



Australian  
Human Rights  
Commission

Mr BF on behalf of  
Master BG v  
Commonwealth of  
Australia (DIBP)

[2017] AushRC 114

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**ISSN 1837-1183**

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**Design and layout** Dancinggirl Designs

**Printing** Masterprint Pty Limited

**Mr BF on behalf of Master BG v  
Commonwealth of Australia  
(Department of Immigration and  
Border Protection)**

[2017] AusHRC 114

Report into arbitrary detention and  
protection of the best interests of  
the child

Australian Human Rights Commission 2017



Australian  
Human Rights  
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**Australian  
Human Rights  
Commission**

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March 2017

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 by Mr BF on behalf of himself and his son, Master BG against the Commonwealth of Australia (Department of Immigration and Border Protection) alleging a breach of their human rights under 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).

I have found that, whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer Mr BF and his son's case to the Minister pursuant to the community detention guidelines, the department's failure to assess Mr BF and his son for community detention resulted in their detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.

Further, I have found that the department breached article 3 of the CRC through its failure to consider Master BG's best interests and to take these interests into account as a primary consideration in the decision on whether to refer his and his father's case to the Minister for consideration of a residence determination.

In light of my findings, I have recommended that the Commonwealth pay to Mr BF appropriate compensation in relation to his and his son's period of arbitrary detention and for the breach of article 3 of the CRC.

By letter dated 27 February 2017 the department provided a response to my findings and recommendations. I have set out the department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs".

Gillian Triggs  
**President**  
Australian Human Rights Commission

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# 1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint by Mr BF on behalf of himself and his son, Master BG against the Commonwealth of Australia – Department of Immigration and Border Protection (department) alleging a breach of their human rights.
2. Mr BF's complaint is about his and his son's detention on Christmas Island from 23 July 2013 to 28 March 2014. His complaint raises for consideration the right to liberty protected by 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). I have also considered article 3 of the CRC, which places a requirement on decision makers to make the best interests of the child a primary consideration in all actions concerning them.
3. I consider that the preservation of the anonymity of Mr BF and Master BG is necessary to protect their privacy. Accordingly, I have given a direction under s 14(2) of the AHRC Act and referred to them by the pseudonyms BF and BG in this document.
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, whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer Mr BF and his son's case to the Minister pursuant to the community detention guidelines, the failure to assess Mr BF and his son for community detention has resulted in their detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.
6. Further, the department has not demonstrated that Master BG's best interests were explored and taken into account as a primary consideration when it decided not to refer his and his father's cases to the Minister for consideration of a residence determination. I therefore find that there has been a breach of article 3 of the CRC.
7. I have recommended that the Commonwealth pay to Mr BF appropriate compensation in relation to his and his son's period of arbitrary detention and for the breach of article 3 of the CRC.

## 2 Background

8. Mr BF and his 17-year-old son, Master BG, are Iranian nationals, who arrived in Australia by boat on 24 July 2013. They arrived without a visa, seeking asylum. Mr BF alleges that he and his son had to leave Iran because of Mr BF's involvement in political protests in Iran and his son's complaints about the Iranian government in the music he made. When they arrived in Australia, the department immediately detained them in the Christmas Island Immigration Detention Centre pursuant to s 189(3) of the *Migration Act 1958* (Cth) (Migration Act).
9. As Mr BF and his son arrived after 19 July 2013, they were subject to the Australian Government's 'no advantage' policy and were to be transferred to a Regional Processing Centre, such as Nauru, pursuant to s 198AD of the Migration Act. Further, under s 46A of the Migration Act, they were barred from making a valid visa application, including a Protection Visa, in Australia.
10. Mr BF states that although he and his son were under threat of persecution if they returned to Iran, they agreed to be voluntarily returned to Iran so that they would no longer be held in detention. They made separate written requests for removal from Australia on 26 March 2014 and 27 March 2014 respectively. As a result of their decision to depart Australia, they were exempt from being transferred to a Regional Processing Centre and taken to have withdrawn any claims for Australia's protection that they may have made.
11. On 28 March 2014 Mr BF and his son were transferred to Perth Immigration Transit Accommodation. On 2 April 2014 they voluntarily departed Australia.

## 3 Legislative Framework

### 3.1 Functions of the Commission

12. Section 11(1)(f) of the 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.
13. 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 a 'practice'?

14. 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.



15. 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.
16. 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.<sup>1</sup>

### 3.3 What is a human right?

17. 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.
18. 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

19. 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

20. 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.

21. Similarly, section 4AA of the Migration Act confirms that children should only be detained as a measure of last resort.

22. Article 3(1) of the CRC relevantly provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

## 4 Detention in an immigration detention centre

23. Mr BF complains about the length of his and his son's detention in an immigration detention centre on Christmas Island. He states:

There are high electrified fences around the compound and more than 100 cameras. It feels like we are in prison for dangerous criminals. There are many children in this negative environment. It is not suitable for them to play, there is limited space and things to play with. The children are sad and nervous.

...

I would like for my son [Master BG] and I (as well as other people who have been here for 6 months) to be transferred to the mainland of Australia. We would like to be put in the community, however if this is not possible, either to be given a bridging visa or to be placed in community detention.

24. Mr BF and his son were detained on Christmas Island for a period of approximately 8 months from 23 July 2013 to 28 March 2014.
25. This raises for consideration whether Mr BF and his son's detention was arbitrary within the meaning of article 9(1) of the ICCPR and additionally whether Master BG'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.
26. I will also consider whether the best interests of Master BG were a primary consideration during his detention in accordance with article 3 of the CRC.

### 4.1 Law

27. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:

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

28. 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.<sup>6</sup>
29. 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.<sup>7</sup>
30. Relevant jurisprudence of the UNHRC on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:<sup>8</sup>

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum 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 in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.

31. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.

## 4.2 Act or practice of the Commonwealth?

32. Section 197AB of the Migration Act permits the Minister, where he thinks that it is in the public interest to do so, to make a residence determination to allow a person to reside in a specified place instead of being detained in closed immigration detention. A 'specified place' may be a place in the community. This is commonly referred to as community detention.
33. The act of the Commonwealth to which I have given consideration is the failure by the department to make a submission to the Minister that he consider exercising his discretionary powers to make a residence determination in favour of Mr BF and his son.

### 4.3 The department's response

34. When the Commission asked the department the reason for the length of Mr BF and his son's detention in an immigration detention centre, the department responded that:

During their time in immigration detention, Mr [BF] and his son were unlawful non-citizens and were required under section 196 of the [Migration] Act to be detained until there was no longer reasonable suspicion that they were unlawful non-citizens, [or] they were granted a visa or removed from Australia.

...Mr [BF] and his son voluntarily departed Australia on 2 April 2014.

35. The department's response states that Mr BF and his son's detention was reviewed on eight occasions under case management processes by Case Management and at Detention Review Committee meetings. The department reported that 'the outcome of these reviews had consistently found that their detention remained appropriate'.

36. I note that the department's Case Review of Mr BF, dated 31 October 2013 states:

Mr [BF] and his son [Master BG] arrived after July 19, 2013 and as a result has had no case progression under the Australian Government's 'No Advantage' policy. He has been notified of Regional Processing Country (RPC) arrangements as per the announcement made by the Minister on July 19, 2013 and related communication guides.

...

[Mr BF] and his son [Master BG] are identified as Unauthorised Maritime Arrivals (UMAs), who arrived after July 19, 2013. As per the policy they will be transferred to a Regional Processing Country when it is practical to do so.

37. When the Commission asked whether alternative, less restrictive detention options were considered for Mr BF and his son, the department replied:

In line with Part 10 of the "*Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act 1958*" instruction, less restrictive forms of detention were not considered an option for Mr [BF] and his son at that time as they arrived after 19 July 2013 as IMAs and no "exceptional reasons" (such as immediate health or welfare concerns) for consideration had been identified. On each occasion where their case was reviewed, their placement was determined as appropriate.

38. The instruction referred to in the department's response is the Guidelines issued by the Hon Scott Morrison MP, then Minister for Immigration and Border Protection on 18 February 2014 (the 2014 Guidelines). These guidelines explain the circumstances in which the Minister may wish to consider exercising his discretionary powers under s 197AB of the Migration Act to make a residence determination.

39. The 2014 Guidelines contain the following important statement about the detention of children:

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.

It is 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.

40. The 2014 Guidelines followed the former Prime Minister Rudd's announcement on 19 July 2013 that asylum seekers arriving after that date would be subject to offshore processing and would not be resettled in Australia. Accordingly, the 2014 guidelines relevantly provided:

**10 Cases generally not to be referred for my consideration under section 197AB**

I would not expect the department to refer to me for consideration of Residence Determination under section 197AB of the Act a specified person or persons in any of the following circumstances, unless there are exceptional reasons or I have requested it:

- where a person arrived after 19 July 2013, ...

41. That is, the Minister had decided that, in the absence of exceptional reasons, people who were subject to removal to a regional processing country because they arrived after 19 July 2013 would not be eligible for community detention prior to their removal.

## 5 Findings

### 5.1 Finding – arbitrary detention

42. I am not satisfied that Mr BF and his son's detention in an immigration detention centre on Christmas Island for 8 months was necessary or proportionate to the Commonwealth's legitimate aim of ensuring the effective operation of its migration system.

43. Apart from a brief initial period in order to document their entry, record their claims and determine their identity, their detention in Australian immigration detention centres has not been justified by the department. It has provided no particular reasons for their lengthy detention specific to their case such as an individualised risk of absconding or risk of crimes against others. There is no evidence that either Mr BF or his son posed a risk to the Australian community.

44. I note that according to government policy, Mr BF and his son were subject to regional resettlement arrangements. Pursuant to s 198AD(2) of the Migration Act, they were to be taken to a regional processing country 'as soon as reasonably practicable'. However, in the 8 months prior to Mr BF and his son's decision to voluntarily return to Iran, the department had not made any transfer arrangements.
45. Further, it is apparent that during this time, the department did not refer Mr BF and his son's case to the Minister for him to consider exercising his discretionary power to make a residence determination under s 197AB of the Migration Act. The department's response states that this was in line with Part 10 of the 2014 Guidelines.
46. However, under the 2014 Guidelines, individuals who entered Australia after 19 July 2013 could still be referred to the Minister where there were 'exceptional reasons'.
47. The phrase 'exceptional reasons' is not defined in the 2014 guidelines, however the phrase 'unique or exceptional circumstances' is defined in similar guidelines relating to the Minister's power to grant visas in the public interest.<sup>9</sup> In those guidelines, factors that are relevant to an assessment of unique or exceptional circumstances include:
- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration;
  - circumstances that may bring Australia's obligations as a party to the CRC into consideration; and
  - the length of time the person has been present in Australia (including time spent in detention).
48. The fact that Mr BF and his son were in immigration detention for a period of 8 months without any individualised assessment of risk of absconding or risk of crimes against others brings Australia's obligations as a party to the ICCPR into consideration and is therefore relevant to an assessment of whether Mr BF and his son's case presents 'exceptional' circumstances.
49. I note further that during their time in detention, Master BG was a child, which brings Australia's obligations under the CRC into consideration. As set out above, the 2014 Guidelines acknowledge that:
- 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. I further note that the 2014 Guidelines were only in operation from 18 February 2014. Accordingly, for the majority of Mr BF and his son's detention, the previous set of Guidelines were in force. These Guidelines were published by the Hon Brendan O'Connor MP and were in force from 30 May 2013 until 17 February 2014. These Guidelines did not prevent individuals who had arrived in Australia after 19 July 2013 from being referred to the Minister for the consideration of his residence determination power under s 197AB of the Migration Act. These guidelines also provided that the Minister would consider cases 'where a person presents unique or exceptional circumstances'. Like the 2014 Guidelines, they also stated:

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.

51. I find that, whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer Mr BF and his son's case to the Minister pursuant to the community detention guidelines, the failure to assess Mr BF and his son for community detention has resulted in their detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.

## 5.2 Finding – best interests of the child

52. Article 3 of the CRC requires that in all actions concerning children, their best interests must be a primary consideration of the decision maker.

53. The United Nations Children's Fund (UNICEF) Implementation Handbook for the Convention on the Rights of the Child states that while 'the best interests of the child will not always be the single, overriding factor to be considered;...it must be demonstrated that children's interests have been explored and taken into account as a primary consideration'.<sup>10</sup>

54. In *Wan v Minister for Immigration & Multicultural Affairs*,<sup>11</sup> the Full Court of the Federal Court considered the way in which a decision maker should assess the requirements of article 3 of the CRC. The starting point is to identify what the best interests of the child indicate that the decision maker should decide.<sup>12</sup> It is open to the decision maker to depart from the best interests of Master BG. However, in order to do so there are two requirements:

- the decision maker must not treat any other factor as inherently more significant than the best interests of Master BG;
- the strength of other relevant considerations must outweigh the consideration of the best interests of Master BG, understood as a primary consideration.

55. There is no evidence before me that the department undertook this exercise when deciding not to refer Master BG and his father's cases to the Minister for consideration of a residence determination.

56. First, neither the Case Reviews provided by the department, nor its various responses to this inquiry demonstrate that the department identified Master BG's best interests as the starting point in its decision making. For the purposes of this inquiry, I consider that it was in the best interests of Master BG to be released with his father into the community pursuant to a residence determination, potentially with conditions attached.

57. Further, it is apparent from the department's responses to this inquiry that the overriding consideration in this case was the 'no advantage policy'. As set out at [36] above, the department's view was that:

Less restrictive forms of detention were not considered an option for Mr [BF] and his son at that time as they arrived after 19 July 2013 as IMAs and no "exceptional reasons" (such as immediate health or welfare concerns) for consideration had been identified.

58. The department's submission suggests that the best interests of Master BG were not evaluated as an equally important consideration. Instead, the 'no advantage' policy was regarded as inherently more significant than the best interests of Master BG unless there were 'exceptional reasons'.

59. In the department's response to my preliminary view, it maintained that:

Mr [BF] and Master [BG's] placement and ongoing detention was appropriate, reasonable and justified in the individual circumstances of their case and therefore not contrary to article 3 of the CRC.

60. I find that the department has not demonstrated that Master BG's interests were explored and taken into account as a primary consideration when it decided not to refer his and his father's cases to the Minister for consideration of a residence determination. I therefore find that there has been a breach of article 3 of the CRC.

## 6 Recommendations

61. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>13</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>14</sup> 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.<sup>15</sup>



## 6.1 Compensation

62. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
63. However, in considering the assessment of a recommendation for compensation under section 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.<sup>16</sup>
64. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.<sup>17</sup>

### (a) Compensation

65. I must now consider the appropriate compensation for Mr BF and his son for breaches of article 9(1) of the ICCPR and article 37(b) of the CRC, as well as article 3 of the CRC.
66. In the particular circumstances of this case, the ‘wrong’ that has occurred is that both Mr BF and his son were in immigration detention for a period of 8 months. I have found this length of detention to be disproportionate to any legitimate aim of the Commonwealth and therefore arbitrary under article 9(1) of the ICCPR and article 37(b) of the CRC. I have also found that there is no evidence that the department either identified Master BG’s best interests or took them into account as a primary consideration when deciding not to refer his and his father’s cases to the Minister for consideration of a residence determination in breach of article 3 of the CRC. Accordingly, in this case, there is a close relationship between the breach of article 3 of the CRC and the right to liberty. I therefore consider that damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation in this case. 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.
67. I note that the tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR (or articles 37(b) and 3 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 articles 37(b) or 3 of the CRC may be made out where it can be established that the detention was arbitrary, irrespective of legality.
68. 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).<sup>18</sup>

69. In the case of *Fernando v Commonwealth of Australia (No 5)*,<sup>19</sup> Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:<sup>20</sup>

The *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach 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.<sup>21</sup>

70. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).<sup>22</sup> In that case at first instance,<sup>23</sup> the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
71. 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'.
72. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.<sup>24</sup>
73. 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 an appellable error.<sup>25</sup> Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested". (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.<sup>26</sup>

74. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth's argument that Mr Fernando was only entitled to nominal damages,<sup>27</sup> his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of 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.<sup>28</sup>

**(b) Recommendation that compensation be paid**

75. As a result of the inquiry, I find that, whether required by a policy decision of the Minister or whether resulting from a failure by the department to refer Mr BF and his son's case to the Minister pursuant to the community detention guidelines, the failure to assess Mr BF and his son for community detention has resulted in their detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC.
76. I have also found that the department has not demonstrated that Master BG's best interests were explored and taken into account as a primary consideration when it decided not to refer his and his father's cases to the Minister for consideration of a residence determination, in breach of article 3 of the CRC.
77. There is no material before me that indicated that either Mr BF or his son had been previously imprisoned in Australia and therefore it is likely that they would have felt the disgrace and humiliation experienced by persons of good character.
78. I consider that the Commonwealth should pay to Mr BF an appropriate amount of compensation to reflect the loss of liberty caused by his and his son's detention in accordance with the principles outlined above.

## 7 The department's response to my findings and recommendations

79. On 8 February 2017 I provided a notice to the Department of Immigration and Border Protection under section 29(2) of the AHRC Act settling out my findings and recommendations in relation to the complaint dealt with in this report.
80. By letter dated 27 February 2017 the department provided the following response to my findings:

### **Response to Findings 1 and 2**


The Department considers that Mr [BF] and Master [BG's] ongoing detention was in accordance with Australia's immigration laws and procedures. Mr [BF] and his son were detained in accordance with a well-established and publicised policy regarding unauthorised arrivals which is aimed at the legitimate goal of controlling Australia's borders.

### **Response to Recommendation 1**

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 principles and practice.

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

81. I report accordingly to the Attorney-General.



Gillian Triggs  
**President**  
Australian Human Rights Commission

March 2017

## Endnotes

- 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* (Oxford University Press, 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 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 [18].
- 9 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, *Minister's Guidelines on Ministerial Powers (s345, s 351, s 417 and s 501J)* 24 March 2012 (reissued on 10 October 2015). The guidelines are incorporated into the Department's Procedures Advice Manual.
- 10 Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the CRC in areas falling within the scope of their respective mandates.
- 11 (2001) 107 FCR 133.
- 12 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [26] (the Court).
- 13 AHRC Act s 29(2)(a).
- 14 AHRC Act s 29(2)(b).
- 15 AHRC Act s 29(2)(c).
- 16 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 17 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 18 *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].
- 19 [2013] FCA 901.
- 20 [2003] NSWSC 1212.
- 21 [2013] FCA 901 [121].
- 22 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 23 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 24 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court [140] (Murrell DCJ)).
- 25 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 26 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 27 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].
- 28 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].



## Further Information

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