



Australian
Human Rights
Commission

AQ v Commonwealth of Australia (DIBP)

[2014] AusHRC 84

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ISSN 1837-1183

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Design and layout Dancingirl 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.

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AQ v Commonwealth of Australia (Department of Immigration and Border Protection)

Report into arbitrary detention and the
failure to consider less restrictive forms
of detention

[2014] AusHRC 84

Australian Human Rights Commission 2014



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**Australian
Human Rights
Commission**

August 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 Mr AQ against the Commonwealth of Australia – Department of Immigration and Border Protection (the Department).

I have found that the prolonged detention of Mr AQ in immigration detention facilities was not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia. I have also found that the Department's failure to grant Mr AQ a visa or to place him in the least restrictive manner possible was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant of Civil and Political Rights*. In light of my findings regarding the acts and practices of the Commonwealth, I recommended that the Commonwealth pay compensation to Mr AQ in the amount of \$150,000 and issue an apology to Mr AQ.

In response to my notice, the Department wrote to me on 8 July 2014. This response is set out in part 8 of my report.

I enclose a copy of my report.

Yours sincerely

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 (the Commission) and the reasons for those findings following an inquiry by the Commission into the complaint lodged by Mr AQ.
2. Mr AQ alleges that his treatment by the Commonwealth of Australia – Department of Immigration and Citizenship (subsequently redesignated as the Department of Immigration and Border Protection (the Department)), involved an act or practice inconsistent with or contrary to his human rights under the International Covenant on Civil and Political Rights (ICCPR).
3. I have directed that the complainant's identity be suppressed in accordance with section 14(2) of the AHRC Act. For the purposes of this report, the complainant's name has been suppressed and replaced with the pseudonym AQ.

2 Summary of complaint, findings and recommendations

2.1 Relevant act under the AHRC Act

4. I have found that the Commonwealth's failure to grant Mr AQ a visa or to place him in a less restrictive form of detention prior to 6 September 2013 was an 'act' for the purposes of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The Minister could have placed Mr AQ in community detention or in a place other than an immigration detention centre but did not do so.

2.2 Detention in immigration detention facilities

5. I have found that the prolonged detention of Mr AQ in immigration detention facilities was not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia.
6. For this reason, I have found that the failure to grant Mr AQ a visa or place him in community detention or some other less restrictive form of detention was inconsistent with the prohibition of arbitrary detention in Article 9 of the ICCPR.

2.3 Recommendations

7. I have recommended that the Commonwealth:
 - pay Mr AQ compensation in the amount of \$150,000; and
 - issue an apology to Mr AQ.

3 Background

8. Mr AQ is a national of Iran who arrived at Christmas Island by boat on 4 June 2011. He was considered to be an unlawful non-citizen and was detained in immigration detention on Christmas Island on that date. On 15 August 2011, he was moved to the Northern Immigration Detention Centre (NIDC) in the Northern Territory. He was subsequently moved again to the Villawood Immigration Detention Centre (VIDC). On 6 September 2013, Mr AQ was granted a protection visa and released into the community.
9. The Department found Mr AQ to be a refugee on 23 November 2011.
10. The Department referred Mr AQ to the Australian Security Intelligence Organisation (ASIO) for a security assessment on 24 November 2011. The purpose of this assessment was for ASIO to advise whether Mr AQ would pose any risk to security if granted a protection visa.¹ I shall hereinafter refer to this security assessment as the 'PIC 4002 security assessment'. Mr AQ received a 'clear result' from ASIO in relation to this referral on 21 November 2012.
11. On 21 February 2012, the Department requested that ASIO provide a security assessment with respect to placing Mr AQ in community detention, pursuant to section 197AB of the *Migration Act 1958* (Cth) (Migration Act). On 22 February 2012, ASIO advised that Mr AQ met the security requirements for being placed in community detention. Following 'the department receiving additional information relating to Mr AQ's case', on 26 October 2012 ASIO advised that Mr AQ continued to meet the security requirements for being placed in community detention. I shall hereinafter refer to these security assessments as the 'community detention security assessments.'
12. Despite these three clear security assessments, Mr AQ was not placed in community detention or granted any form of visa until 6 September 2013. He was held in immigration detention facilities until that time. In total, Mr AQ was held in these facilities for a period of over 27 months.
13. Mr AQ was referred for consideration for community detention by his departmental case manager on 10 February 2012. On 24 February 2012, he was assessed by the Department's Community Detention Referrals and Placements Section as meeting the relevant Ministerial guidelines then in place. Despite that fact, no requests for Ministerial intervention were made by the Department on behalf of Mr AQ until about 6 May 2013.² At that time, the Department made a submission to the Minister recommending that he consider 'lifting the bar' under section 46A of the Migration Act and allowing Mr AQ to apply for a protection visa.³ The Department made submissions in the alternative, inviting the Minister to consider granting Mr AQ a bridging visa or placing him in community detention.
14. The Minister did not allow Mr AQ to apply for a visa, otherwise grant him a visa, or decide to place him in community detention at that time. The Minister instead sought further information from the Department.
15. The Department had previously considered making a submission to the Minister asking him to consider granting Mr AQ a bridging visa under section 195A of the Migration Act, but had decided not to do so on about 22 May 2012 because it deemed Mr AQ to be 'ineligible'.

4 Legislative framework

4.1 Functions of the Commission

16. Section 11(1)(f) of the 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.⁴
17. 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.
18. 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.⁵

5 Assessment

5.1 Act or Practice of the Commonwealth

19. I find that the failure to place Mr AQ in a less restrictive place of detention than immigration detention centres or to grant him a visa allowing him to reside in a less restrictive location constituted an act under the AHRC Act.
20. From an administrative perspective, this act could be said to comprise a number of acts. It was the Minister who had the power to remedy the failures described above. The Department failed to make submissions to the Minister in a timely fashion recommending that he exercise his powers. Ultimately, I consider that the act identified above is the relevant act of the Commonwealth for the purposes of this inquiry, whatever the chain of administrative events that led to it.

5.2 Legislative Framework

21. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens.
22. However, 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.
23. 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.
24. 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.’⁶

25. Accordingly, at any time after 4 June 2011, the Minister could have granted a visa to Mr AQ, made a residence determination in relation to him under section 197AB of the Migration Act or could have approved that Mr AQ reside in a place other than an immigration detention centre.
26. Mr AQ was an unlawful non-citizen because he did not hold a valid visa.⁷ He was prevented from applying for a protection visa unless the Minister exercised a discretion to allow him to do so under section 46A of the Migration Act. The Minister could have exercised that discretion but, prior to 6 September 2013, failed to do so. Had he done so, Mr AQ could have applied for a protection visa. As noted above, had Mr AQ been granted a visa, he would not have been required to be detained under s 189 of the Migration Act.

5.3 Inconsistent with or contrary to human rights

(a) Art 9 ICCPR – arbitrary detention

27. Mr AQ was detained in immigration detention from 4 June 2011 until 6 September 2013. It is claimed on behalf of Mr AQ that his detention, first on Christmas Island and subsequently in NIDC and VIDC, was arbitrary.
28. I find that the failure to grant Mr AQ a visa or place him in community detention or another less restrictive form of detention during this period was arbitrary and inconsistent with his right to liberty protected by article 9 of the ICCPR.
29. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁸
30. The United Nations Human Rights Committee 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 individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.⁹
31. Mr AQ received a clear community detention security assessment on 22 February 2012. I do not consider that any of the information before me suggests that it was necessary to detain Mr AQ in an immigration detention facility after this time. There is no information before me to suggest that it was necessary at any time to detain Mr AQ in an immigration detention centre because he was a flight risk, or because he posed a risk to the Australian community.
32. The Department has referred to the fact that Mr AQ received a 'Five Country Check match', and to his membership of a particular foreign organization. However given that ASIO effectively advised the Department on three separate occasions that Mr AQ would not constitute a risk if placed in the community, I do not consider that the Department was justified in detaining Mr AQ on the basis that he would have posed an unacceptable risk if so placed.
33. Accordingly, I find that the detention of Mr AQ on Christmas Island and in NIDC and VIDC was not necessary or proportionate. The Department has not explained why Mr AQ could not reside in the community or in a less restrictive form of detention while his immigration status was resolved.

6 Recommendations

6.1 Power to make recommendations

34. 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
35. 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.¹²

6.2 Mr AQ's submissions

36. Mr AQ submitted that his time in immigration detention has had ongoing physical and psychological effects. He states that this has made it more difficult for him to find work. He has asked that the Commonwealth assist him in this regard. I did not receive detailed submissions about what precise assistance should be provided.

6.3 Consideration of compensation

37. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
38. 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.¹³
39. 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
40. 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.
41. 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.
42. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).¹⁵

43. 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. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁷
- ...the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.¹⁸
44. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).¹⁹ In that case at first instance,²⁰ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
45. 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'.
46. 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
47. 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 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.²³
48. 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. 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 \$265,000.²⁵

6.4 Recommendation that compensation be paid

- 49. I have found that Mr AQ's detention in immigration detention facilities was arbitrary for the purposes of article 9(1). Mr AQ was detained for approximately 27 months.
- 50. I consider that the Commonwealth should pay to Mr AQ an amount of compensation to reflect the loss of liberty caused by his detention.
- 51. Mr AQ's case is one where he continued to be detained in immigration detention facilities for some 18 months after ASIO first advised he would not pose a risk to security if placed in the community, and for 22 months after he was found to be owed protection obligations.
- 52. I have taken into account the statement of the Court of Appeal in *Ruddock v Taylor*, that the effect of false imprisonment on a person progressively diminishes with time.
- 53. There is no evidence before me to suggest that the circumstances surrounding Mr AQ being taken into detention were particularly shocking, that the conditions of that detention were particularly harsh, or that Mr AQ feared for his safety while detained.
- 54. The information before me indicates that at times, Mr AQ's detention in an immigration detention centre has impacted on his mental health. I take this factor into account in the quantum of compensation that I have recommended.
- 55. 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 is appropriate. I therefore recommend that the Commonwealth pay Mr AQ that amount.

6.5 Other recommendations sought

- 56. I have a great deal of sympathy with the difficulties that Mr AQ has encountered in obtaining employment. However, I do not consider I am in a position to make any recommendations in that regard, in the absence of any specific submissions about the form any such recommendations could take.

6.6 Apology

- 57. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr AQ for the breaches of his human rights. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁶

7 The Department's response to my finding and recommendations

58. On 8 July 2014, the Department responded to my notice.

59. The following is the response to my finding:

The Department reaffirms its position that Mr [AQ's] detention was lawful in accordance with the *Migration Act 1958* and consistent with the prohibition of arbitrary detention in article 9 of the ICCPR.

60. The following is the response to my recommendations:

The Department notes the recommendation of the AHRC in this case. The Department maintains that Mr [AQ's] immigration detention was lawful and was carried out in accordance with applicable statutory procedure prescribed under the Act.

...

The Department considers that Mr [AQ's] detention was lawful and that the decisions and processes were appropriate having regard to his 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 Mr [AQ].

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis...On the basis of the current information, the Department is not satisfied that there is a proper basis for payment of discretionary compensation at this time.

The Department advises that it will not be taking any further action in relation to this recommendation.

...

Given the Department's view that Mr [AQ's] detention was lawful, and that the decisions and processes in relation to his immigration detention were appropriate at all times, the Commonwealth will not issue an apology to Mr [AQ].

61. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

August 2014

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- 1 ASIO was asked to provide a security assessment with respect to public interest criterion 4002, as prescribed in the *Migration Regulations 1994* (Cth). For the sake of completeness, I note that the prescription of this criterion as a criterion for the grant of a protection visa was held to be invalid by the High Court on 5 October 2012 in *Plaintiff M47 v Director General of Security* [2012] HCA 46; (2012) 292 ALR 243.
 - 2 The Department variously gave this date as 6 or 7 May 2013.
 - 3 The operation of section 46A is discussed further below.
 - 4 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* (ICCPR).
 - 5 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 6 *Migration Act 1958* (Cth) (Migration Act) s 5.
 - 7 Migration Act ss 13 and 14.
 - 8 *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.
 - 9 *F.K.A.G. et al. v Australia*, Communication No 2094/2011 UN Doc CCPR/C/108/D/2094/2011.
 - 10 AHRC Act s 29(2)(a).
 - 11 AHRC Act s 29(2)(b).
 - 12 AHRC Act s 29(2)(c).
 - 13 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
 - 14 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
 - 15 *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].
 - 16 [2013] FCA 901.
 - 17 [2003] NSWSC 1212.
 - 18 [2013] FCA 901 at [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.

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