Australian Human Rights Commission

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2011

# Mr Al Jenabi v Commonwealth of Australia (Department of Immigration and Citizenship)

[2011] AusHRC 45

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# 2011

# Mr Al Jenabi v Commonwealth of Australia (Department of Immigration and Citizenship)

Report into arbitrary detention

[2011] AusHRC 45

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July 2011

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

Dear Attorney

I have completed 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 Al Jenabi.

I have found that the acts of the Commonwealth breached Mr Al Jenabi's right not to be subject to arbitrary detention protected by article 9(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 17 May 2011 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 Ali Al Jenabi**
>
> 1. *That payment of compensation in the amount of $450,000 is appropriate*
>
> While we note your findings, in the Department's view Mr Al Jenabi was detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention was not arbitrary.
>
> The Department notes that Mr Al Jenabi continued to be detained under section 189 of the Migration Act while the department was working to finalise his protection visa application. As we have advised previously, a primary impediment to the resolution of Mr Al Jenabi's protection visa process was that as a result of his criminal history, he did not satisfy Public Interest Criterion 4001, the character requirements. The Department's view is that the assessment of a non-citizen's risk to the Australian community; by seeking to obtain a full picture of their criminal history prior to allowing them to enter the Australian community, is a legitimate and justifiable basis for the continuation of detention and is not contrary to Article 9 of the ICCPR. The Department would like to affirm its position that as soon as Mr Al Jenabi's visa process was finalised through refusal to grant a protection visa under section 501 of the Migration Act by the former Minister, he was released from immigration detention on a Removal Pending bridging visa pending his availability for removal.

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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 Al Jenabi for the breaches of his human rights identified in this report.*

The Department notes your recommendation, however, in line with the Department's position regarding Mr Al Jenabi's detention, the Department advises the Commission that there will no action [sic] taken with regard to this recommendation.

Other Recommendations

The Department notes that the Commission has suggested policy reform in number [sic] of areas associated with:

a) *Open periodic review and detention placement decisions for clients in immigration detention;*

b) *that the Ministerial guidelines be reviewed in regards to risk; and*

c) *that decisions not to refer a case to the Minister be made after an individualised assessment and based on evidence.*

The Department agrees with the general principle of ongoing policy reform to ensure that departmental decision making remains a robust and evidenced based process.

There is now a rigorous system of regular reviews for each client in detention which takes into account the client's progress to status resolution as well as their health and the appropriateness of their detention placement.

Case managers, or another senior officer, review their client's case regularly to ensure that the right level of support is in place to facilitate status resolution. This review includes consideration of such things as whether detention continues to be appropriate, whether the right level of case management intervention is being applied as well as a re-consideration of the client's detention placement taking into account health and well being [sic], family structure, community support as well as availability of accommodation and any security factors. If there are any concerns about the lawfulness of the detention the case is referred to a Detention Review Manager who undertakes a full lawfulness review.

In regard to a review of the ministerial guidelines, the Department would like to advise that the s197AB guidelines were revised in 2009 and endorsed by the former Minister. Ministerial intervention guidelines are periodically reviewed to ensure they are consistent with the Minister's wishes for the use of their non-compellable and non-delegable powers. Under the current guidelines the Department assesses individual clients against the set of vulnerability indicators. Clients who are single adult males are not, on that basis, precluded from consideration under the guidelines.

Pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
**President**
Australian Human Rights Commission

# Contents

# 1 Introduction

1. This is a report of my inquiry into the detention of Mr Al Jenabi and his right to be free from arbitrary detention.
2. I have found that the failure by the Commonwealth to place Mr Al Jenabi in a less restrictive form of detention than being held in Villawood Immigration Detention Centre (VIDC) amounts to a breach of his right not to be arbitrarily detained.

# 2 Summary of findings

## 2.1 Relevant acts and practices under the *Australian Human Rights Commission Act 1986* (Cth)

3. I find that the Commonwealth's failure to place Mr Al Jenabi in a less restrictive form of detention is an 'act' for the purpose of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The Minister for Immigration and Citizenship (the Minister) could have placed Mr Al Jenabi in community detention or in a place other than a detention centre but did not do so.

## 2.2 Detention in VIDC

4. I find that the failure of the Commonwealth to place Mr Al Jenabi in community detention or another less restrictive form of detention was inconsistent with the prohibition of arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

5. I find that Mr Al Jenabi should have been removed from VIDC through either the grant of a bridging visa or residence determination on or about 10 October 2006 when Mr Al Jenabi cleared his Australian Security Intelligence Organisation (ASIO) assessment. This is particularly so given there was no realistic prospect of removing Mr Al Jenabi to Iraq at that time.

# 3 The complaint by Mr Al Jenabi

## 3.1 Background

6. On or about 15 November 2008 Mr Al Jenabi made a complaint to the Commission.

7. Both Mr Al Jenabi and the Commonwealth have provided submissions in this matter.

8. Mr Al Jenabi and the Commonwealth have also had the opportunity to respond to my tentative view dated 10 March 2010.

9. My function in investigating complaints of breaches of human rights is to determine whether the Commonwealth has acted consistently with any human right within the meaning of the AHRC Act which includes those rights defined and protected by the ICCPR.

10. 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 that international instrument and by international jurisprudence about their interpretation.

## 3.2 Findings of Fact

11. I consider the following statements about the circumstances which have given rise to Mr Al Jenabi's complaint to be uncontentious.

12. Mr Al Jenabi is a national of Iraq. On 22 February 2003 he was extradited from Thailand and arrived in Australia on a Criminal Justice Entry visa to face people smuggling charges under the *Migration Act 1958* (Cth) (Migration Act).

13. Mr Al Jenabi was convicted of people smuggling offences in the Supreme Court of the Northern Territory and on 21 September 2004 was sentenced to 8 years imprisonment with a non-parole period of 4 years.[1]

14. On 15 June 2006 Mr Al Jenabi's imprisonment sentence ended and his Criminal Justice Entry visa expired. On 16 June 2006 Mr Al Jenabi was detained at Darwin Detention Centre under s 189 of the Migration Act. On 18 June 2006 Mr Al Jenabi was transferred to VIDC where he was detained until his release on 7 February 2008 – a period of approximately 20 months.

15. On 16 June 2006 Mr Al Jenabi lodged an application for a Protection (Class XA) visa (Subclass 866) and a Bridging visa E. The application was treated as an application for a Temporary Protection visa (Subclass 785) because Mr Al Jenabi had a criminal conviction in the prior four years.[2]

16. On 10 July 2006, the Minister refused Mr Al Jenabi a Bridging visa E on the basis that he had a 'substantial criminal record' under s 501 of the Migration Act.
17. On 10 October 2006 Mr Al Jenabi was assessed by ASIO to not be directly or indirectly a risk to Australian national security.[3]
18. Mr Al Jenabi made an application for a residence determination under s 197AB of the Migration Act in July 2007. A case officer assessed Mr Al Jenabi's case as 'not meeting the guidelines' and therefore did not refer Mr Al Jenabi's application to the Minister.
19. The Federal Magistrates Court on 17 January 2008 made an order for mandamus requiring the Minister to determine Mr Al Jenabi's application for a Temporary Protection visa according to law.[4]
20. A decision to refuse Mr Al Jenabi's application for a Temporary Protection visa was made on 7 February 2008. On the same day, Mr Al Jenabi was granted a Removal Pending Bridging visa under s 195A of the Migration Act and released from immigration detention.

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

21. 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.

22. 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.

23. Section 8(6) of the AHRC Act provides that the functions of the Commission under s 11(1)(f) are to be performed by the President.

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

24. The expressions '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 under an enactment.

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

26. As a judge of the Federal Court in *Secretary, Department of Defence v HREOC, Burgess & Ors* (Burgess),[5] 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.[6]

27. I therefore proceed on the basis that 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 agents.

28. Accordingly, neither the decision to detain a person where required under s 189 of the Migration Act, nor his or her continuing immigration detention until either a visa is granted or he or she is removed under s 196 of the Migration Act, is an 'act' or 'practice' for the purposes of the AHRC Act.

29. However, all 'discretionary' acts of the Commonwealth are 'acts' or 'practices' within the meaning of the AHRC Act.

30. Consistent with the Commission's views in *Badrae v Commonwealth (Department of Immigration and Multicultural and Indigenous Affairs),*[7] the scope of the Commission's jurisdiction is sufficiently broad to cover failures or refusals to act, even where a decision-maker is under no statutory duty to exercise a particular power or function.

31. Therefore the failure to remove Mr Al Jenabi from the detention centre environment where this is within the discretion of the Commonwealth falls within the Commission's inquiry jurisdiction.

## 4.2 'Human rights' relevant to this complaint

### Article 9(1)

32. 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.

33. The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that detention be lawful. In *Van Alphen v The Netherlands*,[8] 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.[9]

34. In order to avoid the characterisation of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.[10]

35. In *A v Australia*[11] 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.[12]

36. The Committee further stated:

> … the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.[13]

37. In *C v Australia* the UNHRC found that detention was arbitrary because:

> The State party has not demonstrated that, in light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.

# 5 Forming my opinion

38. 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.

## 5.1 It was open to the Minister to grant a bridging visa

39. The Department of Immigration and Citizenship (the Department) accepts that it was possible for the Minister to grant Mr Al Jenabi a bridging visa at any time throughout his detention.

40. On 10 July 2006 the Minister refused Mr Al Jenabi the grant of a Bridging visa E under s 501(1) of the Migration Act.

41. Section 501E of the Migration Act provides that a person may not make an application for a visa if the Minister has previously made a decision under s 501 to refuse to grant the person a visa and the Minister's decision has not been set aside or revoked. Mr Al Jenabi was therefore unable to make an application for a visa after 10 July 2006.

42. However, under s 195A of the Migration Act, the Minister may grant a visa where the Minister thinks that it is in the 'public interest' to do so.

43. In the absence of any submissions to the contrary, I accept that this discretion is available in special cases to avoid the Commonwealth acting in a way that breaches its international human rights obligations.

44. Given that the Minister ultimately granted Mr Al Jenabi a Removal Pending Bridging visa by exercising his power under s 195A of the Migration Act, I have formed the view that it was open to the Minister, at any time throughout Mr Al Jenabi's detention, to grant a bridging visa under s 195A of the Migration Act.

## 5.2 It was open to the Minister to make a residence determination

45. It is also open to the Minister to make a residence determination under s 197AB of the Migration Act where it is in the 'public interest' to do so. 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).

46. Further, s 5 of the Migration Act defines 'immigration detention' to include 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.[14]

47. Accordingly, ss 189 and 196 of the Migration Act do not require the Department to detain unlawful non-citizens in immigration detention centres.

48. The Ministerial Guidelines in 2006/2007 for the exercise of discretion under s 197AB of the Migration Act specifically refer to the following factors that should be taken into account when deciding whether it is in the 'public interest' to approve a residence determination:[15]

    a. family composition;
    b. the level of cooperation with immigration and removal processes;
    c. character;
    d. the likelihood of compliance with residence determination conditions; and
    e. removal prospects.

49. At a directions hearing held before the Commission on 11 December 2009, the Department's representative explained that the Department's practice at the time was to prioritise health concerns and children.

50. The Department's written response confirms that its approach was to refer a detainee for community detention if there were 'issues that could not be managed in a detention centre'.[16]

51. On 16 July 2007 a Departmental delegate determined that the requirements for referral to the Minister were not met on the basis that Mr Al Jenabi's medical report indicated that his mental health condition could be treated in detention. Mr Al Jenabi's case was, for this reason, not referred to the Minister for the purpose of him giving consideration to the making of a residence determination.

52. As demonstrated by the scope of factors listed in the Guidelines, s 197AB of the Migration Act did not require the Departmental delegate to deal with Mr Al Jenabi's case in this way. Further, the Department's written response does not suggest that it was either legally or practically impossible to make a residence determination in Mr Al Jenabi's case.

53. I am therefore of the view that it was open to the Minister to grant Mr Al Jenabi a residence determination and the Department's failure to refer Mr Al Jenabi's case to the Minister for the purpose of giving consideration to granting a residence determination is an 'act' for the purposes of the AHRC Act.

## 5.3 Arbitrary detention

54. Mr Al Jenabi claims that his detention in VIDC is arbitrary within the meaning of article 9(1) of the ICCPR.

55. Mr Al Jenabi was held in immigration detention between 16 June 2006 and 7 February 2008 when he was granted a Removal Pending Bridging visa.

56. I accept the Department's submission that Mr Al Jenabi was lawfully detained under s 189 of the Migration Act as he did not have a visa permitting him to stay lawfully in Australia. The Department states that the position of the Australian Government is that the detention of individuals requesting protection on the basis that they are unlawful non-citizens is neither unlawful nor arbitrary per se under international law.[17]

57. I note the Department's submission that it did not have the legal authority to grant a bridging visa or the power to make a residence determination. However, as previously discussed I have found it was open to the Minister to grant a bridging visa or make a residence determination.

58. The Department submits that Mr Al Jenabi's detention:

> was in accordance with Australia's immigration laws and that seeking to resolve Mr Al Jenabi's complex character issues was a legitimate and justifiable basis for the continuation of his detention and was not contrary to Article 9 of the ICCPR.[18]

59. I do not accept the Department's submission that it was legitimate and justifiable to detain Mr Al Jenabi in order to resolve his 'complex character issues'. While I accept that Mr Al Jenabi's case was particularly complex, I do not accept that the processing of his Temporary Protection visa application (including resolution of character issues) required his prolonged detention in an immigration detention centre.

60. The Commonwealth was under an obligation to detain Mr Al Jenabi in the least restrictive manner possible. The Commonwealth could have detained Mr Al Jenabi in a less restrictive manner. As discussed I have found that it was open to the Minister to remove Mr Al Jenabi from VIDC either through the grant of a bridging visa pursuant to s 195A of the Migration Act or by making a residence determination under s 197AB of the Migration Act.

61. The UNHRC has commented that detention should be subject to periodical review in order to reassess the necessity of detention.[19]

62. It appears from the Department's written response and the Detention Review Manager's reports for the period 27 December 2006 to 22 January 2008 that instead of taking steps to ensure Mr Al Jenabi was in the least restrictive form of detention justifiable in the particular circumstances of his case, the Department's approach was to consider whether there were exceptional circumstances warranting his removal from an immigration detention centre. This is evidenced by the decision of the Department not to refer Mr Al Jenabi to the Minister for a residence determination because a medical report indicated that his mental health condition could be treated in detention.

63. In my view, the failure to refer Mr Al Jenabi's case to the Minister for the purpose of giving consideration to making a residence determination is inconsistent with article 9(1) of the ICCPR.

64. I further note that the Department did not consider Mr Al Jenabi's suitability to be placed in community detention until 5 June 2007; that is, almost one year after he had been in immigration detention.

65. In my view, the failure promptly to consider Mr Al Jenabi for community detention was unreasonable and inconsistent with article 9(1) of the ICCPR.

## 5.4 When could the Department no longer justify Mr Al Jenabi's continued detention?

66. I find that legitimate justification for Mr Al Jenabi's continued detention in an immigration detention centre came to an end when (a) he had cleared the ASIO security assessment and (b) the Department became aware that he could not be removed to Iraq.

67. Once justification for Mr Al Jenabi's continued detention in an immigration detention centre came to an end, I am of the view that Mr Al Jenabi's detention became arbitrary in that it was unjust and disproportionate.

68. I note that this reasoning is consistent with the UN Human Rights Committee's views in *Jalloh v Netherlands*[20] that the release of a detainee as soon as it became clear that there was no realistic prospect of removal prevented his detention in an immigration detention centre from being found arbitrary.[21] Further, the fact that there was no hope of removing a detainee even if a visa were not granted was a relevant factor in the UN Human Rights Committee's finding of arbitrary detention in *Baban v Australia*.[22]

69. Mr Al Jenabi submits:

> While it is appropriate in the circumstances of this case to find that the continued detention of Mr Al Jenabi after a clear security assessment was issued on 10 October 2006 was arbitrary contrary to Article 9 of the ICCPR, in our respectful submission, such a finding should not be made in any way that suggests that a clear security assessment is a pre-requisite to a finding of arbitrary detention contrary to Article 9 of the ICCPR. There will undoubtedly be cases in which a clear security assessment has not been issued in respect of a person, yet the continued detention of the person will be arbitrary and contrary to Article 9 of the ICCPR.[23]

70. I accept that detention may be justified in order to conduct initial investigations including security checks by the Department. In my view, an initial security check should consist of a summary assessment of whether there is reason to believe that the individual concerned would pose an unacceptable risk to the Australian community were they given authority to live in the community. I consider that an initial security check should not be interpreted as requiring a full ASIO security assessment for each individual before they can be released from an immigration detention facility.

71. However, in this particular case, given that Mr Al Jenabi spent time in several countries prior to arriving in Australia (including Iraq, Iran, Malaysia, Indonesia and Thailand), his criminal record and recent imprisonment, I am not satisfied that it was unreasonable to detain Mr Al Jenabi until a full ASIO security assessment was completed.

72. The Department initiated the ASIO assessment on 7 September 2006; that is almost three months after Mr Al Jenabi was placed in detention. The Department provided the following explanation regarding this delay:

> Mr Al Jenabi's security referral was initiated shortly after his protection interview which was conducted on 29 August 2006. It is usual practice for a referral to be initiated following interview as the interview provides an opportunity to collect information required to complete the relevant forms.
>
> Considerable preparation was required for Mr Al Jenabi's interview as it needed to explore some complex issues relating to Articles 1F(b) and 33(2) of the Refugees Convention as well as Mr Al Jenabi's protection claims.

> While [the Department's] security checking policy does not provide specific advice on when to initiate a security referral, policy has instructed (since at least September 2004) that a security referral must only be initiated once the full set of requisite information, as set out by ASIO, has been obtained by [the Department]. The Security Checking Handbook outlines the mandatory information requirements that [the Department] must satisfy in order for ASIO to commence security checking. These mandatory data requirements were in place at the time of Mr Al Jenabi's application.
>
> As set out on page 3 of [the Department's] 4 August 2010 response to the President's tentative view, it is important to note that PIC 4002 is only one of the legislative criteria to be satisfied for the grant of a Protection visa. At the time, an assessment of the danger Mr Al Jenabi posed was unresolved.[24]

73. I acknowledge that certain requirements need to be fulfilled prior to initiating a security assessment with ASIO and that at that time the usual practice of the Department was to initiate ASIO security assessments after an initial interview with the detainee. However, in rare cases such as Mr Al Jenabi's, where it is reasonable to require an ASIO security assessment prior to release, in my view, the security assessment should be initiated as soon as possible after the individual is taken into immigration detention. I reiterate that the Commonwealth had an obligation to detain Mr Al Jenabi in the least restrictive manner possible. I consider the delay in initiating the ASIO security assessment to be regrettable and inconsistent with Mr Al Jenabi's right to liberty.

74. The evidence before me is that Mr Al Jenabi was assessed by ASIO to not be directly or indirectly a risk to Australian national security on 10 October 2006. The Department submits that the security assessment was for the purposes of Mr Al Jenabi's Protection visa application and that the assessment of the danger he posed to the community remained unresolved. The Department has not provided information regarding what, if any, steps were taken to identify whether Mr Al Jenabi posed a danger to the community for the purposes of releasing him from detention.

75. I accept that the security assessment was initiated for the purposes of the Temporary Protection visa application. However, in my view, the assessment also supports a conclusion that Mr Al Jenabi would not pose a danger to the community if released. If the Minister had concerns about the risk that Mr Al Jenabi posed to the community, it is unclear on what evidence these concerns were based and what steps were taken to assess this risk for the purposes of releasing Mr Al Jenabi from detention.

76. I am also of the view that there was no realistic prospect of removing Mr Al Jenabi to Iraq during his period of detention for the following reasons:

- There is evidence that as early as 4 April 2006, a Department employee who interviewed Mr Al Jenabi in prison was aware that it was the Department's practice at that time not to remove Iraqis to Iraq without their consent.
- During an interview conducted by a Department employee with Mr Al Jenabi on 13 April 2006, while he was in prison, he indicated that he did not want to return to Iraq.
- On 16 June 2006 Mr Al Jenabi lodged an application for a Protection visa based on claims to have a well-founded fear of persecution in Iraq.

77. The Commonwealth does not accept that there was no realistic prospect of removing Mr Al Jenabi. The Commonwealth submits that although Mr Al Jenabi expressed a preference to remain in Australia, he stated that he would return to Iraq if that was not possible. The Commonwealth notes that during the protection visa assessment process potential removal to Iraq or another safe third country was not pursued.

78. While I accept that during an interview conducted on 13 April 2006 Mr Al Jenabi stated that if he could not remain in Australia, he would have to go back to Iraq, I do not accept that this evidences an intention to return to Iraq. Mr Al Jenabi made it clear that he did not want to return to Iraq and the Department's interview notes dated 13 April 2006 state that he did not wish to sign a request to be removed.

79. For the above reasons I am of the view that the Commonwealth has not justified Mr Al Jenabi's continued detention in an immigration detention centre beyond 10 October 2006. By 10 October 2006, Mr Al Jenabi had cleared his ASIO security assessment and it was apparent to the Department that he could not be returned to Iraq. Accordingly, I find that Mr Al Jenabi's detention in VIDC from 10 October 2006 was arbitrary in breach of article 9(1) of the ICCPR.

# 6 Findings and recommendations

## 6.1 Power to make recommendations

80. 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.[25] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[26]

81. 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.[27]

## 6.2 Consideration of compensation

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

83. However, in making a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[28]

84. 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.[29]

85. 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 can not 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.

86. 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.

87. 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).[30]

88. 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:

(a) In *Taylor v Ruddock,*[31] 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 NSW prisons.

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.

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.

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.[32]

On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.[33] The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[34]

(b) In *Goldie v Commonwealth of Australia (No 2)*[35] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.

(c) In *Spautz v Butterworth*[36] 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.

(d) In the matter of *El Masri v Commonwealth*[37] I recommended that the Commonwealth pay Mr El Masri $90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention.

## 6.3 Recommendation that compensation be paid

89. I have found that on or about 10 October 2006 Mr Al Jenabi should have been placed in community detention or a less restrictive form of detention rather than being detained in VIDC. The failure to release Mr Al Jenabi from VIDC was inconsistent with his right not to be arbitrarily detained.

90. Mr Al Jenabi has requested that I consider the effects arbitrary detention has had on his mental health and wellbeing when assessing any compensation that I might recommend.

91. Mr Al Jenabi has submitted three psychological reports from Ms Paula Farrugia, psychologist, dated 30 March 2007, 26 August 2008 and a more recent undated report. While Mr Al Jenabi was detained at VIDC Ms Farrugia was requested by his community advocate to examine the effect immigration detention may be having on him.

92. In Ms Farrugia's report dated 30 March 2007 she found that while in detention Mr Al Jenabi suffered from a chronic major depressive disorder and posttraumatic stress disorder. Ms Farrugia found that:

> During recent months Mr Aljenabi (sic) has experienced a progressive psychological deterioration that has not failed to escape the notice of people with whom he is in contact and has culminated in psychological sypmtomology requiring highly skilled specialist intervention. Furthermore he is currently suffering detention reactive, physical and psychological symptomology at increased levels of duration, frequency and intensity.[38]

93. Ms Farrugia made the following recommendation:

> At the very least continued detention would serve to maintain Mr Al Jenabi's current level of psychological distress resulting in further decline which is considered to be grossly unacceptable even by, it would appear, [the Department's] new revised standards.
>
> It is my clinical recommendation that Mr Al Jenabi be released from immigration detention, at the earliest possible time so he may commence the reconstruction of his life.[39]

94. I note that Ms Farrugia's most recent undated report prepared after Mr Al Jenabi was released from immigration detention confirms her previous findings:

> Mr Al Jenabi's disturbingly fragile condition, as identified, in a comprehensive psychological assessment in March 2007 while being held in the VIDC intensified the longer he was being held. He reported a preoccupation with suicidal thoughts while a sense of personal worthlessness, desolation and hopelessness predominated. Evidently his deteriorating mental condition was highly reactive to the detention centre experience.[40]

95. The Department submitted a medical report concerning Mr Al Jenabi prepared by Ms Alexandra Vrjosseck, consultant psychiatrist, dated 2 July 2007. The report states:

> I did not form the impression that he [Mr Al Jenabi] was suffering from Post Traumatic Stress Disorder, nor did I consider that he suffered from a Major Depressive Disorder.
>
> Indeed, I felt that Mr Al Jenabi was coping extremely well and was remarkably well adjusted in view of his stressful and traumatized youth and adult life.
>
> I did not believe that he was suffering from any psychiatric disorder and hence there is no actual "psychiatric condition" which is being exacerbated by his current detention arrangements.
>
> Hence from this perspective Mr Al Jenabi can be cared for in Immigration Detention.[41]

96. I note that it was on the basis of Ms Vrjosseck's report that the Department did not refer Mr Al Jenabi for community detention.

97. The reports of Ms Farrugia and Ms Vrjosseck contain remarkably different findings on Mr Al Jenabi's mental health while detained at VIDC. Having reviewed both reports I accord greater weight to the findings of Ms Farrugia. Ms Farrugia's 22 page report dated 30 March 2007 provides a clear overview of the assessment procedure including the specific psychological testing framework she utilised. Importantly, Ms Farrugia's report provides detailed explanations to support her findings. On the other hand, Ms Vrjosseck's report is brief consisting of only 1.5 pages, does not provide any detail on the assessment procedures used, and contains limited detail to support her findings.

98. Accordingly, in considering an appropriate quantum for compensation, I have taken into consideration the deterioration of Mr Al Jenabi's psychological well-being in detention.

99. The Department contended that it was not appropriate for me to apply a 'daily rate' to determine a recommendation for compensation. The Department 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.

100. I consider that the Commonwealth should pay to Mr Al Jenabi an amount of compensation to reflect the substantial loss of liberty caused by his detention at VIDC, but I have not assessed the quantum of that compensation by utilising a strict 'daily rate'. I have taken into account that Mr Al Jenabi had served a substantial prison sentence immediately preceding being detained under s 189 of the Migration Act and thus he is not in a comparative position to an individual who ought never to have experienced incarceration.

101. Assessing compensation in circumstances such as those of this case 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 **$ 450 000** would be appropriate.

## 6.4 Apology

102. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Al Jenabi for the breaches of his human rights identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.[42]

## 6.5 Policy

103. I consider that the Department should regularly conduct open periodic reviews of the necessity of detention for people in immigration detention centres. I recommend that the reviews focus on whether detention in an immigration detention centre is necessary in the specific case and if detention is not considered necessary, the identification of alternate means of detention or the grant of a visa should be considered.

104. I consider that the guidelines relating to the Minister's residence determination power should be amended to provide that unless the Department is satisfied that a person in an immigration detention centre is a flight risk, or poses an unacceptable risk to the Australian community that cannot be addressed through the imposition of conditions on community detention, the Department should refer all persons to the Minister for consideration of making a residence determination. The Department should make the referral as soon as practicable and in no circumstances later than 90 days after the individual is placed in an immigration detention centre.

105. I consider that the guidelines should require that a decision by the Department not to refer a person to the Minister for consideration of making a residence determination should be a decision that is made after an individualised assessment of the person's circumstances and based on reliable and documented evidence. The guidelines should expressly provide that a criminal record is insufficient evidence of itself that an individual poses an unacceptable risk to the Australian community.

# 7 The Department's response to the recommendations

106. By letter dated 5 May 2011, 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.

**The Department's response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr Ali Al Jenabi**

1. *That payment of compensation in the amount of $450,000 is appropriate*

While we note your findings, in the Department's view Mr Al Jenabi was detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act) and his detention was not arbitrary.

The Department notes that Mr Al Jenabi continued to be detained under section 189 of the Migration Act while the department was working to finalise his protection visa application. As we have advised previously, a primary impediment to the resolution of Mr Al Jenabi's protection visa process was that as a result of his criminal history, he did not satisfy Public Interest Criterion 4001, the character requirements. The Department's view is that the assessment of a non-citizen's risk to the Australian community; by seeking to obtain a full picture of their criminal history prior to allowing them to enter the Australian community, is a legitimate and justifiable basis for the continuation of detention and is not contrary to Article 9 of the ICCPR. The Department would like to affirm its position that as soon as Mr Al Jenabi's visa process was finalised through refusal to grant a protection visa under section 501 of the Migration Act by the former Minister, he was released from immigration detention on a Removal Pending bridging visa pending his availability for removal.

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 Al Jenabi for the breaches of his human rights identified in this report.*

The Department notes your recommendation, however, in line with the Department's position regarding Mr Al Jenabi's detention, the Department advises the Commission that there will no action [sic] taken with regard to this recommendation.

Other Recommendations

The Department notes that the Commission has suggested policy reform in number [sic] of areas associated with:

a) *Open periodic review and detention placement decisions for clients in immigration detention;*

b) *that the Ministerial guidelines be reviewed in regards to risk; and*

c) *that decisions not to refer a case to the Minister be made after an individualised assessment and based on evidence.*

The Department agrees with the general principle of ongoing policy reform to ensure that departmental decision making remains a robust and evidenced based process.

There is now a rigorous system of regular reviews for each client in detention which takes into account the client's progress to status resolution as well as their health and the appropriateness of their detention placement.

Case managers, or another senior officer, review their client's case regularly to ensure that the right level of support is in place to facilitate status resolution. This review includes consideration of such things as whether detention continues to be appropriate, whether the right level of case management intervention is being applied as well as a re-consideration of the client's detention placement taking into account health and well being [sic], family structure, community support as well as availability of accommodation and any security factors. If there are any concerns about the lawfulness of the detention the case is referred to a Detention Review Manager who undertakes a full lawfulness review.

In regard to a review of the ministerial guidelines, the Department would like to advise that the s197AB guidelines were revised in 2009 and endorsed by the former Minister. Ministerial intervention guidelines are periodically reviewed to ensure they are consistent with the Minister's wishes for the use of their non-compellable and non-delegable powers. Under the current guidelines the Department assesses individual clients against the set of vulnerability indicators. Clients who are single adult males are not, on that basis, precluded from consideration under the guidelines.

107. I report accordingly to the Attorney-General.

Catherine Branson
**President**
Australian Human Rights Commission
July 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 *R v Al Jenabi* [2004] NTSC 44 (Unreported, Mildren J, 7 September 2004).
2 *Migration Regulations 1994* (Cth) r 866.222A (repealed).
3 'Security' is defined by s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) to mean: (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within, Australia or not; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).
4 *SZLDG v Minister for Immigration and Citizenship* [2008] FCA 11.
5 (1997) 78 FCR 208.
6 Ibid.
7 (2002) AusHRC 25. See also *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
8 Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988.
9 Ibid [5.8].
10 *C v Australia Communication* No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2], *D and E v Australia* Communication No 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001 [7.2], *Bakhtiyari v Australia* Communication No 1069/2002 UN Doc CCPR/C/79/D/1069/2002 [9.2].
11 Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993.
12 Ibid [9.2].
13 Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 [9.4].
14 *Migration Act 1958* (Cth), s 5.
15 Department of Immigration and Citizenship, Minister's Detention Intervention Powers (Section 197AB of the Migration Act 1958) Guidelines (2007).
16 Email from Department to Commission, dated 25 January 2010.
17 The Department's Response on behalf of the Commonwealth of Australia to the AHRC's Tentative Views, dated 4 August 2010.
18 Ibid.
19 *Shafiq v Australia,* Communication No 1324/2004 UN Doc CCPR/C/88/D/1324/2004, [7.2].
20 Communication No 794/1998 UN Doc CCPR/C/74/D/794/1998.
21 Ibid, [8.2].
22 Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.
23 Email from Stephen Blanks to the Commission dated 21 December 2010.
24 Email from Department to Commission, dated 4 March 2011.
25 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a).
26 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(b).
27 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c).
28 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
29 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
30 *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 (22 November 1999), [87].
31 *Taylor v Ruddock* [2002] NSWDC 662 (Unreported, Murrell DCJ, 18 December 2002).
32 Ibid, [140].
33 *Ruddock v Taylor* (2003) 58 NSWLR 269.
34 Ibid, [49].
35 (2004) 81 ALD 422.
36 *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA).
37 [2009] AusHRC 41.
38 Report of P Farrugia, p 18, dated 30 March 2007.
39 Report of P Farrugia, p 19, dated 30 March 2007.
40 Report of P Farrugia, p 5, undated.
41 Report of Alexandra Vrjosseck, p 1, dated 2 July 2007.
42 D Shelton, *Remedies in International Human Rights Law* (2000), 151.

# Further Information

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