian Government's broader purpose of regulating immigration into Australia and its more specific purpose of effecting [MG's] removal from Australia. [MG's] extensive litigation in relation to the cancellation of his spouse visa between October 2005 and May 2009, was a key barrier to the Department's ability to effect his removal. During this time, [MG] also made repeat requests for Ministerial intervention under section 417 of the Act, in relation to the refusal of his Protection visa application. As such the Australian Government maintains that [MG's] detention was not arbitrary and therefore did not breach Article 9 of the International Covenant on Civil and Political Rights.

The Department has previously provided the Commission with the history of the decisions that have been made in relation to [MG's] requests for alternative management under sections 195A and 197AB of the *Migration Act 1958*. The Commission would be aware that both powers are non-compellable and non-delegable.

The then Minister considered the circumstances of [MG's] case on one occasion under section 197AB and on three separate occasions under section 195A. On each occasion the then Minister determined that it was not in the public interest to intervene in [MG's] case.

The Department reasserts that ultimately, decisions are made at the discretion of the Minister, and are a reflection of what is deemed to be in the public interest at that time.

....

### **Recommendation 1**

*That the Commonwealth pay [MG] compensation in the amount of \$300,000.*

### **DIBP response**

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

In the Department's view, [MG's] detention was lawful, reasonable and proportionate with the Australian Government's aim of effecting his removal from Australia.

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

### **Recommendation 2**

*That the Commonwealth issue [MG] a formal written apology for the breach of his human rights.*

## DIBP response

The Department notes the recommendation of the AHRC in this case. As per the Department's response to Recommendation 1, [MG's] detention was lawful, reasonable and proportionate with the Australian Government's aim of effecting his removal from Australia.

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

96. I report accordingly to the Attorney-General.



Gillian Triggs  
**President**  
Australian Human Rights Commission

July 2014

- 
- 1 *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16/12/1966, 999 UNTS 171 (entered into force 23/03/1976 except Article 41 which came into force 28/03/1979), ratified 13/08/1980, except Article 41 which was ratified 28/1/1993.
  - 2 *Convention on the Rights of the Child*, opened for signature 20/11/1989 1577 UNTS 3 (entered into force 2/09/1990), ratified 17/12/1990.
  - 3 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
  - 4 *Migration Act 1958* (Cth) s 5.
  - 5 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
  - 6 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), p 29.
  - 7 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), pp 34-37.
  - 8 UN Human Rights Committee, General Comment 8 (1982) at [1]. See also *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; *Baban v Australia*, Communication No 1014 of 2001, UN Doc CCPR/C/78/D/1014/2001.
  - 9 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) p 308, at [11.10].
  - 10 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *van Alphen v The Netherlands*, 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; *Spakmo v Norway*, Communication No 631 of 1995, UN Doc CCPR/C/67/D/631/1995.
  - 11 *A v Australia*, Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993 (the fact that the author may have absconded if released into the community with not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
  - 12 *van Alphen v The Netherlands*, Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988.
  - 13 UN Human Rights Committee, Concluding Observations on Switzerland, UN Doc CCPR/A/52/40 (1997) at [100].
  - 14 *C v Australia*, Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia*, Communication No 1255 of 2004, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia*, Communication No 1014 of 2001, UN Doc CCPR/C/78/D/1014/2001; *D and E v Australia*, Communication No 1050 of 2002, UN Doc CCPR/C/87/D/1050/2002.
  - 15 *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2005/6, 1 December 2004 at [77].

- 16 UN Human Rights Committee, General Comment 8 (1982) at [4]. See also the *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, United Nations Doc E/CN.4/826/Rev.1 at [783]-[787].
- 17 *Mansour Ahani v Canada*, Communication No 1051 of 2002, UN Doc CCPR/C/80/D/1051/2002 at [10.2].
- 18 *Jalloh v The Netherlands*, Communication No 794 of 1998, UN Doc CCPR/C/74/D/794/1998; *Baban v Australia*, Communication No 1014 of 2001, UN Doc CCPR/C/78/D/1014/2001.
- 19 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005), p 35.
- 20 AHRC Act s 29(2)(a).
- 21 AHRC Act s 29(2)(b).
- 22 AHRC Act s 29(2)(c).
- 23 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 24 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 25 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoll v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 26 [2013] FCA 901.
- 27 [2003] NSWSC 1212.
- 28 [2013] FCA 901 at [121].
- 29 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 30 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 31 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 32 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 33 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 34 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].
- 35 *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [139].
- 36 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

## Further Information

### **Australian Human Rights Commission**

Level 3, 175 Pitt Street  
SYDNEY NSW 2000

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

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

For detailed and up to date information about the Australian Human Rights Commission visit our website at: [www.humanrights.gov.au](http://www.humanrights.gov.au)

To order more publications from the Australian Human Rights Commission download a Publication Order Form at: [www.humanrights.gov.au/publications/index.html](http://www.humanrights.gov.au/publications/index.html)  
or call: (02) 9284 9600 fax: (02) 9284 9611  
or email: [publications@humanrights.gov.au](mailto:publications@humanrights.gov.au)

