Australian Human Rights Commission

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2011

Mr NK v Commonwealth (Department of Immigration and Citizenship)

[2011] AusHRC 43

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Mr NK v Commonwealth of Australia (Department of Immigration and Citizenship)

Report into arbitrary detention, the right of people in detention to protection of the family and freedom from arbitrary interference with the family

[2011] AusHRC 43

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February 2011

The Hon Robert McClelland MP
Attorney General
Parliament House
Canberra ACT 2600

Dear Attorney

I attach my report of an inquiry into the complaint made pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) by Mr NK.

I have found that the acts and practices of the Commonwealth breached Mr NK's right not to be subject to arbitrary detention and his right to protection of and freedom from arbitrary interference with his family. These fundamental human rights are protected by articles 9(1), 17(1) and 23(1) of the *International Covenant on Civil and Political Rights.*

By letter dated 8 December 2010 the Department of Immigration and Citizenship provided the following response to my findings and recommendations:

> **The Department's Response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr NK**
>
> *1. That payment of compensation in the amount of $500,000 is appropriate*
>
> While we note your findings, in the Department's view Mr NK has been and continues to be detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention has not been and is not arbitrary.
>
> Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.
>
> *2. That it is appropriate that the Commonwealth provide a formal written apology to Mr NK for the breaches of his human rights identified in this report.*
>
> The Department disagrees with this recommendation.
>
> The Department notes that Mr NK's detention has continued while the Department has been working to remove him in accordance with s 198 of the *Migration Act 1958*. As we have advised previously, the issue of Mr NK's removal has been complicated given the Department's assessment that if Mr NK is to be returned to the People's Republic of China (PRC), it is possible that he may be investigated and prosecuted over the two murders he committed in Australia. The Department also considers that in the absence of reliable and adequate assurances, there will be a real risk that Mr NK will face the death penalty or torture as a necessary and foreseeable consequence of his removal.

Human Rights and Equal Opportunity Commission

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Such action would place Australia in breach of our express and implied *non-refoidement* [sic] obligations.

Consequently the issue of whether Mr NK can be removed from Australia is complex. The Department confirms that active steps have been and continue to be taken to effect his lawful removal. Australia is obliged to ensure, as a consequence of his removal, we will not be in breach of our *non-refoulement* obligations.

The Department advises the Commission that there will be no action taken with regard to this recommendation.

Other Recommendations

The Department notes that the Commission has made two further recommendations with regard to the ongoing management of Mr NK's case. These related recommendations as identified in the Commission's report are:

3. That Mr NK immediately be placed in community detention; and

4. That Mr NK's immigration status be resolved at the earliest possible opportunity.

The Department notes recommendation three. The Department assures the Commission that Mr NK's case has been and will continue to be assessed in line with the appropriate legislation and policies. Mr NK's placement has been, and will continue to be, reviewed in accordance with the Ministerial guidelines as appropriate. However, the Department has no power to consider Mr NK for a residence determination. The power to make such a determination may only be made by the Minister.

With regard to recommendation four, the Department agrees with this recommendation. As Mr NK has not departed voluntarily, the Department is working towards resolving his immigration status through involuntary removal. To ensure Australia does not breach its international obligations under the ICCPR, the Department will continue to seek effective and reliable assurances in order to effect Mr NK's removal.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

Contents

1 Introduction

1. This is a report of my inquiry into a complaint of breach of human rights made to the Australian Human Rights Commission (the Commission) by Mr NK. The complaint is made against the Commonwealth of Australia, Department of Immigration and Citizenship (DIAC).
2. This inquiry was undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. I have found that the failure by the Commonwealth to place Mr NK in a less restrictive form of detention than in Villawood Immigration Detention Centre (VIDC) amounts to a breach of his right not to be arbitrarily detained.
4. I have also found that the failure to place Mr NK in a less restrictive form of detention amounted to arbitrary interference with his family and interfered with his right to protection of the family.
5. I have directed that the complainant's identity be protected in accordance with section 14(2) of the AHRC Act.

2 Summary

6. In 1989 Mr NK entered Australia from the People's Republic of China (PRC) on a student visa. In October 1992 Mr NK was convicted of two counts of murder and sentenced to 20 years imprisonment with a non-parole period of 15 years. He was issued with a Bridging Visa E (criminal detention) (BVE) for the period of his imprisonment.
7. On 9 October 2006 Mr NK was released from prison and his BVE was cancelled. As he was an unlawful non-citizen he was transferred to VIDC. At the date of this report, Mr NK remains detained in VIDC.
8. From October 2006 to February 2008 the Commonwealth did not consider whether Mr NK could be detained in a less restrictive manner than in VIDC. On 12 August 2009 the Minister of Immigration and Citizenship (the Minister) declined to make a residence determination to allow Mr NK to be placed in community detention.
9. I have found that the failure by the Commonwealth to place Mr NK in a less restrictive form of detention than in VIDC as soon as he entered the custody of the Commonwealth was inconsistent with his right under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) not to be arbitrarily detained.
10. The State Parole Authority had determined that Mr NK was suitable for release into the community and placed substantial conditions on his release such as regular reporting to a parole officer, residence at a nominated address and a curfew. An Australian citizen in Mr NK's circumstances would be considered to have been punished for his or her crimes and would have been living in the community.
11. In addition, DIAC proposed to place conditions on Mr NK should he be placed in community detention, such as: reporting to DIAC by telephone once a week, receiving visits from DIAC once per fortnight, accepting non-scheduled visits from DIAC and not having visitors overnight without prior consent.
12. If the Minister had concerns about the risk that Mr NK posed to the community, it is unclear on what evidence these concerns were based and why they were not allayed by the conditions that would have been imposed on Mr NK's release.
13. When Mr NK's request to be placed in community detention came before the Minister, there were limited options for the resolution of Mr NK's immigration status. He had been refused the grant of a visa on several occasions. Accordingly, it was unlikely that he would be granted a visa which would allow him to reside lawfully in Australia. Further, International Treaty Obligations Assessments (ITOA) conducted by DIAC found that there was a real risk that Mr NK would be subject to cruel, inhuman or degrading treatment

or punishment if he were returned to the PRC. In my view, the lack of realistic options available to resolve Mr NK's immigration status was a factor weighing in favour of Mr NK being placed in community detention.

14. I have also found that the failure to place Mr NK in a less restrictive form of detention amounted to arbitrary interference with his family and with his entitlement to protection of the family in breach of articles 17(1) and 23(1) of the ICCPR.

15. In 2007 Mr NK married. His wife has a vision impairment and has experienced depression. Mr NK advises that if he were placed in community detention he would reside with his wife and would act as her full time carer.

16. Mr NK also alleged a breach of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10(1) of the ICCPR. I have not found that such a breach of Mr NK's human rights occurred.

17. I have recommended that Mr NK be paid a total of $500 000 in compensation and that the Commonwealth apologise to Mr NK. I also recommended that Mr NK be immediately placed in community detention and that his immigration status be resolved at the earliest possible opportunity.

3 The complaint by Mr NK

3.1 Background

18. On or about 20 November 2008 Mr NK made a complaint to the Commission.

19. Both Mr NK and the Commonwealth have provided submissions in this matter.

20. Mr NK and the Commonwealth have also had the opportunity to respond to my tentative view dated 17 May 2010.

21. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.

22. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instrument and by international jurisprudence about their interpretation.

3.2 Findings of fact

23. I consider the following statements about the circumstances which have given rise to Mr NK's complaint to be uncontentious.

24. Mr NK is a national of the PRC. He entered Australia on a student visa in 1989. On 30 October 1992 Mr NK was convicted of two counts of murder and was sentenced to 20 years imprisonment with a non-parole period of 15 years. He was granted a BVE for the period of his detention.

25. On 6 October 2006 Mr NK applied for a protection visa. On 9 October 2006 Mr NK was released on parole and his BVE was revoked. As Mr NK was an unlawful non-citizen at this time, he was placed in VIDC.

26. On 7 November 2006 Mr NK applied for a bridging visa. On 21 November 2006 Mr NK was advised that the Minister had refused his application for a bridging visa under section 501(1) of the *Migration Act 1958* (Cth) (Migration Act) (refusal of visa on character grounds).

27. On 19 December 2006 Mr NK's application for a protection visa was refused. On 22 December 2006 Mr NK lodged a review of the decision to refuse his protection visa application with the Refugee Review Tribunal (RRT).

28. On 2 February 2007 Mr NK applied for another bridging visa. However, section 501E of the Migration Act prevented Mr NK from making another application for a visa, aside from an application for a protection visa. Accordingly, on 5 February 2007 Mr NK's application for a bridging visa was deemed invalid.
29. On 20 April 2007 the RRT affirmed the decision of 19 December 2006 to refuse Mr NK's application for a protection visa. On 21 May 2007 Mr NK lodged an application with the Federal Magistrates Court seeking a review of the RRT's decision. On 26 July 2007 the Federal Magistrates Court dismissed Mr NK's application.
30. On 13 September 2007 Mr NK lodged a request for Ministerial intervention under section 417 of the Migration Act (Minister may substitute a more favourable decision). On 5 November 2007 the Minister declined to intervene.
31. On 4 February 2008 DIAC initiated a request for Ministerial intervention under section 197AB (Minister may determine that a person is to reside at a specified place rather than being held in detention).
32. On 12 February 2008 Mr NK applied for a bridging visa. His application was again deemed invalid because of the section 501E restriction.
33. On 13 February 2008 DIAC decided that the Ministerial intervention request under section 197AB did not meet the guidelines for referral and did not refer it to the Minister.
34. On 17 March 2008 Mr NK lodged a further section 417 request for Ministerial intervention. On 1 August 2008 Mr NK requested Ministerial intervention under section 197AB. On 20 October 2008 DIAC referred a combined sections 417, 197AB and 195A (Minister may grant detainee a visa) submission to the Minister.
35. On 25 November 2008 the Minister declined to intervene under sections 417 and 195A but indicated that he would like to see a further section 197AB submission for possible community detention placement. On 11 May 2009 a further section 197AB submission was referred to the Minister.
36. On 14 May 2009 the Minister asked DIAC to provide further advice about what restrictions may be imposed on a client placed in community detention.
37. On 15 June 2009 DIAC provided further information about what restrictions would be imposed on Mr NK if he were to be placed in community detention. On 12 August 2009 the Minister again declined to intervene.
38. On 6 November 2009 Mr NK sought Ministerial intervention under sections 195A, 197AB and 417 of the Migration Act.
39. On 18 May 2010 the Minister again declined to consider Mr NK's request for Ministerial intervention.
40. As at the date of this Report, Mr NK remains in VIDC.

4 The Commission's human rights and inquiry and complaints function

41. Section 11(1)(f) of the AHRC Act gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.

42. 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.

4.1 The Commission can inquire into acts or practices of the Commonwealth

43. The expressions 'act' and 'practice' are defined in section 3(1) of the AHRC Act to include an act done or a practice engaged in 'by or on behalf of the Commonwealth' or under an enactment.

44. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.

45. An act or practice only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or its agents.

46. As a judge of the Federal Court in *Secretary, Department of Defence v HREOC*, *Burgess & Ors* (Burgess),[1] I found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, its officers or agents 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.[2]

47. Mr NK was placed in VIDC on 9 October 2006 and he remains detained there.

48. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. As Mr NK's BVE had been revoked, he was an unlawful non-citizen and as such had to be detained. However, the Migration Act did not require that Mr NK be detained in an immigration detention centre.

49. Section 197AB of the Migration Act states:

> If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a ***residence determination***) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).

50. 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]

51. Accordingly, the Minister could have made a residence determination in relation to Mr NK under section 197AB of the Migration Act or could have approved Mr NK's residing in a place other than VIDC.

52. I consider that the failure by the Minister to place Mr NK in a less restrictive form of detention amounts to an act under the AHRC Act. I note that the Commonwealth agrees with this proposition.[4]

4.2 'Human rights' relevant to this complaint

53. The expression 'human rights' is defined in section 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.

54. The articles of the ICCPR that are of particular relevance to this complaint are:

- Article 9(1) (prohibition on arbitrary detention);
- Article 10(1) (humane treatment of people deprived of their liberty);
- Article 17(1) (prohibition against arbitrary interference with family) and article 23 (protection of family).

(a) Article 9(1) of the ICCPR

55. 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.

56. The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that a detention be lawful. In *Van Alphen v The Netherlands*,[5] the United Nations Human Rights Committee (UNHRC) said:

> [A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[6]

57. A similar view was expressed in *A v Australia*[7] in which the UNHRC said:

> [T]he Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of

> proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.[8]

58. In *Kwok v Australia*[9] the UNHRC said:

> With respect to the claim that the author was arbitrarily detained, in terms of article 9, paragraph 1, prior to her release into community detention, the Committee recalls its jurisprudence that, in order to avoid characterization of arbitrariness, detention should not continue beyond the period for which the State can provide appropriate justification. In the present case, the author's detention as an unlawful non-citizen continued, in mandatory terms, for four years until she was released into community detention. While the State party has advanced general reasons to justify the author's detention, the Committee observes that it has not advanced grounds particular to her case which would justify her continued detention for such a prolonged period. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends.[10]

59. In *MIMIA v Al Masri*,[11] the Full Federal Court stated that article 9(1) requires that arbitrariness is not to be equated with 'against the law' but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust.[12]

60. This broad view of arbitrariness has also been applied in the case of *Manga v Attorney-General*,[13] where Hammond J concluded that:

> The essence of the position taken in the tribunals, the case law, and the juristic commentaries is that under [the ICCPR] all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability and proportionality.
>
> It has also been convincingly demonstrated that the reason for the use of the word 'arbitrary' in the drafting of the international covenant was to ensure that both 'illegal' and 'unjust' acts are caught. The (failed) attempts to delete the word 'arbitrary' in the evolution of art 9(1), and replace with the word 'illegal' are well documented.[14]

61. In another New Zealand case dealing with arbitrary arrest and detention, *Neilsen v Attorney-General*,[15] it was held that:

> An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.[16]

62. In the context of the European Convention on Human Rights, a broad view has also been taken as to the scope of the term arbitrary. The European Court of Human Rights has held that:

> [I]t is a fundamental principle that no detention which is arbitrary can be compatible with [article] 5(1) and the notion of 'arbitrariness' in [article] 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[17]

63. The Court further held that 'one general principle established in the case law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities'.[18]

(b) Article 10(1) of the ICCPR

64. I have considered whether Mr NK's complaint raises potential breaches of article 10(1) of the ICCPR. Article 10 provides:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person.

65. Article 10(1) of the ICCPR requires States to treat all persons deprived of their liberty 'with humanity and respect for the inherent dignity of the human person'.[19] This requirement is generally applicable to persons deprived of their liberty – including in immigration detention.[20]

66. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.[21] However, a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.[22]

67. In particular, the alleged breach of article 10(1) must impact on one or more human needs other than liberty or freedom.[23] These include, failing to respect the rights and interests of detainees: to light, sanitation and bedding,[24] to maintain family connections,[25] to know one's own personal information,[26] to company and personal space[27] and to be free from hunger.[28]

68. In Australian Human Rights Commission Report 40, the Commission expressed the view that arranging for Chinese Officials to interview asylum seekers without explaining the purpose of the interview, causing fear and distress, was a violation of article 10 of the ICCPR.[29]

69. In that report, the Commission expressed the view that ultimately, whether there has been a breach of this article 10(1) will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.[30]

(c) Article 17(1) and 23(1) of the ICCPR

70. I have also considered whether Mr NK's continued detention in VIDC has interfered with his family pursuant to articles 17 and 23 of the ICCPR.

71. 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.

72. Article 23(1) provides:

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

73. Professor Manfred Nowak has noted that:

> [T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.[31]

74. For the reasons set out in Australian Human Rights Commission Report 39[32] I consider 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). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of article 23(1).

75. In its General Comment on Article 17(1), the UNHRC confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.[33]

76. It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness.[34] In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:[35]

> 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.[36]

77. The relevant issue is whether there was an arbitrary interference with Mr NK's family life. There is no clear guidance in the jurisprudence of the UNHRC as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family.

5 Forming my opinion

78. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have carefully considered all of the information provided to me by both of the parties, including the submissions received from the parties in response to my tentative view.

6 Arbitrary detention

79. Mr NK claims that his continued detention in VIDC is arbitrary within the meaning of article 9(1) of the ICCPR.

80. The Commonwealth submits that the Minister's decision not to exercise a non-compellable and non-delegable power does not characterise Mr NK's detention as arbitrary. The Commonwealth notes that Mr NK has no lawful right to remain in Australia and therefore has been detained in accordance with section 189 of the Migration Act.

81. The Commonwealth notes that the determining factor as to whether detention is arbitrary is whether it is justifiable. The Commonwealth claims that there is a legitimate and justifiable basis for the continuation of Mr NK's detention pending his removal from Australia.

82. Mr NK was placed in immigration detention on 9 October 2006 after being released from prison and he remains in immigration detention.

83. The international jurisprudence indicates that the Commonwealth has an obligation to detain Mr NK in the least restrictive manner possible. The Commonwealth could detain Mr NK in a less restrictive manner. The Minister could make a residence determination in relation to Mr NK under section 197AB of the Migration Act or could approve Mr NK's residing in a place other than VIDC.

84. In the period 9 October 2006 to 3 February 2008 the Minister gave no consideration to whether Mr NK could be detained in a less restrictive manner than in immigration detention. DIAC advises that the first assessment of Mr NK's suitability to be placed in community detention occurred on 4 February 2008.[37]

85. Mr NK was imprisoned within the New South Wales correctional system for 15 years. The Commonwealth was aware that Mr NK would become an unlawful non-citizen at the time of his release from prison because the type of visa that he held was valid only for the period of his criminal detention. Mr NK was granted parole after completing his minimum sentence. Thus it was clearly foreseeable by the Commonwealth that in October 2006 Mr NK would be released into the custody of DIAC. No clear explanation has been offered as to why it took the Commonwealth 16 months to consider detaining Mr NK in a less restrictive manner.

86. On 12 August 2009 the Minister declined to place Mr NK in community detention. The Minister considered a further request that Mr NK be placed in community detention in early 2010 and on 18 May 2010 again declined to place Mr NK in community detention. The reasons for the Minister's decisions are unclear.

87. The submissions that DIAC provided to the Minister in October 2008 and May 2009 stated that Mr NK has a history of abusive and aggressive behaviour, both in prison and in VIDC. I note that Mr NK's behaviour in prison did not prevent his being released on parole. Further, whilst Mr NK has been involved in a number of reportable incidents whilst in VIDC, the Report by the Commonwealth and Immigration Ombudsman to the Minister dated 14 December 2009 notes that

> the last incident where (VIDC officers) documented that Mr NK demonstrated aggressive, abusive and violent behaviour was in December 2007, although Mr NK denies his involvement in this incident.[38]

88. The State Parole Authority determined that Mr NK was suitable for release into the community and placed substantial conditions on Mr NK's release such as regular reporting to a parole officer, residence at a nominated address and a 6pm to 6am curfew. A file note of Mr Andrew Bleeze of DIAC records a telephone conversation with Mr Mike Ryan of Community Offender Services, New South Wales Probation and Parole Office where Mr Ryan states that there are 'no serious concerns' with Mr NK being granted community detention.[39]

89. In addition to the parole conditions, DIAC's submission CE 2009/04271 to the Minister indicates that DIAC proposed to place further conditions on Mr NK should he be placed in community detention. DIAC would have required Mr NK to: report to DIAC by telephone once a week, receive visits from DIAC once per fortnight, accept non-scheduled visits by DIAC and not have visitors overnight without prior consent.

90. If the Minister had concerns about the risk that Mr NK posed to the community, it is unclear on what evidence those concerns were based and why they were not allayed by the conditions that would have been imposed by DIAC and the State Parole Authority.

91. Whilst Mr NK has been convicted of serious criminal offences, there is nothing in the evidence before me that suggests that he is a danger to the community. I note that when sentencing Mr NK for his crimes the sentencing judge noted that in the psychiatric assessments of Mr NK 'there is no suggestion that he is a danger to the community'.[40]

92. Section 197AB of the Migration Act provides that the Minister may make a residence determination 'if it is in the public interest to do so'. There is a public interest in ensuring that non-citizens are not detained indefinitely without justification. An Australian citizen in Mr NK's circumstances would be considered to have been punished for his or her crimes and would have been living in the community for the last four years.

93. The ITOA undertaken by DIAC in relation to Mr NK in January 2010 stated

> I find that there is a real risk than Mr NK will be subjected to deprivation of life, to torture and to cruel, inhuman or degrading treatment or punishment as a necessary and foreseeable consequence of his removal to the PRC. He therefore engages Australia's *non-refoulement* obligations under article 3 of the CAT, articles 6(1) and 7 of the ICCPR, and the Second Optional Protocol to the ICCPR.

94. I note that the preceding ITOA of July 2008 reached the same conclusion.

95. As the ITOAs recognised, unless satisfied that Mr NK would not be subject to death or torture in the PRC, it would breach Australia's international human rights obligations to return Mr NK to the PRC. I note that diplomatic assurances must not be relied upon unless they are unequivocal and a system to monitor such assurances is in place.[41]

96. In any event, when the Minister was considering whether Mr NK should be placed in community detention, the Commonwealth had made no attempt to obtain diplomatic assurances from the PRC in relation to Mr NK.

97. When the Minister was considering whether Mr NK should be placed in community detention, the options available for resolution of Mr NK's immigration status were that he be granted a visa or that he remain in some form of immigration detention. He was not then on a removal pathway.

98. When Mr NK's request to be placed in community detention came before the Minister in August 2009, Mr NK had made several applications for a visa, all of which had been refused. Further, Mr NK had unsuccessfully challenged several of the decisions to refuse him a visa. Accordingly, it was unlikely that Mr NK's immigration status was going to be resolved by the granting of a visa.

99. Thus when the Minister considered Mr NK's request for community detention, it did not appear that Mr NK could be returned to the PRC and it was unlikely that he would be granted a visa. Accordingly, the only realistic alternative to indefinite detention in VIDC was that Mr NK be placed in community detention.

100. I consider that the lack of options available to resolve Mr NK's immigration status was a factor weighing in favour of Mr NK being placed in community detention.

101. For the reasons mentioned above, I find that Mr NK's detention in VIDC is arbitrary in breach of article 9 of the ICCPR.

7 Treatment in detention

102. It is also claimed that Mr NK's continued detention in VIDC amounts to a breach of article 10(1) of the ICCPR.

103. DIAC claims that Mr NK has been treated with humanity and respect for his dignity in accordance with article 10(1) of the ICCPR. DIAC claims that Mr NK's detention is conducted in accordance with relevant departmental procedures which have been developed consistently with human rights.

104. Mr NK has not provided evidence to suggest that he has experienced any additional exacerbating factors beyond the usual incidents of detention.

105. In relation to his right to maintain family connections, it is not disputed that Mr NK regularly speaks to his wife on the telephone and receives visits from her in VIDC. I also understand that Mr NK has been allowed to leave VIDC to spend a day with his wife. Accordingly, I consider that any interference with Mr NK's family resulting from his detention in VIDC does not support a breach of article 10.

106. I find that Mr NK's continued detention in VIDC does not amount to a breach of article 10(1) of the ICCPR.

8 Interference with and protection of the family

107. Mr NK claims that his continued detention in VIDC has interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.

108. DIAC claims that Mr NK's detention is lawful and proportionate and therefore maintains that the interference which flows as a result from Mr NK's detention is reasonable in the circumstances and is not a breach of article 17 or 23 of the ICCPR.

109. On 3 November 2007 Mr NK married a former fellow detainee. Mr NK's wife was granted a protection visa and left VIDC on 11 December 2006. Since Mr NK's wife left VIDC, she has maintained contact with Mr NK through regular telephone calls and visits to VIDC.

110. Mr NK's wife has several disabilities. The Vision Australia assessment of Mr NK's wife dated 5 December 2008 states that she is legally blind. Reports completed in 2007 and 2008 from Mr NK's wife's psychologist diagnose Mr NK's wife with Adjustment Disorder with mixed anxiety and depressed mood.

111. In DIAC submission number CE 2009/04271 requesting the Minister's intervention, the author notes:

> [Mr NK's wife] has no other family in Australia and her condition means that she is unable to manage many day to day tasks without being assisted. [Mr NK's wife] visits Mr NK regularly, although her ability to do so is becoming more difficult as her condition deteriorates.

112. Mr NK claims that if he were released into the community, he would become his wife's full time carer.

113. In considering whether any interference with Mr NK's family was arbitrary, I must consider whether it was reasonable and proportionate to DIAC's legitimate aim of ensuring that non-citizens who pose a risk to the community are not released into the community.

114. It is unclear on what basis the Commonwealth has formed the view that Mr NK is a risk to the community other than that he has a criminal record involving serious offences. If the Commonwealth has legitimate concerns about the risk to the community posed by Mr NK, it is unclear why these concerns were not allayed by the significant parole and community detention conditions to which he would have been subjected.

115. Mr NK and his wife have been separated as a result of Mr NK's detention in VIDC. This could have been avoided had Mr NK been detained in a less restrictive manner.

116. I have found that Mr NK's detention was arbitrary from the time that he was placed in VIDC. Accordingly, the interference with his family occasioned by his detention was also arbitrary.

117. I note that being separated from his wife had a greater impact on Mr NK because of his wife's disabilities. In addition to not being able to live with his wife, Mr NK has also not been able to give his wife the care that she requires because of her disabilities.

118. For the above-mentioned reasons, I find that Mr NK's continued detention has arbitrarily interfered with his family from the time that he and his wife were married in breach of articles 17 and 23 of the ICCPR.

9 Findings and recommendations

9.1 Power to make recommendations

119. 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.[42] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[43]

120. 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.[44]

9.2 Consideration of compensation

121. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.

122. 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.[45]

123. 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.[46]

124. 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.

125. 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.

126. 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).[47]

127. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case.

128. In *Taylor v Ruddock*,[48] the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in New South Wales prisons.

129. Although the award of the District Court was ultimately set aside by the High Court, it provides useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.

130. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him $50 000 for the first period of 161 days and $60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of $110 000 (ie $348.10 per day).

131. In awarding Mr Taylor $110 000 the District Court 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.[49]

132. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.[50] The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[51]

133. In *Goldie v Commonwealth of Australia & Ors (No 2)*[52] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days (approximately $5 500 per day).

134. In *Spautz v Butterworth*[53] Mr Spautz was awarded $75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement. This is an award of approximately $1 400 per day.

135. In Australian Human Rights Commission Report 41,[54] I recommended that the Commonwealth should pay the complainant $90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention.

9.3 Recommendation that compensation be paid

136. I have found that on or about 9 October 2006 Mr NK should have been placed in community detention rather than detained in VIDC. The failure to release Mr NK from VIDC is inconsistent with his right not to be arbitrarily detained in breach of article 9(1) of the ICCPR. It has also interfered with his family from the time he and his wife were married in breach of articles 17(1) and 23(1) of the ICCPR.

137. Mr NK has not made any submissions on an appropriate sum of compensation but requests that I consider the collateral suffering of his wife.

138. DIAC contended that it was not appropriate for me to apply a 'daily rate' to determine a recommendation for compensation. DIAC noted that in common law proceedings, the quantum of damages for matters such as pain and suffering is tested on the basis of submissions from both parties on these issues.

139. I consider that the Commonwealth should pay to Mr NK an amount of compensation to reflect the loss of liberty caused by his detention at VIDC, rather than in community detention, and the consequent interference with his family. Had Mr NK been transferred to community detention he would still have experienced some curtailment of his liberty and I have taken this into account when assessing his compensation.

140. I have also taken into account the fact that Mr NK's detention in VIDC followed directly on from a lengthy period of imprisonment within the New South Wales correctional system. In this regard, I note the statement of the Court of Appeal in *Ruddock v Taylor*, that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[55]

141. 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 $500 000 is appropriate.

9.4 Apology

142. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr NK for the breaches of his human rights identified in this report. Apologies are important remedies for breaches of human rights. At least to some extent, they alleviate the suffering of those who have been wronged.[56]

9.5 Other recommendations

143. I recommend that Mr NK immediately be placed in community detention.

144. I recommend that Mr NK's immigration status be resolved at the earliest possible opportunity.

10 DIAC's response to the recommendations

145. By letter dated 10 November 2010, the Commonwealth was requested to advise the Commission within 14 days whether it has taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.

146. By letter dated 8 December 2010 the Commonwealth provided the following response to my notice of recommendations

The Department's Response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr NK

1. That payment of compensation in the amount of $500,000 is appropriate

While we note your findings, in the Department's view Mr NK has been and continues to be detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention has not been and is not arbitrary.

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

2. That it is appropriate that the Commonwealth provide a formal written apology to Mr NK for the breaches of his human rights identified in this report.

The Department disagrees with this recommendation.

The Department notes that Mr NK's detention has continued while the Department has been working to remove him in accordance with s 198 of the *Migration Act 1958.* As we have advised previously, the issue of Mr NK's removal has been complicated given the Department's assessment that if Mr NK is to be returned to the People's Republic of China (PRC), it is possible that he may be investigated and prosecuted over the two murders he committed in Australia. The Department also considers that in the absence of reliable and adequate assurances, there will be a real risk that Mr NK will face the death penalty or torture as a necessary and foreseeable consequence of his removal. Such action would place Australia in breach of our express and implied *non-refoidement* [sic] obligations.

Consequently the issue of whether Mr NK can be removed from Australia is complex. The Department confirms that active steps have been and continue to be taken to effect his lawful removal. Australia is obliged to ensure, as a consequence of his removal, we will not be in breach of our *non-refoulement* obligations.

The Department advises the Commission that there will be no action taken with regard to this recommendation.

Other Recommendations

The Department notes that the Commission has made two further recommendations with regard to the ongoing management of Mr NK's case. These related recommendations as identified in the Commission's report are:

3. That Mr NK immediately be placed in community detention; and

4. That Mr NK's immigration status be resolved at the earliest possible opportunity.

The Department notes recommendation three. The Department assures the Commission that Mr NK's case has been and will continue to be assessed in line with the appropriate legislation and policies. Mr NK's placement has been, and will continue to be, reviewed in accordance with the Ministerial guidelines as appropriate. However, the Department has no power to consider Mr NK for a residence determination. The power to make such a determination may only be made by the Minister.

With regard to recommendation four, the Department agrees with this recommendation. As Mr NK has not departed voluntarily, the Department is working towards resolving his immigration status through involuntary removal. To ensure Australia does not breach its international obligations under the ICCPR, the Department will continue to seek effective and reliable assurances in order to effect Mr NK's removal.

I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission

February 2011

Appendix 1

Functions of the Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the AHRC Act. Part II Divisions 2 and 3 of the AHRC Act confer functions on the Commission in relation to human rights. In particular, section 11(1)(f) of the AHRC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the AHRC Act.

Section 11(1)(f) of the AHRC Act states:

> (1) The functions of the Commission are:
>
> …
>
> (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
>
> (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
>
> (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.

Section 3 of the AHRC Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in section 11(1)(f) of the AHRC Act upon the Attorney-General's request, when a complaint is made in writing or when the Commission regards it desirable to do so (section 20(1) of the AHRC Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in section 10A of the AHRC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the AHRC Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Attorney-General until it has given the respondent to the complaint an opportunity to make written and/or oral submissions in relation to the complaint (section 27 of the AHRC Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (section 29(2)(a) of the AHRC Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (sections 29(2)(b) and (c) of the AHRC Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (sections 29(2)(d) and (e) of the AHRC Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with section 46 of the AHRC Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (section 20(2) of the AHRC Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (section 20(2)(c)(v) of the AHRC Act).

1 (1997) 78 FCR 208.
2 Ibid, [215].
3 *Migration Act 1958* (Cth), section 5.
4 The Department's Response on behalf of the Commonwealth of Australia to the AHRC's Tentative Views dated 4 August 2010.
5 Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.
6 Ibid, [5.8].
7 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.
8 Ibid, [9.2].
9 Communication No 1442/2005, UN Doc CCPR/C/97/D/144/2005.
10 Ibid, [9.3].
11 (2003) 126 FCR 54.
12 Ibid, [152].
13 [2000] 2 NZLR 65.
14 Ibid, [40], [41], references listed at [41], [42].
15 [2001] 3 NZLR 433.
16 Ibid, [34].
17 *Saadi v United Kingdom* [2008] ECHR 80, [67].
18 Ibid, [69].
19 Comments of Ms Cecilia Medina in an individual opinion concurring with the majority decision given in *Tatiana Zheludkova v Ukraine*, Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996.
20 United Nations Human Rights Committee, General Comment 21, Article 10 (44th sess, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153; United Nations Human Rights Committee, General Comment 9, Article 10 (16th sess, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 131.
21 United Nations Human Rights Committee, General Comment 21, Article 10 (44th sess, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153.
22 *Jensen v Australia*, Communication No 762/1997, UN Doc CCPR/C/71/D/762/1997.
23 *Taunoa v Attorney-General* [2008] 1 NZLR 429.
24 See *Daley v Jamaica*, Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), [7.6]; *Teesdale v Trinidad and Tobago*, Communication No 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), [9.1].
25 *Miguel Angel Estrella v Uruguay*, Communication No 74/1980, UN Doc CCPR/C/18/D/74/1980.
26 *Tatiana Zheludkova v Ukraine*, Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996.
27 *McTaggart v Jamaica*, Communication No 748/1997, UN Doc CCPR/C/67/D/748/1997 (1999), [8.5].
28 *Michael and Brian Hill v Spain*, Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993 (1997).
29 Australian Human Rights Commission, *Report of Complaints by immigration detainees against the Commonwealth of Australia* [2009] AusHRC 40.
30 Ibid, [106].
31 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
32 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].
33 United Nations Human Rights Committee, General Comment 16 (23rd sess, 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].
34 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 482-3.
35 Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992.
36 Ibid, [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.
37 The Department's Response on behalf of the Commonwealth of Australia to the AHRC's Tentative View dated 4 August 2010, page 4.
38 Report for tabling in Paliament by the Commonwealth and Immigration Ombudsman 599/09, 14 December 2009, [33].
39 File note of Mr Andrew Bleeze Director, Case Escalation and Liaison headed Record of discussion with Mike Ryan, Community Offender Services, NSW Probation and Parole Office at 10.30 am Friday 12 June 2009.

40 *R v NK* citation omitted pursuant to suppression direction made under *Australian Human Rights Commission Act 1986* (Cth), section 14(2).
41 *Agiza v Sweden,* Communication No 233/2003, UN Doc CAT/C/34/D/233/2003, [10.7].
42 *Australian Human Rights Commission Act 1986* (Cth), section 29(2)(a).
43 *Australian Human Rights Commission Act 1986* (Cth), section 29(2)(b).
44 *Australian Human Rights Commission Act 1986* (Cth), section 29(2)(c).
45 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
46 See *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 239 (Lockhart J).
47 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (Bergin J, 22 November 1999), [87].
48 *Taylor v Ruddock* [2002] NSWDC 662 (unreported, Murrell DCJ, 18 December 2002).
49 Ibid, [140].
50 (2003) 58 NSWLR 269, [49]-[50].
51 Ibid, [49].
52 (2004) 81 ALD 422.
53 (1996) 41 NSWLR 1 (Clarke JA).
54 [2009] AusHRC 41.
55 (2003) 58 NSWLR 269, [49].
56 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

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