



Australian
Human Rights
Commission

Ms Bakhtiari and Master Reza Bakhtiari v Commonwealth of Australia (DIBP)

[2016] AusHRC 106

© Australian Human Rights Commission 2016.

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



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

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

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

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

Please give attribution to:

© Australian Human Rights Commission 2016.

ISSN 1837-1183

Further information

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

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

Design and layout Dancingirl Designs

Printing Masterprint Pty Limited

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

[2016] AusHRC 106

Report into arbitrary detention

Australian Human Rights Commission 2016

Contents

1	Introduction to this inquiry	3
2	Legislative framework	4
2.1	Functions of the Commission	4
2.2	What is an 'act' or 'practice'?	4
2.3	What is a human right?	4
3	Arbitrary detention	5
3.1	Law	5
3.2	Act or practice of the Commonwealth?	6
3.3	The Department's response	6
3.4	Finding	8
4	Recommendations	9
4.1	Compensation	9
4.2	Apology	11
5	Department's response to recommendations	12



**Australian
Human Rights
Commission**

March 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 Mrs Bakhtiari on behalf of herself and her 15 year old son, Master Mohammad Reza against the Commonwealth of Australia, Department of Immigration and Border Protection (Department).

I have found that the Department's failure to refer Mrs Bakhtiari and Master Reza's case to the Minister of Immigration and Border Protection for consideration for a residence determination or a visa during the eight months they were detained on Christmas Island, was inconsistent with or contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC).

In light of my findings I recommended that the Commonwealth pay to Mrs Bakhtiari and Master Reza appropriate compensation in relation to their period of arbitrary detention. In addition, the Commonwealth should provide a formal written apology to Mrs Bakhtiari and Master Reza in relation to their period of arbitrary detention.

The Department provided a written response to my findings and recommendations on 3 February 2016. I have set out the Department's response in part 5 of this report.

I enclose a copy of my report.

Yours sincerely,

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mrs Bakhtiari on behalf of herself and her 15 year old son, Master Mohammad Reza against the Commonwealth of Australia – Department of Immigration and Border Protection (Department) alleging a breach of their human rights.
2. Mrs Bakhtiari, her husband Mr A and Master Reza are Iranian nationals, who arrived in Darwin on 16 August 2013 aboard the boat ‘Suspected Illegal Entry Vessel (SIEV) 833, Quinton’. They were detained for approximately one week at the Northern Immigration Detention Centre. On 22 August 2013, the family were transferred to Christmas Island and were accommodated at the Phosphate Hill Alternative Place of Detention. On 23 August 2013, the family were transferred to the Lilac Aqua Alternative Place of Detention on Christmas Island. On 16 October 2013, Mr A was moved to the North West Point Immigration Detention Centre. Mrs Bakhtiari and Master Reza remained detained on Christmas Island until 22 April 2014.
3. As Mrs Bakhtiari and Master Reza arrived after 19 July 2013, they were subject to Regional Resettlement Arrangements and subsequent transfer to an Offshore Processing Centre, such as Nauru. Before transfer arrangements were made, Mrs Bakhtiari and Master Reza agreed to be voluntarily removed to Iran. They signed authorisations for removal on 11 March 2014 and 17 March 2014 respectively. They were accommodated at Great Eastern Motor Lodge in Perth for three days prior to their removal on 25 April 2014.
4. While in detention, Master Reza was seen by medical professionals on at least 21 occasions. He committed acts of self-harm on three occasions and attempted to commit suicide.
5. Mrs Bakhtiari complains that her and her son Master Reza’s detention on Christmas Island from 22 August 2013 until 22 April 2014 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 37(b) of the *Convention on the Rights of the Child* (CRC).
6. As a result of the inquiry, I find that the Department’s failure to refer Mrs Bakhtiari and Master Reza’s case to the Minister of Immigration and Border Protection (Minister) for consideration for a residence determination or a visa during the eight months they were detained on Christmas Island, was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.
7. I have recommended that:
 - The Commonwealth pay to Mrs Bakhtiari and Master Reza appropriate compensation in relation to their period of arbitrary detention.
 - The Commonwealth provide a formal written apology to Mrs Bakhtiari and Master Reza in relation to their period of arbitrary detention.
8. Mrs Bakhtiari also made a number of other complaints of human rights breaches relating to the period she and her son were detained on Christmas Island. For reasons already provided to Mrs Bakhtiari and the Commonwealth, I have found that those complaints have not been substantiated. Those complaints and findings do not form part of this report.

2 Legislative framework

2.1 Functions of the Commission

9. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (AHRC Act) provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
10. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

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

11. The terms 'act' and 'practice' are defined in s 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.
12. 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.
13. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.¹

2.3 What is a human right?

14. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
15. There are a number of human rights relevant to this inquiry under both the ICCPR and the CRC.

(a) *Relevant human rights under the ICCPR*

16. 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.

(b) *Relevant human rights under the CRC*

17. Article 37(b) of the CRC relevantly provides:

State parties shall ensure that:

- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

3 Arbitrary detention

18. Mrs Bakhtiari complains about the length of her and her son Master Reza's detention on Christmas Island.
19. She states:

I feel that we have been in detention for too long and I wish to complain about this.
20. Mrs Bakhtiari and her son, Master Reza were detained on Christmas Island for a period of approximately eight months from 22 August 2013 to 22 April 2014.
21. This raises for consideration whether Mrs Bakhtiari and her son's detention was arbitrary within the meaning of article 9(1) of the ICCPR and additionally whether Master Reza's detention was a measure of 'last resort' and for the 'shortest appropriate period of time' as set out in article 37(b) of the CRC.

3.1 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;²
 - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;³
 - (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁴ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵
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.⁶
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.⁷
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.⁸

3.2 Act or practice of the Commonwealth?

26. The Commonwealth detained Mrs Bakhtiari and Master Reza in an immigration detention centre on Christmas Island for approximately eight months from 22 August 2013 until 22 April 2014.
27. Mrs Bakhtiari and Master Reza were detained on Christmas Island under s 189(3) of the *Migration Act 1958* (Cth) (Migration Act). Section 189(3) of the Migration Act requires the detention of unlawful non-citizens in an excised offshore place.
28. As Mrs Bakhtiari and Master Reza arrived by boat without a valid visa, they were unlawful non-citizens and therefore the Migration Act required that they be detained.
29. However, there are a number of powers that the Minister could have exercised so that Mrs Bakhtiari and Master Reza were detained in a less restrictive manner than in an immigration detention centre.
30. The Minister could have granted them a visa. Under s 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 s 189 of the Migration Act.
31. 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).
32. Further, the definition of ‘immigration detention’ includes ‘being held by, or on behalf of, an officer in another place approved by the Minister in writing.’⁹
33. Accordingly, the Minister could have granted a visa to Mrs Bakhtiari and Master Reza, made a residence determination in relation to them under s197AB of the Migration Act or could have approved that Mrs Bakhtiari and Master Reza reside in a place other than an immigration detention centre.
34. I therefore find that the failure by the Department to refer Mrs Bakhtiari and Master Reza’s case to the Minister for consideration of the exercise of those discretionary powers constitutes an ‘act’ within the definition of s 3 of the AHRC Act.

3.3 The Department’s response

35. When the Commission asked the Department the reason for Mrs Bakhtiari and Master Reza’s detention in an immigration detention centre, the Department responded that:
- Mrs Bakhtiari and Master Reza arrived in Australia as Illegal Maritime Arrivals and were detained in accordance with Australian migration law under section 189(1) and (3) of the Act on the mainland and Christmas Island respectively. As Mrs Bakhtiari and Master Reza arrived after 19 July 2013 they were subject to Regional Resettlement Arrangements under section 198AD of the Act.
36. The Department’s response states that Mrs Bakhtiari and Master Reza’s detention was reviewed at monthly intervals by both the Detention Review Committee and Case Management.

37. When the Commission asked whether alternative, less restrictive detention options were considered for Mrs Bakhtiari and Mr Reza, the Department replied:

As Mrs Bakhtiari and Master Reza were subject to Regional Resettlement Arrangements under section 198AD of the Act, alternative placement options were not considered. Mrs Bakhtiari and Master Reza were appropriately accommodated at the family compound Lilac Aqua APOD.

38. In its response to the Commission dated 20 August 2014, the Department stated:

Mrs Bakhtiari's and Master Reza's Case Manager did not identify any immediate health and welfare concerns or significant vulnerabilities which would have warranted a change of detention placement or precluded them from being transferred to an Offshore Processing Centre.

39. On 13 August 2015, the Commission provided its preliminary view in relation to this complaint to the Department. The Department responded to this preliminary view by stating that 'it is Departmental practice that only cases which meet the s 197AB guidelines are referred for the Minister's consideration'. The Department stated that Mrs Bakhtiari and Master Reza's case did not meet the Guidelines for referral.

40. There were two sets of Guidelines that were operative during Mrs Bakhtiari and Master Reza's period of detention.

41. The first set of Guidelines, in force between 30 May 2013 and 17 February 2014, provided that the following cases be referred for the Minister's consideration:

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a residence determination rather than under traditional detention arrangements.

For this reason, 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:
 - physical disabilities requiring significant and ongoing intervention, congenital illness requiring significant and ongoing intervention;
 - diagnosed tuberculosis where supervision of medication dispensing is required
 - ongoing illnesses requiring significant and ongoing medical intervention;
 - diagnosed mental illness;
 - elderly clients over 65 years of age requiring significant and ongoing intervention; and/or
 - families with other complex needs that may present a risk if placed into community without adequate support.

It is also my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a residence determination being made which would split a family unit.

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

I also consider the following additional types of cases appropriate to consider:

- where a person's presents unique or exceptional circumstances; or
- where I personally request a specified person's case be referred to me to consider exercising my public interest power.

42. The Department stated that Master Reza's case was not brought within the Guidelines because he was not diagnosed with a mental illness which required significant and ongoing intervention.
43. The second set of Guidelines in force from 18 February 2014 provide that the Minister does not expect the Department to refer cases where a person arrived after 19 July 2013, unless there are exceptional reasons or the Minister has requested it. The Department stated that as Mrs Bakhtiari and Master Reza arrived after 19 July 2013 and as there were no exceptional reasons for referral, no referral was made.

3.4 Finding

44. Having considered all the material before me, I am not satisfied that Mrs Bakhtiari's and Master Reza's detention on Christmas Island was necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of its migration system.
45. The Department has stated that it did not consider alternative placement options because Mrs Bakhtiari and Master Reza were subject to s 198AD of the Migration Act. Section 198AD(2) of the Migration Act provides that 'an Officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country'.
46. I understand that the Department did not make any transfer arrangements for Mrs Bakhtiari or Master Reza until they agreed to be voluntarily removed to Iran. Mrs Bakhtiari signed an authorisation for her removal on 11 March 2014 and Master Reza signed an authorisation for his removal on 17 March 2014. As such, Mrs Bakhtiari and Master Reza were detained in an immigration detention centre for a period of seven months without any arrangements for their removal to an Offshore Processing Country having been made and without any consideration of less restrictive form of detention.
47. There is no evidence that either Mrs Bakhtiari or Master Reza posed a risk to the Australian community. Based on the material before me, I am not satisfied that the detention of Mrs Bakhtiari or Master Reza in an immigration detention centre was justified. I am also not satisfied that Master Reza's detention was a measure of 'last resort' or for the 'shortest appropriate period of time'.
48. I note the Department's submission that it did not refer Mrs Bakhtiari or Master Reza's case to the Minister for consideration of a residence determination because their case did not meet either set of the Minister's Guidelines.
49. However, the Guidelines in force from 30 May 2013 to 18 February 2014, the majority of the time Mrs Bakhtiari and Master Reza were in detention, state:

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a residence determination rather than under traditional detention arrangements.

50. Further, both sets of Guidelines state that the Minister will also consider appropriate cases where a person presents unique or exceptional circumstances. Although Master Reza was not diagnosed with a mental illness while he was in detention, he was seen by medical professionals on at least 21 occasions. He committed acts of self-harm on three occasions and attempted to commit suicide. In my view, a 15 year old boy exhibiting these behaviours presents exceptional circumstances. Accordingly, it appears that there was scope to bring Mrs Bakhtiari and Master Reza's case within the Guidelines for referral to the Minister.
51. The statutory provisions identified above empowered the Minister to place Mrs Bakhtiari and Master Reza in a less restrictive form of detention. I find that the Department's failure to refer Mrs Bakhtiari and Master Reza's case to the Minister to consider the exercise of his discretionary powers is an act inconsistent with or contrary to the human rights recognised in article 9(1) of the ICCPR and article 37(b) of the CRC.

4 Recommendations

52. 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.¹⁰ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹¹ The Commission may also recommend:
- The payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - Other action to remedy or reduce the loss or damage suffered by a person.¹²

4.1 Compensation

53. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
54. However, in considering the assessment of a recommendation for compensation under s 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.¹³
55. 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.¹⁴

(a) *Compensation*

56. I have been asked to consider compensation for Mrs Bakhtiari and Master Reza being arbitrarily detained in contravention of article 9(1) of the ICCPR and article 37(b) of the CRC.

57. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR or article 37(b) of the CRC. This is because an action for false imprisonment cannot succeed where there is lawful authority for the detention, whereas a breach of article 9(1) of the ICCPR or article 37(b) of the CRC will be made out where it can be established that the detention was arbitrary, irrespective of legality.
58. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR and article 37(b) of the CRC. 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.
59. The principle heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).¹⁵
60. In the recent 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. Justice Siopis 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 recognised by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.¹⁸
61. Justice Siopis 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.
62. 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'.
63. 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

64. 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.²² Chief Justice Spigelman 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.²³

65. 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,²⁴ 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. Justice Siopis accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of the inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.²⁵

(b) Recommendation that compensation be paid

66. I have found that Mrs Bakhtiari’s and Master Reza’s detention on Christmas Island from 22 August 2013 to 22 April 2014 was arbitrary within the meaning of article 9(1) of the ICCPR and article 37(b) of the CRC.
67. I note that neither Mrs Bakhtiari nor Master Reza had been previously imprisoned in Australia and would have felt the disgrace and humiliation experienced by a person of good character. I note also that Master Reza was a minor during his detention on Christmas Island and experienced severe emotional distress.
68. I consider that the Commonwealth should pay to Mrs Bakhtiari and Master Reza an appropriate amount of compensation to reflect the loss of liberty caused by their detention in accordance with the principles outlined above.

4.2 Apology

69. I also consider that it is appropriate that the Commonwealth provide a formal written apology to Mrs Bakhtiari and Master Reza. 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

5 Department's response to recommendations

70. On 3 February 2016, the Department provided a response to my findings and recommendations.
71. In relation to my recommendation that Mrs Bakhtiari and Master Reza be paid compensation, the Department stated:

The Department maintains that Mrs Bakhtiari and Master Jamalisoufiamlashi'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 Mrs Bakhtiari and Master Jamalisoufiamlashi's detention was lawful and that the decisions and processes were appropriate having regard to their circumstances. The Department therefore considers that there is no meaningful prospect of liability being established against the Commonwealth under Australian domestic law and, as such, no proper legal basis to consider a payment of compensation to Mrs Bakhtiari and Master Jamalisoufiamlashi. The Department therefore is unable to pay compensation to Mrs Bakhtiari and Master Jamalisoufiamlashi.

Although there are limited circumstances in which the Commonwealth 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 the 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.

72. In relation to my recommendation that the Department apologise to Mrs Bakhtiari and Master Reza, the Department advised that it would not be taking any action in response to this recommendation.
73. I report accordingly to the Attorney General.



Gillian Triggs
President
Australian Human Rights Commission

March 2016

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 2 UN Human Rights Committee, General Comment 8 (1982) Right to liberty and security of persons (Article 9). See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 3 UN Human Rights Committee, General Comment 31 (2004) [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].
- 4 *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.
- 5 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 6 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 7 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 8 *F.K.A.G. et al. v Australia*, Communication No 2094/2011 UN Doc CCPR/C/108/D/2094/2011.
- 9 *Migration Act 1958* (Cth) s 5.
- 10 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 11 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 12 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 13 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 14 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 15 *Cassel & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) [87].
- 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] FCA 901 [98]-[99].
- 25 *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [139].
- 26 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

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
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
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

