



Australian
Human Rights
Commission

Tapara v Commonwealth of Australia (DIBP)

[2014] AusHRC 91

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

Report into arbitrary detention

[2014] AusHRC 91

Australian Human Rights Commission 2014



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Contents

1	Introduction to this inquiry	3
2	Background	3
3	Legislative framework	4
3.1	Functions of the Commission	4
3.2	What is an 'act' or 'practice'?	4
3.3	What is a human right?	5
4	Act or practice of the Commonwealth?	5
5	Arbitrary detention	6
5.1	Law	6
5.2	The Department's response	7
5.3	Mr Tapara's risk to the Australian community	7
5.4	Finding	8
6	Interference with family	8
6.1	The Department's response	9
6.2	Finding	9
6.3	Failure to attend funeral on 22 February 2012	10
7	Recommendations	11
7.1	Compensation	11
7.2	Apology	13
8	The Department's responses to my finding and recommendations	14



**Australian
Human Rights
Commission**

November 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Tapara against the Commonwealth of Australia – Department of Immigration and Border Protection (Department).

I have found that Mr Tapara's detention from 2 December 2011 until his release from the Maribyrnong Immigration Detention Centre on 10 May 2013 was arbitrary within the meaning of article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). It also arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

In light of my findings, I recommend that the Commonwealth pay compensation to Mr Tapara in the amount of \$100,000 and provide him with a formal written apology.

By letter dated 10 October 2014 the Department provided a response to my findings and recommendations. I have outlined the Department's response in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a notice setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint by Mr Phillip Tapara against the Commonwealth of Australia – Department of Immigration and Citizenship (as it then was – it has subsequently been redesignated the Department of Immigration and Border Protection) (Department) alleging a breach of his human rights.
2. Mr Tapara’s visa was cancelled pursuant to s 501 of the *Migration Act 1958* (Cth) (Migration Act) on the basis of his criminal record. He was detained at the Maribyrnong Immigration Detention Centre (MIDC) for some 17 months pending removal to New Zealand. On 10 May 2013, the Department involuntarily removed him to New Zealand.
3. Mr Tapara complains that his detention at MIDC from 2 December 2011 until 10 May 2013 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR), and interfered with his family, contrary to articles 17 and 23 of the ICCPR.
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. As a result of the inquiry, I find that the acts of the Commonwealth identified below were inconsistent with or contrary to human rights recognised in articles 9(1), 17(1) and 23(1) of the ICCPR.
6. The recommendations made in this notice are that:
 - The Commonwealth pay to Mr Tapara compensation in the amount of \$100 000; and
 - The Commonwealth provide a formal written apology to Mr Tapara.

2 Background

7. Mr Tapara was born in New Zealand and is a citizen of New Zealand. He first came to Australia on 4 March 2006 when he was 39 years of age. He left Australia on 13 August 2006, returning two days later on a class TY subclass 444 Special Category (Temporary) visa granted on 15 August 2006. This visa allows the holder to remain in Australia indefinitely while they remain a citizen of New Zealand.
8. On 23 June 2010, Mr Tapara was convicted in the Supreme Court of Queensland of one count of ‘causing grievous bodily harm with intent’ under s 317 of the *Criminal Code 1899* (Qld) and sentenced to five years and six months imprisonment.¹ His conviction arose out of his conduct on 22 February 2009, when shortly after an altercation at a hotel in Southport, Queensland, Mr Tapara drove his car deliberately to collide with another man. Mr Tapara was incarcerated at the Woodford Correctional Centre from 3 March 2009.
9. On 28 September 2011, a delegate of the Minister for Immigration and Citizenship decided to cancel Mr Tapara’s visa under s 501(2) of the Migration Act.
10. On 23 November 2011, the Southern Queensland Regional Parole Board decided to grant Mr Tapara his release on parole with effect from 2 December 2011. Mr Tapara was released from police custody and immediately taken into immigration detention under s 189(1) of the Migration Act, first at the Brisbane Immigration Transit Accommodation (BITA) and then to MIDC. He remained at the MIDC until his involuntary removal from Australia on 10 May 2013.

11. At the time of Mr Tapara's conviction, he had two previous convictions in New Zealand. In 1991 and 1992, he was convicted as party to offences involving kidnapping and aggravated burglary involving the use of a firearm. Mr Tapara was the driver of a vehicle associated with these offences. The longest sentence imposed was for 10 years imprisonment. Mr Tapara served seven years of that sentence in New Zealand.
12. In mid-2009, while Mr Tapara was incarcerated in Woodford Correctional Centre, Mr Tapara met and formed a relationship with Ms Michelle Dunn. They later married on 4 February 2012. Mr Tapara claims that he also formed a close relationship with Ms Dunn's three children, William (born 17 February 1994), Jennifer (born 18 August 1996) and Britney (born 11 July 1999). He further claims that Ms Dunn and the children have serious health conditions requiring his care and financial support. He states that he is also close to his older brother and his four nieces and nephews who reside in Brisbane.
13. Mr Tapara remained in detention while he exhausted the legal avenues of appeal available to him. On 22 December 2011, the Administrative Appeals Tribunal affirmed the Minister's decision to cancel Mr Tapara's TY 444 visa. On 19 January 2012, Mr Tapara sought judicial review of this decision in the Federal Court. On 28 February 2013, the Federal Court dismissed Mr Tapara's application to set aside the Administrative Appeals Tribunal decision.

3 Legislative framework

3.1 Functions of the Commission

14. Section 11(1)(f) of the AHRC Act empowers the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right.
15. 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.

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

16. 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.
17. 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.
18. 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.² Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission's human rights inquiry jurisdiction.

3.3 What is a human right?

19. 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.
20. As I have said above, the following articles of the ICCPR are relevant to this inquiry.
21. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
22. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, **family**, home or correspondence, nor to unlawful attacks on his honour and reputation.
23. Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

4 Act or practice of the Commonwealth?

24. The Commonwealth detained Mr Tapara in an immigration detention centre for 17 months from his release from prison on 2 December 2011 until his involuntary removal to New Zealand on 10 May 2013.
25. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. As Mr Tapara's visa had been cancelled before his release from prison, he was an unlawful non-citizen upon his date of release and therefore the Migration Act required that he be detained. However, the Migration Act did not require that Mr Tapara be detained in an immigration detention centre.
26. There are a number of powers that the Minister could have exercised so that Mr Tapara was detained in a less restrictive manner than in an immigration detention centre.
27. The Minister could have granted Mr Tapara 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.
28. 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).
29. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.³

30. It appears to be uncontroversial that it was within the power of the Minister to have made a residence determination in relation to Mr Tapara under s 197AB of the Migration Act or to have approved a place other than MIDC where Mr Tapara could have been “held”. Further, under s 197AB(2)(b) of the Migration Act, it was open to the Minister to exercise the power conferred by s 197AB in relation to Mr Tapara subject to additional conditions.
31. I find that the failure by the Department to refer Mr Tapara’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.

5 Arbitrary detention

5.1 Law

32. Mr Tapara claims that his detention in MIDC from 2 December 2011 until 10 May 2013 was arbitrary within the meaning of article 9(1) of the ICCPR.
33. 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;⁴
 - (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;⁵
 - (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;⁶ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁷
34. 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.⁸
35. 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.⁹

5.2 The Department's response

36. The Department states that Mr Tapara's detention in MIDC was due to its assessment that Mr Tapara 'posed a risk to the integrity of the immigration program and was an unacceptable risk to the community'.
37. The Department also states that the assessing Compliance Officer found that Mr Tapara did not meet the guidelines for community detention. In the Detention Note signed on 2 December 2011, the Compliance Officer refers to the risks to the immigration program identified in section 3.1 of the Procedures Advice Manual guiding principles for decision makers, which includes 'unlawful non-citizens repeatedly refusing to comply with visa conditions, absconding or not co-operating with engagement strategies aimed at resolving their immigration status.'
38. The Department states that it reviewed Mr Tapara's detention on seven occasions, on 4 January 2012, 29 February 2012, 2 April 2012, 3 May 2012, 6 June 2012, 15 June 2012 and 29 June 2012. I note that on three of these occasions, the Case Manager recommended Mr Tapara be detained in the BITA rather than the MIDC.
39. On 7 May 2012, the Department assessed Mr Tapara as not meeting the guidelines for referral to the Minister to consider granting a visa under s 195A of the Migration Act. On 22 April 2013, the Department again concluded that Mr Tapara did not meet the s 195A guidelines or the s 197AB guidelines for community detention. Further, s 417 of the Migration Act enables the Minister to intervene and substitute the Tribunal's decision with a more favourable decision. The Minister decided not to intervene under s 417 of the Migration Act on 9 August 2012.

5.3 Mr Tapara's risk to the Australian community

40. I acknowledge that the offence Mr Tapara committed was serious. When considering whether to affirm the Minister's decision to cancel Mr Tapara's visa, the Administrative Appeals Tribunal stated that his offences were 'so serious that the public are entitled to expect the Minister will be cautious'.¹⁰
41. However, while Mr Tapara has a criminal record, this does not appear to be evidence, of itself, that Mr Tapara posed a danger to the community such that the Commonwealth could detain him in no less restrictive way than in the MIDC.
42. I note that in *R v Tapara* [2010] QCA 320, Chesterman JA made the following comments when hearing Mr Tapara's appeal of his criminal conviction:

I think there is no doubt that the appellant now deeply regrets his actions which have given rise to his imprisonment. I accept that his conduct was aberrant and that he is, by and large, if not completely, committed to a peaceful and law abiding life. I regard his previous convictions as largely irrelevant and as being the product of an unsatisfactory upbringing and the influence of bad company. There are grounds for thinking that upon his release the applicant will not re-offend.
43. The Administrative Appeals Tribunal noted that there was 'significant time between his offending in New Zealand and Australia (although he was in gaol for a large portion of that time); and that the offence in Australia was different in 'important respects' from the offences in New Zealand.¹¹ The Tribunal also noted that Mr Tapara was 'for the most part, a well-behaved prisoner' and 'earned a number of trade qualifications' during his imprisonment. Further, the Tribunal noted that he had a 'good employment record when he lived in New Zealand' and 'regular employment in Australia'.

44. Importantly, on 23 November 2011, the Southern Queensland Regional Parole Board assessed Mr Tapara as eligible for parole. Having served his prison sentence, Mr Tapara would have been entitled to live in the community, albeit subject to various parole conditions, which included reporting, supervision and residence requirements. The Tribunal commented that although there was 'little in the way of independent evidence from experts...[the applicant was] eligible for parole, which suggests a level of confidence that he can be released into the community, albeit subject to supervision'.¹²
45. Mr Tapara's Case Assessment Report as at 9 July 2012 states 'while Mr Tapara was in Correction custody, he has not been violent or aggressive'.

5.4 Finding

46. I am not satisfied that Mr Tapara could not be detained in a less restrictive way, for example, in community detention with conditions, such as reporting requirements, travel restrictions or a curfew, to mitigate any risk he posed. Mr Tapara had served his sentence and was eligible for parole. He had not been violent while in custody.
47. In my view, Mr Tapara's detention in an immigration detention centre was for the legitimate purpose of protecting the Australian community from non-citizens who pose an unacceptable risk and preventing the flight of a non-citizen pending removal. However, I find that Mr Tapara's detention in an immigration detention centre for 17 months was not proportionate to these aims. I consider any risk that Mr Tapara posed could have been mitigated in a less restrictive manner.
48. The statutory provisions identified above empowered the Minister to make less restrictive arrangements for Mr Tapara. I find that the failure of the Department to refer Mr Tapara's case to the Minister for consideration of the exercise of those powers was an act that was inconsistent with or contrary to the human right recognised in article 9(1) of the ICCPR. I find that Mr Tapara's detention in the MIDC for 17 months was arbitrary in breach of article 9 of the ICCPR.

6 Interference with family

49. Mr Tapara also claims that his detention in MIDC interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR. He states that his wife, Ms Dunn, her three children and his brother and four nieces and nephews live in Brisbane, Queensland and his detention at MIDC in Melbourne, Victoria separated him from them for 17 months. In particular, he complains that he was not able to attend the funeral of Ms Dunn's son on 22 February 2012.
50. For the reasons set out in *Australian Human Rights Commission Act Report 39*, the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1).¹³ If this breach is made out, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).
51. In its General Comment on Article 17(1), the UNHRC confirmed that a lawful interference with a person's family may still be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.¹⁴ It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness. In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.¹⁵

6.1 The Department's response

52. The Department has acknowledged that Mr Tapara was detained at a distance from the majority of his family in Brisbane. However, it states that the MIDC was the only appropriate facility in which to house him given the risk-based security requirements of his detention.
53. The Department states that Mr Tapara was considered to be a 'high' risk placement. It stated that there is only one immigration detention centre in Brisbane – the BITA – and this is used for short-stay clients who are on a fast-removal pathway and Unauthorised Air Arrival clients whose status is yet to be resolved.
54. The Department states that Mr Tapara's request to be transferred to BITA was discussed at Client Placement/Security meetings on 24 February 2012, 9 March 2012 and 13 April 2012. It states that 'by reason of the section 501 visa cancellation, Mr Tapara was rated as an unacceptable risk to the community' and his detention in the MIDC was confirmed.
55. Mr Tapara's Case Review as at 9 July 2012 states that in an email to the Detention Operations Director dated 20 June 2012, Mr Tapara's Case Manager expressed ongoing support of placing Mr Tapara in the BITA. However, senior Detention Operations personnel refused the transfer.

6.2 Finding

56. The objects of the ICCPR require that the term 'family' be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.¹⁶ The Committee has said

that the term 'family' must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. Some minimal requirements for the existence of a family are, however necessary, such as life together, economic ties, a regular and intense relationship etc.¹⁷
57. In *Ngambi v France*,¹⁸ the UN Human Rights Committee stated that 'the right to protection of family is not necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must be a family bond to protect'. In *Dauphin v Canada*,¹⁹ the Committee considered that the author's parents, brothers and sisters constitute family under the ICCPR.
58. Mr Tapara met Ms Dunn in mid-2009 while he was imprisoned in the Woodford Correctional Centre. Mr Tapara states that his relationship with Ms Dunn and her three children occurred through the medium of telephone and postal contact as well as visits. At 2 December 2011, when Mr Tapara was detained in the MIDC, the relationship had been ongoing for approximately 18 months. Shortly afterwards, on 4 February 2012, Mr Tapara and Ms Dunn were married. Mr Tapara claims that Ms Dunn's children consider him to be a father figure and call him 'Dad'.
59. When considering evidence given by Ms Dunn's children, the Administrative Appeals Tribunal observed that these children 'appear to have formed a very strong bond with the applicant, although they have only met him on a small number of occasions and conversed with him on the phone and through the post'.²⁰
60. Further, the Tribunal stated that '[it] was provided with a picture of a strong family structure that would support the applicant if he was released from prison into the Australian community. It was obvious the various family members have a genuine regard for the applicant, and he appeared to have a genuine affection for his blood relatives and for those whom he hoped would become his new family'.²¹

61. However, when considering the best interests of the children, the Tribunal ultimately found that the children's relationship with Mr Tapara had not reached the point where Australia's international obligations made a difference to the decision to cancel Mr Tapara's visa.
62. While Mr Tapara did not live with Ms Dunn, I consider that there was evidence of a strong bond and relationship between the couple that resulted in their marriage. Marriage is a recognised family bond in Australia. I therefore consider the relationship between Mr Tapara and Ms Dunn was sufficient to constitute a 'family' for the purposes of this inquiry. I also consider Mr Tapara's family to include his brother.
63. In light of the fact that:
- Mr Tapara and his family were separated for seventeen months as a result of his detention in MIDC;
 - MIDC was a great distance from his family in Brisbane; and
 - during his earlier incarceration in Queensland, Mr Tapara was able to maintain a close relationship with his family through visits;
- I find that Mr Tapara's lengthy detention in MIDC interfered with his ability to maintain a relationship with his family.
64. In considering whether any interference with Mr Tapara's family was arbitrary, I must consider whether it was reasonable and proportionate to a legitimate aim of the Commonwealth, including ensuring that non-citizens who pose an unacceptable risk to the community are not released into the Australian community, or preventing a flight risk.
65. In light of my finding above that Mr Tapara's detention at MIDC was arbitrary and not necessary and proportionate to any legitimate aim of the Commonwealth, I find that the failure of the Department to refer Mr Tapara's case to the Minister for consideration of the exercise of the powers identified above:
- (a) arbitrarily interfered with Mr Tapara's family; and (accordingly)
 - (b) was an act or practice that was inconsistent with or contrary to the human rights recognised in articles 17(1) and 23(1) of the ICCPR.

6.3 Failure to attend funeral on 22 February 2012

66. Mr Tapara also complains that he was not able to attend the funeral of Ms Dunn's eldest son on 22 February 2012.
67. The Department confirms that Mr Tapara did not attend the funeral of Ms Dunn's 25-year-old son on 22 February 2012. The funeral was in Maryborough, a three-hour drive from Brisbane.
68. The Department states that on 14 February 2012, Mr Tapara advised the Welfare Client Support Manager that his stepson had passed away and that the funeral would be held in Maryborough on 22 February 2012. The Department states that at this time, Mr Tapara indicated that he would be content to visit his family in Brisbane and not attend the funeral in Maryborough.
69. The Department states that on 20 February 2012, Mr Tapara asked to attend the funeral as well. At the time, the Department concluded that 'with such short notice, it would be logistically difficult and a significant security risk to facilitate Mr Tapara's escort to the funeral'. Mr Tapara denies that he had earlier said that he did not wish to attend the funeral.

70. The Department states that on 25 February 2012, Mr Tapara was taken to the BITA so that he could see and support his family. Mr Tapara stayed overnight at the BITA and returned to the MIDC the following day after spending time with his family again in the morning.
71. It is apparent that the Department facilitated Mr Tapara's visit to Brisbane to see his family but did not facilitate a visit to Maryborough to attend the funeral at the relevant time. Mr Tapara denies ever saying that he did not wish to attend the funeral. Neither party has provided me with any contemporaneous evidence of the conversations that occurred between the parties. There is therefore insufficient information before me to establish a breach of articles 17 or 23 of the ICCPR in relation to his failure to attend the funeral.

7 Recommendations

72. 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.²² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²³ 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.²⁴

7.1 Compensation

73. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
74. 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.²⁵
75. 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.²⁶

(a) Principles relating to compensation for detention and interference with family

76. I have been asked to consider compensation for Mr Tapara for being arbitrarily detained in contravention of article 9(1) of the ICCPR and the consequent interference with his family.
77. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. 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 will be made out where it can be established that the detention was arbitrary, irrespective of legality.
78. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR. 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.

79. 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).²⁷
80. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,²⁸ 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*:²⁹
- ...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.³⁰
81. 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).³¹ In that case at first instance,³² 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.
82. 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'.
83. 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.³³
84. 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.³⁴ 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.³⁵

85. 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,³⁶ 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 \$265,000.³⁷

(b) Recommendation that compensation be paid

86. I have found that Mr Tapara's detention from 2 December 2011 until his release from MIDC on 10 May 2013 was arbitrary within the meaning of article 9(1) of the ICCPR and arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.
87. I consider that the Commonwealth should pay to Mr Tapara an amount of compensation to reflect the loss of liberty caused by his detention at MIDC and the consequent interference with his family.
88. I have taken into account the fact that Mr Tapara's detention in MIDC followed immediately after a period of two and a half years imprisonment within the Queensland correctional system. In this regard, I note the statement in *Ruddock v Taylor*, that 'as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish'.
89. I have also considered the particular circumstances of Mr Tapara's case including his age, his prior lengthy periods of imprisonment, the place in which he was detained and the length of time for which he was detained. Taking into account the guidance provided by the decisions referred to above, I consider that payment of compensation in the amount of \$100, 000 is appropriate.

7.2 Apology

90. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Tapara. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.³⁸

8 The Department's responses to my finding and recommendations

91. On 15 September 2014, I provided a notice to the Department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
92. By letter dated 10 October 2014, the Acting Secretary of the Department provided a response to my Notice.
93. In response to my recommendation that the Commonwealth pay Mr Tapara \$100,000 in compensation, the Department stated:

The department does not accept this recommendation.

The department does not agree that Mr Tapara's detention from 2 December 2011 until his involuntary removal to New Zealand on 10 May 2013 was arbitrary and amounted to a breach of article 9(1) of the ICCPR. Further, based on the department's earlier responses to President Triggs, the department does not accept that Mr Tapara's immigration detention arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

The department stands by the facts presented in its previous correspondence to the Australian Human Rights Commission that provided Mr Tapara's case history and the legal basis for his immigration detention. The information provided in these responses demonstrated that Mr Tapara's immigration detention was proportionate to the Australian Government's legitimate aim of ensuring the integrity of Australia's immigration framework and mitigating risks to the Australian community.

While Mr Tapara was detained, the department reviewed his case regularly and investigated on numerous occasions whether his case could be referred to the Minister, both for the grant of a visa or for residence determination under section 197AB of the *Migration Act 1958* (the Act). Mr Tapara invariably could not meet the Ministerial guidelines for referral due to his serious criminal history in Australia and New Zealand and his section 501 (character) visa cancellation. The department notes that Mr Tapara also misled the Australian Government regarding his criminal history in New Zealand.

The risks associated with granting a visa or making a residence determination with respect to an individual with a proven history of violence and dishonesty are clear, even if Mr Tapara's case had been referred and the Minister had been minded to exercise his power to make these decisions.

Mr Tapara's history also resulted in a 'High' *Client Placement Risk Assessment* which necessitated his placement in a facility designed to accommodate high risk detainees. Mr Tapara's requests to be transferred to Brisbane to be closer to his family could not be accommodated because the immigration detention facilities in Brisbane (and in Queensland) are not designed to accommodate high risk detainees.

The department notes that Mr Tapara met his wife and her children while he was in gaol and developed strong bonds with them in spite of his criminal detention. Mr Tapara's subsequent separation from his family was not arbitrary but rather a consequence of his lawful immigration detention. Mr Tapara was able to sustain his family bonds throughout his immigration detention, including through limited home visits facilitated by the department.

Therefore the department remains firmly of the view that Mr Tapara's immigration detention was lawful and not arbitrary for the purposes of article 9(1) and did not arbitrarily interfere with his family in breach of articles 17(1) and 23(1) of the ICCPR. Any consideration by the Commonwealth to pay compensation on a legal liability basis must be made in accordance with the *Legal Services Directions 2005*. The *Legal Services Directions 2005* provide that a monetary claim may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice.

The department considers that Mr Tapara's detention was lawful and that the decisions and processes were appropriate having regard to the circumstances of his case. 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 Tapara.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, *Resource Management No. 409* and *No. 401* generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective acts on the part of the Commonwealth, or otherwise experiences an anomalous, inequitable or unintended outcome as a result of the application of Commonwealth legislation or policy. On the basis of the information the Commonwealth is currently aware of, the department is not satisfied there is a proper basis for payment of compensation at this time.

The department therefore holds the view that there is no basis for any payment of discretionary compensation to Mr Tapara.

94. In response to my recommendation that the Commonwealth provide a formal written apology to Mr Tapara, the Department stated:

The department does not accept this recommendation.

With respect to the view that the Commonwealth acted inconsistently with, or contrary to the procedures by law within the meaning of articles 9(1), 17(1) and 23(1) of the ICCPR, the department continues to rely on its previous submissions that Mr Tapara's immigration detention was lawful, being in accordance with the relevant provisions of the Act, was not arbitrary and did not arbitrarily interfere with his family.

Given the department maintains this position there is no basis for a formal apology and therefore, there will be no action with regard to this recommendation.

95. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

November 2014

- 1 Mr Tapara's appeal against conviction and leave to appeal against his sentence was refused by the Court of Appeal of the Supreme Court of Queensland. See *R v Tapara* [2010] QCA 320.
- 2 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.
- 3 *Migration Act 1958* (Cth) s 5.
- 4 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.
- 5 UN Human Rights Committee, General Comment 31 (2004) [6]. See also S Joseph, J Schultz and M Castan *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (Oxford University Press, 2nd ed, 2004) 308 [11.10].
- 6 *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.
- 7 *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 a 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.
- 8 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 9 *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.
- 10 *Re NZA v Minister for Immigration and Citizenship* [2011] AATA 928, [23].
- 11 *Re NZA v Minister for Immigration and Citizenship* [2011] AATA 928, [17].
- 12 *Re NZA v Minister for Immigration and Citizenship* [2011] AATA 928, [18].
- 13 Australian Human Rights Commission, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2007] AusHRC 39, [80]-[88].
- 14 United Nations Human Rights Committee, General Comment 16 (Thirty-second session, 1988), Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 142 (the right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [4].
- 15 *Toonen v Australia* Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992, [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
- 16 S Joseph and M Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary*, (Oxford University Press, 3rd ed, 2013) 668 [20.06].
- 17 *Balaguer Santacana v Spain*, Communication No. 417 of 1990, UN Doc CCPR/C/51/D/417/1990.
- 18 Communication No. 1179 of 2003, UN Doc CCPR/C/81/D/1179/2003, [6.4].
- 19 Communication No. 1792 of 2008, UN Doc CCPR/C/96/D/1792/2008.
- 20 *Re NZA v Minister for Immigration and Citizenship* [2011] AATA 928, [20].
- 21 *Re NZA v Minister for Immigration and Citizenship* [2011] AATA 928, [21].
- 22 *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) s 29(2)(a).
- 23 AHRC Act s 29(2)(b).
- 24 AHRC Act s 29(2)(c).
- 25 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 26 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 27 *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].
- 28 [2013] FCA 901.
- 29 [2003] NSWSC 1212.
- 30 [2013] FCA 901, [121].
- 31 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 32 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 33 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140].
- 34 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 35 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 36 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].
- 37 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901, [139].
- 38 D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1st ed, 2000), 151.

Further Information

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