



Australian
Human Rights
Commission

**Ms OR on behalf
of Mr OS, Miss OP
and Master OQ v
Commonwealth of
Australia (DIBP)**

[2017] AusHRC 119

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**Ms OR on behalf of Mr OS,
Miss OP and Master OQ v
Commonwealth of Australia
(Department of Immigration
and Border Protection)**

[2017] AusHRC 119

Report into arbitrary detention,
arbitrary interference with family
and failure to consider the best
interests of the child

Australian Human Rights Commission 2017



**Australian
Human Rights
Commission**

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**Australian
Human Rights
Commission**

July 2017

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

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint by Ms OR on behalf of herself and her husband Mr OS, her daughter Miss OP (now 4 years old) and her son Master OQ (now almost 2 years old) against the Commonwealth of Australia, Department of Immigration and Border Protection (department) alleging a breach of their human rights under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and under articles 3 and 37 of the *Convention on the Rights of the Child* (CRC).

I have found that a 12 month delay by the department in putting a submission to the Minister for Immigration and Border Protection (Minister) for consideration of community detention for Ms OR and her family, resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure by the department to take into account Miss OP's best interests as a primary consideration, contrary to article 3 of the CRC.

I have also found that the failure to assess this family for community detention in the period of September 2014 to June 2015, resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure to take into account Miss OP and Master OQ's best interests as a primary consideration, contrary to article 3 of the CRC.

I have found that Mr OS's continued detention is arbitrary, contrary to article 9 of the ICCPR, and his separation from his wife and children since October 2015 amounts to an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

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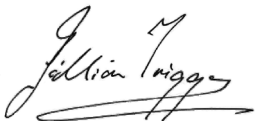
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Finally, I have found that the 15 month separation of Mr OS's brother, Mr ON, from the complainants amounted to an arbitrary interference with family, contrary to article 17 and 23 of the ICCPR.

In light of these findings, I have made six recommendations detailed in Part 7 of this report.

By letter dated 12 June 2017, the department provided a response to my findings and recommendations. I have set out the department's response in Part 8 of this report.

I enclose a copy of my report.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs

President

Australian Human Rights Commission

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (the Commission) following an inquiry into a complaint by Ms OR on behalf of herself and her husband Mr OS, her daughter Miss OP (now 4 years old) and her son Master OQ (now almost 2 years old) (the complainants) against the Commonwealth of Australia – Department of Immigration and Border Protection (department) alleging a breach of their human rights.
2. Ms OR complains that the detention of the whole family in immigration detention for more than 2.5 years (in Master OQ’s case, since his birth on 1 June 2015) and the continued detention of Mr OS alone since 28 October 2015, is arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and articles 3 and 37(b) of the *Convention on the Rights of the Child* (CRC). The continued detention of Mr OS following the release of Ms OR and their children on bridging visas also raises issues under articles 17 and 23 of the ICCPR and article 3 of the CRC about an arbitrary interference with family.
3. Ms OR also complains about the family’s separation from Mr OS’s brother, Mr ON, who arrived in Australia at the same time as Ms OR and her family. This separation again raises issues under article 17 and 23 of the ICCPR.
4. This inquiry is being undertaken pursuant to section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. On the basis of this inquiry I made the following findings:
 - a) the delay by the department in putting a submission to the Minister for Immigration and Border Protection (Minister) for a 12 month period from April 2013 for consideration of community detention for this family resulted in the family’s detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure by the department to take into account Miss OP’s best interests as a primary consideration, contrary to article 3 of the CRC;
 - b) whether required by a policy decision of the Minister, or whether resulting from a failure by the department to refer the family’s case to the Minister pursuant to the community detention guidelines, I find that the failure to assess this family for community detention in the period of September 2014 to June 2015, resulted in the family’s detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. Further, there was a failure to take into account Miss OP and Master OQ’s best interests as a primary consideration, contrary to article 3 of the CRC;

- c) the continued detention of Mr OS is arbitrary, contrary to article 9 of the ICCPR, and his separation from his wife and children since October 2015 amounts to an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR; and
- d) the 15 month separation of Mr ON from the complainants, from two days after their arrival in Darwin until July 2014, amounted to an arbitrary interference with family, contrary to article 17 and 23 of the ICCPR.

6. Based on those findings I made the following recommendations:

- a) that the department promptly make a further submission to the Minister for him to consider exercising his power under s 195A of the *Migration Act 1958* (Cth) (Migration Act) to grant Mr OS a bridging visa (subject to any conditions as may be necessary) and release him from immigration detention so that he might be reunited with his family;
- b) that the Commonwealth pay to Ms OR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention, and to reflect the emotional distress caused to the family as a result of Ms OR and her children's separation from Mr OS, in accordance with the principles outlined in section 7.3 below;
- c) that the Commonwealth pay to Mr ON an appropriate amount of compensation to reflect the emotional distress caused to him and the family, as a result of his separation from Ms OR, Mr OS, Miss OP and Master OQ, in accordance with the principles outlined in section 7.3 below; and
- d) that the department review the efficiency and effectiveness of its current guidelines and procedures regarding the separation of family members in circumstances where a parent is separated from his/her partner and children, and in circumstances where an individual in detention is separated from other family members also in detention.

2 Background

7. Ms OR, her husband Mr OS, their daughter Miss OP, and Mr OS's brother Mr ON, are Vietnamese nationals who arrived onshore in Broome on 14 April 2013. Miss OP was born two days previously, on the boat journey to Australia. Ms OR and Mr OS's second child, a boy named Master OQ was born on 1 June 2015 while the family were in closed immigration detention.
8. On 18 April 2013, the complainants were transferred into immigration detention facilities in Darwin and Mr ON was transferred into immigration detention facilities in Western Australia.
9. On 8 May 2013, the complainants were transferred to Wickham Point Alternative Place of Detention (Wickham Point) near Darwin.
10. As the complainants arrived onshore in Broome prior to June 2013, they were not affected by the bar in section 46A of the Migration Act. They lodged a valid protection visa application on 6 September 2013.
11. On 16 April 2014, the Minister intervened under section 197AB of the Migration Act, making a residence determination in relation to the family. However, that placement was put on hold pending the outcome of a departmental submission to the Minister to revoke the residence determination, pursuant to section 197AD of the Migration Act. On 6 June 2014, the Minister decided to revoke the prior residence determination.
12. On 13 October 2014, the complainants' protection visa application was refused by the department, as the department determined they did not satisfy section 36(2) of the Migration Act – they were not persons to whom Australia owed protection obligations. On 20 October 2014, the complainants sought merits review of the department's decision at the Refugee Review Tribunal (RRT) and on 10 December 2014 the RRT affirmed the protection visa refusal decision.
13. On 18 December 2014, the complainants sought judicial review of the RRT decision in the Federal Circuit Court.
14. With the exception of a brief period in July 2014, the complainants were not accommodated in the same detention facilities as Mr ON.
15. On 9 December 2014, Mr ON was granted a Temporary Humanitarian Stay visa and a bridging visa and released into the community in Brisbane.
16. On 27 October 2015, the Minister granted a bridging visa to Ms OR and her children and they were released into the community in Brisbane. The Minister was invited to consider granting a bridging visa to Mr OS but declined to do so, and Mr OS remained in detention at Wickham Point.

17. On 11 January 2016, the Federal Circuit Court upheld the RRT's decision, refusing to grant protection to the complainants in Australia.
18. On 28 January 2016, Mr OS and his family sought judicial review of the decision at the Full Federal Court. Mr OS's appeal before the Full Federal Court was heard on 4 May 2016 and on 21 July 2016 the Full Federal Court dismissed the appeal.
19. On 11 April 2016 Mr OS was moved from Wickham Point to Brisbane Immigration Transit Accommodation (BITA). He remained in BITA until 26 August 2016 when he was transferred to North West Point Immigration Detention Centre on Christmas Island where he remains to date. Ms OR, her children, and Mr ON continue to reside in Brisbane.

3 Legal Framework

3.1 Functions of the Commission

20. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, section 11(1)(f) gives the Commission the following functions:
 - 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.
21. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.
22. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

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

23. The terms '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 an authority of the Commonwealth or under an enactment.

24. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
25. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;¹ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

3.3 Arbitrary detention

26. The rights and freedoms recognised by the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.²

27. 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.

28. Article 37(b) of the CRC provides:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

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

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

- (a) ‘detention’ includes immigration detention;³
- (b) lawful detention may become arbitrary when a person’s deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth’s legitimate aim of ensuring the effective operation of Australia’s migration system;⁴
- (c) arbitrariness is not to be equated with ‘against the law’; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁵ and
- (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁶

31. In *Van Alphen v The Netherlands* the UN Human Rights Committee found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁷
32. The Human Rights Committee has held in several communications that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁸
33. Relevant jurisprudence of the Human Rights Committee on the right to liberty is collected in a general comment on article 9 of the ICCPR published on 16 December 2014. It makes the following comments about immigration detention in particular, based on previous decisions by the Committee:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.⁹

34. It will be necessary to consider whether the detention of the family in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to them, and in light of the available alternatives to closed detention.

3.4 Interference with family

35. The complainants also claim that the Commonwealth has engaged in acts which are inconsistent with or contrary to their rights under articles 17 and 23 of the ICCPR.
36. 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.

37. Article 23(1) of the ICCPR provides:

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

38. Professor Manfred Nowak has noted that:¹⁰

[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.

39. For the reasons set out in the Australian Human Rights Commission report *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]-[88], the Commission is of the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). 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 the breach is in addition to (or in conjunction with) a breach of article 23(1).

4 Assessment

40. The complainants’ main complaint is that they were arbitrarily detained from 14 April 2013 until 27 October 2015. They also complain about Mr OS’s detention since that time and say that he should be granted a bridging visa so that their family can be reunited.

41. A secondary complaint is in relation to the complainants’ separation from Mr OS’s brother, Mr ON.

42. I therefore consider two issues in my assessment:

- a) alternatives to closed immigration detention in relation to each of the complainants and whether the best interests of the children were considered in relation to these alternatives; and
- b) interference with family, with regard to the separation of Mr OS from Ms OR and the children from 27 October 2015 to date and the complainants’ separation from Mr ON during the time they were detained.

5 Arbitrary detention

5.1 Act or practice of the Commonwealth?

43. The first issue I consider is whether the family was detained arbitrarily. In assessing this issue, I give consideration to the following three acts of the Commonwealth:

- a) the failure by the department to make submissions to the Minister during the 12 months prior to April 2014 (when a first referral was made);
- b) the failure by the department to refer the family's case to the Minister during the period from September 2014 (when a second referral was 'initiated') until June 2015 (when a second referral was in fact made); and
- c) the ongoing detention of Mr OS following the release of Ms OR and her children on bridging visas in October 2015.

44. For the reasons set out below, I find that these acts are inconsistent with or contrary to the rights of each of the family members under article 9 of the ICCPR and the rights of the two children under articles 3 and 37(b) of the CRC.

45. Ms OR and her children were detained by the Commonwealth from 14 April 2013 (in Master OQ's case, from his birth on 1 June 2015) until 27 October 2015, pursuant to section 189(1) of the Migration Act, which requires the detention of unlawful non-citizens. Mr OS continues to remain in immigration detention.

46. However, there are a number of powers that the Minister could have exercised either to grant the complainants a visa, or to allow them to be detained in a less restrictive manner than in a closed immigration detention centre.

47. First, the Minister could have granted them a visa. Under section 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under section 189 of the Migration Act.

48. Second and alternatively, the Minister could have made a residence determination under section 197AB of the Migration Act which provides:

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

49. The definition of ‘immigration detention’ includes ‘being held by, or on behalf of, an officer in another place approved by the Minister in writing’.¹¹ The making of a residence determination may allow a person to reside in the community, in ‘community detention’.
50. Accordingly, the Minister could have granted a visa to the complainants, made a residence determination in relation to them under section 197AB of the Migration Act or could have approved that they reside in a place other than an immigration detention centre. Further, it was open to the Minister to exercise the power conferred by section 197AB subject to additional conditions: see section 197AB(2)(b) of the Migration Act.

(a) Department’s delay in referring the family’s case to the Minister (April 2013 – April 2014)

51. The department first referred the complainants’ case to the Minister for the consideration of the exercise of his discretionary powers under section 197AB of the Migration Act on 14 April 2014 (having ‘initiated’ a referral on 15 December 2013). At this stage, the complainants had been in immigration detention for approximately 12 months, since April 2013.
52. I find that the department’s delay in referring the family’s case to the Minister for consideration of the exercise of his discretionary powers for a 12 months period from April 2013 constitutes an ‘act’ within the definition of section 3 of the AHRC Act.
53. On 16 April 2014, the then Assistant Minister for Immigration and Border Protection, Senator the Hon. Michaelia Cash, agreed to exercise her discretionary powers under section 197AB of the Migration Act, making a residence determination in relation to the family.
54. However, on 26 May 2014, the department referred a submission to the Minister under section 197AD of the Migration Act, to revoke the residence determination for the family. The submission stated the department had become aware of allegations regarding people smuggling in relation to Ms OR and Mr OS. On 6 June 2014, the Minister made a decision revoking the residence determination of 16 April 2014. I note that these allegations were subsequently investigated by the AFP and were dropped.

(b) Department’s failure to refer the family’s case to the Minister during the period September 2014 to June 2015

55. On 5 September 2014, the department initiated a second referral for a residence determination under section 197AB of the Migration Act. In its response of 19 June 2015 (Response), the department advised that on 12 December 2014 this referral was finalised as the family ‘no longer meet the Minister’s guidelines’.

56. I find that the department's failure to refer the family's case to the Minister during the period 5 September 2014 to June 2015 is an 'act' within the definition of section 3 of the AHRC Act.

(c) Minister's refusal to grant Mr OS a bridging visa and his ongoing detention

57. On 9 June 2015, the department referred the complainants' case to the Minister for consideration of the exercise of his discretionary powers under section 195A of the Migration Act or section 197AB of the Migration Act. On 26 June 2015, the Minister decided that he was not inclined to consider intervening under section 197AB of the Migration Act, but he was inclined to consider intervening under section 195A of the Migration Act, on receipt of a further submission from the department.

58. On 19 October 2015, the department made a further submission to the Minister, inviting him to intervene in relation to the complainants under section 195A of the Migration Act. On 27 October 2015, the Minister decided to intervene and grant a bridging visa to Ms OR, Miss OP and Master OQ, but declined to grant a bridging visa to Mr OS. Mr OS remains in closed immigration detention to date.

59. I find that this the Minister's decision not to grant Mr OS a bridging visa allowing him to reside in the community with his family was an 'act' within the definition of section 3 of the AHRC Act.

60. I consider these acts in greater detail below.

5.2 Inconsistent with or contrary to human rights

61. Ms OR and Miss OP were detained for approximately two years and six months prior to being granted a bridging visa on 27 October 2015. Master OQ was detained for approximately 5 months, since his birth in June 2015. Mr OS has been detained for almost four years.

62. As noted above, lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system. Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate to the goals said to justify the detention.

(a) Department's delay in referring the family's case to the Minister (April 2013 – April 2014)

63. Although Ms OR and Mr OS entered detention with their then newborn daughter, Miss OP, on 14 April 2013, it took the department an entire year to refer their case to the Minister for consideration of a residence determination under section 197AB of the Migration Act.

64. The starting point for assessment in this case is the principle that detention of children should be used only as a measure of last resort and for the shortest appropriate period of time. This is a requirement not only of international law pursuant to article 37(b) of the CRC, but also a requirement of domestic law pursuant to section 4AA of the Migration Act.
65. Section 4AA(2) of the Migration Act provides that the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination. The clear objective of section 4AA is to move children and their families out of held detention and into community detention or onto a visa as soon as possible.
66. It is in the best interests of children who are in a closed detention environment to be removed from such an environment as soon as possible. If there are countervailing reasons for keeping families in closed detention, these need to be clearly articulated and balanced against the best interests of the children. In any such exercise, the best interests of children need to be the subject of active consideration and given weight as a primary consideration.
67. On 30 May 2013, the then Minister, the Hon. Brendan O'Connor, issued guidelines in relation to the residence determination power under section 197AB of the Migration Act (2013 Guidelines). Relevantly, part 8 of these 2013 Guidelines provided as follows:

8 Cases to be referred for my consideration

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a residence determination rather than under traditional detention arrangements.

...

It is also my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a residence determination being made which would split a family unit.

68. The complainants clearly fell within the category of cases to be referred to the Minister in accordance with these 2013 Guidelines. The department has not provided any explanation for why it took 12 months for a submission to be referred to the Minister in relation to Ms OR, Mr OS and Miss OP. The department has provided no information to suggest that closed detention was necessary, for example, to prevent flight or for community safety. In light of the fact that a child was being held in closed detention, serious and early consideration should have been given to less restrictive alternatives to closed detention.
69. I find that there was a failure to take into account Miss OP's best interests as a primary consideration, contrary to article 3 of the CRC. I also find that the delay in referring the family's case to the Minister was inconsistent with their rights under article 9 of the ICCPR and article 37(b) of the CRC.

(b) Department's failure to refer the family's case to the Minister during the period September 2014 to June 2015

70. As set out above, on 26 May 2014, the department referred a submission to the Minister recommending that he revoke the residence determination for the family under section 197AD of the Migration Act. The submission stated that the department had become aware of allegations regarding people smuggling in relation to Ms OR and Mr OS. The Minister decided to revoke the residence determination on 6 June 2014.

71. On 5 September 2014, the department initiated a second referral for a residence determination that was finalised on the basis that the department had assessed the family as no longer meeting the Minister's guidelines. The guidelines in place during this period were those issued by the then Minister, the Hon. Scott Morrison MP, on 18 February 2014 (2014 Guidelines). Relevantly, part 8 of the 2014 Guidelines provided as follows:

8 Cases to be referred for my consideration under section 197AB

In accordance with the principle in section 4AA of the Act that a minor shall only be detained as a measure of last resort, where detention of a child is required under the Act, it should, when and wherever possible, take place in the community under a Residence Determination rather than under traditional detention arrangements.

It is also my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a residence determination being made which would split a family unit.

For these reasons, priority cases that are to be referred to me are detainees who arrived in Australia before 19 July 2013 and to whom the following circumstances apply:

- unaccompanied minors; or
- minor children aged 10 years and under and their accompanying family members.

72. Pursuant to these 2014 Guidelines, the complainants were a 'priority case' to be referred to the Minister.

73. The department has provided no information as to why, in September 2014, it assessed the family as not meeting the 2014 Guidelines, or why it then failed to assess the family for community detention during the period from September to June 2015.

74. I note that in May 2014, the department became aware of allegations regarding people smuggling in relation to Ms OR and Mr OS. The department's submission to the Minister dated 26 May 2014 in relation to the revocation of the residence determination stated:

These allegations are currently being investigated by the Department. The Department will consult with the Australian Federal Police regarding a formal referral. There is no indication at this stage that the Australian Federal Police will agree to investigate the allegations.

The Australian Federal Police have advised that if you decide to revoke their residence determination, if they remain in community detention or are moved back to held detention, this will not impact on any future investigations.

75. I note that Ms OR and Mr OS were not charged with any offence which would have been a factor weighing against referral in the 2014 Guidelines.
76. In response to my preliminary finding that the family was arbitrarily detained in the period from September 2014 to June 2015, the department stated as follows:

The family's case was considered for referral to the Minister by the Department in September 2014, however the allegations regarding Ms [OR] and Mr [OS]'s possible involvement in people smuggling activities remained under investigation. Noting that these allegations formed the basis of the Minister's decision to revoke the family's residence determination, it was assessed that resolution of the investigation into these matters was required before a submission could be referred to the Minister.

On 16 December 2014, the investigation was resolved and the Australian Federal Police declared that the couple were not considered of ongoing interest. However, on 10 December 2014, the Refugee Review Tribunal affirmed the Department's decision that the family did not engage Australia's protection obligations.

The Section 197AB guidelines in effect at the time (endorsed by Minister Morrison on 18 February 2014) relevant stated:

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

- *where a person has had their asylum claims rejected at primary and review stages ("finally determined")*

The family were considered to be finally determined and expected to depart Australia. The family continued to be subject to active monitoring of their health and welfare throughout this period. No vulnerabilities were identified and continued placement for the family in detention was determined to be appropriate.

However given the Government[']s prioritisation of the transition of children out of detention, the family was again referred to the minister for consideration of exercising his powers under section 197AB and section 195A with a submission referred to the Minister in June 2015.

77. I do not accept the department's response that holding the family in closed immigration detention during this period was appropriate, reasonable and justified in the circumstances of this case. In particular, I note that in the department's submission to the Minister dated 26 May 2014 in relation to the revocation of the residence determination, it stated that the AFP had advised that whether Ms OR and Mr OS were held in closed detention or in community detention would not impact on any investigation by the AFP. This strongly suggests that the AFP's investigations would not have been compromised, nor had the AFP assessed that the general community would be at risk, if the family were to reside in the community. Given that the family unit included two young children, serious consideration should have been given to allowing the family to reside in less restrictive alternatives to detention prior to June 2015.
78. Further, despite the family being considered as 'finally determined' after the RRT's decision on 10 December 2014, the fact that two young children were part of the family unit and had been in closed immigration detention for some time, should have constituted 'exceptional reasons' to warrant a referral to the Minister under the 2014 Guidelines.
79. In response to my preliminary finding that the department failed to take into account Miss OP and Master OQ's best interests, the department stated the following:
- During this period of time [September 2014 to June 2015], the Department continued to monitor the family's health and welfare, including that of Miss [OP] and Master [OQ] in accordance with articles 3(3) of the CRC. Their best interests were considered as a primary consideration, however, it was not the only consideration undertaken by the Department with regard to a referral to the Minister at the time.
- The Department also considered that it was in the best interests of the Australian Community for any unresolved allegations to be fully investigated so that the Minister could be briefed appropriately before making a decision to allow the family to reside in the community. The Department considered that it was in the best interests of Miss [OP] and Master [OQ] to remain with their parents while these issues were resolved.
80. While the department's response indicates that it considered Miss OP and Master OQ's interests to the extent that their removal from their parents would be harmful, there is nothing to indicate that the department undertook a proper consideration of whether releasing the family into the community was likely to cause any real risk to the Australian public. As above at paragraph 78, the AFP had advised the department that the family residing in community detention would not affect any investigations. The Commission has not been provided with any information that suggests that there was a risk to the family residing in the community while the allegations against Ms OR and Mr OS were being investigated. In these circumstances, I find that the best interests of the children to reside in a less restrictive form of detention to closed immigration detention, with their parents, outweighed any potential risk faced by the Australian community by the release of this family from closed immigration detention.

81. Based on the information before me, it is my view that the department's failure to refer the family's case to the Minister during the period from September 2014 to June 2015 resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. I further find that the department failed to take into account Miss OP and Master OQ's best interests as a primary consideration, contrary to article 3 of the CRC.

(c) The continuing detention of Mr OS

82. As discussed above, in 2015 the Minister considered alternatives to the complainants' detention in a two-stage process. First, he considered a 9 June 2015 submission from the department in relation to whether to intervene in relation to the family, pursuant to section 195A or 197AB of the Migration Act. He decided to consider intervening pursuant to section 195A. Thereafter, on 19 October 2015, the department forwarded a 'second stage submission' to the Minister, inviting the Minister to exercise his section 195A power.

83. It is apparent to me that the department's submissions at the first stage and the second stage of the submission process should be considered holistically. At the first stage of the process, the department's 9 June 2015 submission to the Minister stated as follows:

United Nations Convention [on] the Rights of the Child

23. Article 3.1 of the United Nations *Convention [on] the Rights of the Child*, to which Australia is a party, requires the best interests of any child (under 18 years of age) within Australia's jurisdiction, irrespective of the child's immigration status, to be treated as a 'primary consideration'. Any countervailing considerations may in practice outweigh 'the best interest of the child'. In this case the *Convention [on] the Rights of the Child* is relevant as [Miss OP] is aged two years and has been in held immigration detention since she was two days old and Mr [OS] and Ms [OR]'s newborn child, Master [OQ], is also in held immigration detention.

24. Furthermore, the Department notes that it is government policy that in most circumstances children will not be held in immigration detention centres and it is a priority for the Government to release children from held immigration detention.

Options for Future Management

25. Section 195A of the Act allows you to grant a visa to a person in immigration detention, if you think it is in the public interest to do so. Section 197AB of the Act provides you with the power to make a residence determination in respect of a person in immigration detention, if you think it is in the public interest to do so. Your powers under sections 195A and 197AB are non-compellable.

Discussion

26. There are a number of factors that should be balanced when considering whether your Ministerial intervention in the family's case under sections 195A and 197AB of the Act is appropriate. These factors include:

- [Redacted]
- Miss [OP] is a minor child and she and her family have been in held immigration detention for more than two years;
- The birth of Mr [OS] and Ms [OR]'s second child on 1 June 2015, resulted in two minor children from this family being accommodated in held immigration detention;
- The Department and Refugee Review Tribunal have refused their Protection (subclass 866) visa applications, but the family have an ongoing judicial review request at the Federal Circuit Court, which has been heard with judgment reserved. The resolution of their case is expected to be protracted with a court ruling up to 12 months away;
- There is no information in departmental systems to suggest any security or character concerns in relation to this family; and
- The Department may be subject to public scrutiny and criticism from external review bodies regarding the continued placement of Mr [OS], Ms [OR], Miss [OP] and Master [OQ] in held immigration detention.

84. The department's 'second stage submission' of 19 October 2015 stated as follows:

United Nations Convention on the Rights of the Child

14. On 16 October 2015, Mr [OS] and his family advised their departmental case manager that the family would be prepared to be separated if this would result in the release of Ms [OR], Miss [OP] and Master [OQ], given the length of time spent in immigration detention.

15. Article 3.1 of the United Nations *Convention on the Rights of the Child* (CRC), to which Australia is a party, requires the best interests of any child (under 18 years of age) within Australia's jurisdiction, irrespective of the child's immigration status, to be treated as a '*primary consideration*'.

16. Additionally, the Department notes that it is Government policy that in most circumstances children will not be held in immigration detention centres and it is a priority for the Government to release children from held immigration detention.

85. On 27 October 2015, the Minister decided to grant bridging visas to Ms OR and the children. Ms OR and the children were released into the Brisbane community. The Minister decided not to grant a bridging visa to Mr OS and he continues to remain in closed immigration detention.

86. The continuing detention of Mr OS raises issues under article 9 of the ICCPR. Given the rest of his family has been released from detention, the continuing detention of Mr OS also raises issues under articles 17 and 23 of the ICCPR, dealing with arbitrary interference with family, and article 3 of the CRC dealing with the best interests of Mr OS's children.
87. I find that the continued detention of Mr OS involves an 'interference' with his family. Although Ms OR and Mr OS have made the choice for Ms OR and her two children to be released into the community, the same choice is not available in relation to Mr OS. The interference is lawful, in the sense that it is permitted by the Migration Act. Whether this interference amounts to an arbitrary interference with family is likely to be determined on the same basis as the question of whether Mr OS's detention is arbitrary.
88. When considering whether to grant a bridging visa to a person or to place them into community detention, it is appropriate to weigh the individual's right to liberty against other legitimate considerations, including the risk of flight or the risk that the person may pose to the Australian community if they were released from immigration detention. In Mr OS's case, the fact that his family has been released into the community is a strong factor favouring his release. As stated in the current Minister's community detention guidelines:

It is my expectation that the principle of family unity be maintained (including accompanying guardians or carers for a minor) unless there are significant circumstances that would warrant a Residence Determination being made which would split a family unit.¹²

89. The versions of the department's 6 June 2015 and 19 October 2015 submissions which were provided to the Commission, dealing with the potential exercise of the Minister's public interest powers in favour of the complainants, have been redacted in places. Based on these redacted submissions, it is not clear on what basis the Minister decided to refuse Mr OS a bridging visa at the time that the rest of the family was granted bridging visas. I note that these submissions to the Minister make clear that:
- (a) there is no information in departmental systems to suggest any security or character concerns in relation to the family;
 - (b) Mr OS has been involved in two behavioural incidents since being detained. The last incident occurred in October 2014. There were no outstanding incidents in relation to Mr OS;
 - (c) Mr OS has signed and agreed to abide by a Code of Behaviour if granted a bridging visa.

90. In response to my preliminary finding that the continued detention of Mr OS involves an arbitrary interference with his family, the department stated as follows:

Mr [OS]'s current detention is lawful at domestic law given he does not currently hold a valid visa and his detention is predictable in the sense that under section 189 of the Act, all persons known or reasonably suspected of being unlawful non-citizens must be detained.

The Department notes that since Mr [OS]'s wife and children were granted bridging visas by the Minister in October 2015, that the Department sought to transfer Mr [OS] to the Brisbane Immigration Transit accommodation (BITA) to be closer to his family in November 2015. Due to capacity constraints at the facility, Mr [OS] was unable to be accommodated at the BITA until April 2016.

Since this time, the Department has facilitated regular contact between family members, including regular visits at the BITA, and telephone and internet contact.

The Department submits that the detention of Mr [OS] is in accordance with such procedures as established by law. Therefore the detention of Mr [OS] is not an arbitrary interference with his family and is not inconsistent with articles 17 and 23 of the ICCPR.

91. In its response the department did not address what risk, if any, Mr OS poses to the Australian public if he was to be granted a bridging visa and released into the community, or what other legitimate considerations justify his ongoing detention in a closed immigration detention facility. In my view, the department offers no legitimate reason for the ongoing separation of Mr OS from his wife, children and brother.
92. Mr OS was moved to BITA in April 2016. However, I note that on 26 August 2016, Mr OS was removed from BITA and transferred to North West Point Detention Centre on Christmas Island. His family remain in the community in Brisbane.
93. The Commission asked the department to provide the reason(s) for Mr OS's removal from BITA in Queensland. In an email dated 14 March 2017, the department stated that Mr OS was transferred to Christmas Island as part of a network rebalancing operation to reduce the number of high-risk detainees in mainland detention facilities. The department has further stated in email correspondence that Mr OS has been assessed as 'high risk' by the detention service provider SERCO due to his 'escape risk and abusive/aggressive behaviour'. No further details have been provided by the department as to this assessment of Mr OS. The department has not identified what, if any, consideration was given to questions of family separation in making the decision to move Mr OS to Christmas Island, away from his family in Queensland.
94. Based on the information currently before the Commission, I find that the Minister's failure to exercise his discretionary powers under section 195A of the Migration Act to grant Mr OS a bridging visa was not necessary or proportionate to the Commonwealth's aims of regulating immigration into Australia or protecting the Australian community, or to any other legitimate aim of the Commonwealth; it was therefore contrary to article 9 of the ICCPR. In these circumstances, I find that his ongoing detention and continued separation from his family, amounts to an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

6 Detention of complainants separately to Mr ON

95. The complainants' complaint to the Commission states as follows in relation to their separation from Mr ON:

Mr [OS]'s older brother Mr [ON], was separated from the other family members two days after arriving in Darwin, and sent to Christmas Island for two months. Mr [ON] was then transferred to Yongah Hill in Western Australia for approximately one year. In early July 2014, after continual requests and the family suffering much anxiety, Mr [ON] was transferred to Bladin to be reunited with his family. However, the family was only reunited for two days before Mr [ON] was transferred to Wickham Point. After some further weeks of separation, he was allowed usually weekly visits to see his family at Bladin. On 10 December 2014, Mr [ON] was issued a bridging visa and released to Brisbane community.

96. In its response to their complaint, the department stated as follows:

The Department gave regular consideration to the effect that accommodating Mr [OS]'s brother in a different facility would have on the family.

The brothers' case managers sought family reunification and their cases were raised at the Detention Review Committee meetings.

On 17 December 2013, Mr [OS]'s case manager contacted the brother's case manager at Yongah Hill Immigration Detention Centre regarding possible reunification. In order for reunification to occur case management required identification of specific vulnerabilities and agreement from all stakeholders that reunification is necessary for the ongoing health and welfare of Mr [OS], his family and his brother. If the family had not disclosed any significant vulnerabilities then the reunification request would not be supported as it did not meet the accommodation guidelines in place regarding transferring a single adult male into an Alternative Place of Detention. On this occasion there was no information regarding vulnerabilities so the reunification request was not supported. Their case managers explained to them the reasons why they were not able to be accommodated in the same facility.

On 3 July 2014 Mr [OS]'s brother was transferred to Darwin. While the brothers were both accommodated in Darwin weekly visits were facilitated by the department.

97. It is well established that the term 'family' in the context of article 17 of the ICCPR is to be given a broad interpretation to include all those comprising the family as understood in the society of the State party.¹³ The protection of article 17 is not limited to the nuclear family or married parents and their children. Professor Nowak has explained that:

In addition to blood relationship and statutory forms of establishing relations (marriage, adoption), still further criteria are essential for the existence of a family. Of principal importance is life together, economic ties or other forms manifesting an intensive, regular relationship.¹⁴

98. I find that Mr ON and the complainants fall within the scope of ‘family’ for the purposes of article 17 of the ICCPR. Not only are they blood relations, it is apparent by virtue of their boat journey together to Australia that they have had a close, regular relationship prior to being separated on entering immigration detention. It is my view that the separation of Mr ON from the complainants during the period he was detained on Christmas Island and in Western Australia in immigration detention facilities involves an unreasonable interference with family.

99. In response to my preliminary view that Mr ON’s separation from the complainants was an arbitrary interference with the family and not reasonable in the circumstances, the department stated as follows:

For the purposes of accommodation placement in the immigration detention network Mr [ON] was considered as a single adult male. When the Department received a request from the family for reunification, a decision was taken not to co-locate the family members on the grounds that no vulnerabilities were identified for this detainee. This was consistent with the Department’s processes of not accommodating single adult males in the same detention facilities as family groups and other vulnerable individuals.

100. From this statement, it is clear that the Commonwealth maintains the separation of family members who include single adult males unless ‘significant vulnerabilities’ are disclosed by the family. That is, there is a presumption that such families should remain separated unless ‘significant vulnerabilities’ can be demonstrated by the family. The Human Rights Committee has observed that:

Arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person’s rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant.¹⁵

101. Based on information presently before me, I find that the detention of the complainants in the Northern Territory, while Mr ON was detained on Christmas Island and in Western Australia, was not a reasonable interference in the circumstances. It appears that it was open to the department to detain Mr ON in another detention facility in the Northern Territory, in closer proximity to the complainants so that regular visits could be accommodated. This was the course which was eventually adopted by the department in July 2014, following repeated requests from the complainants and their case managers that the family be reunited.

102. I find that until July 2014, the 15 month separation of Mr ON from the complainants was an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

7 Findings and Recommendations

103. On the basis of this inquiry, I have made the following findings:

- a) I find that the delay by the department in putting a submission to the Minister for a 12 month period from April 2013 for consideration of community detention for the family resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. I also find that there was a failure by the department to take into account Miss OP's best interests as a primary consideration, contrary to article 3 of the CRC;
- b) whether requested by a policy decision of the Minister, or whether resulting from a failure by the department to refer the family's case to the Minister pursuant to the community detention guidelines, I find that the failure to assess this family for community detention in the period of September 2014 to June 2015, resulted in the family's detention being arbitrary, contrary to article 9 of the ICCPR and article 37(b) of the CRC. I also find that there was a failure to take into account Miss OP and Master OQ's best interests as a primary consideration, contrary to article 3 of the CRC;
- c) I find that the continuing detention of Mr OS is arbitrary, contrary to article 9 of the ICCPR, and his separation from his wife and children since October 2015 amounts to an arbitrary interference with family, contrary to article 17 and 23 of the ICCPR; and
- d) I find that the 15 month separation of Mr ON from the complainants, amounts to an arbitrary interference with family, contrary to article 17 and 23 of the ICCPR.

7.1 Power to make recommendations

104. 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.¹⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice, or for the taking of action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.¹⁷

105. The Commission may also recommend:¹⁸

- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice; and
- (b) the taking of other action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.

7.2 The continued detention of Mr OS

106. The Minister has had two opportunities to consider options that would allow Mr OS to reside with his family in the community or in a less restrictive form of detention. The first time was on 16 April 2014 when the Minister intervened under s 197AB, making a residence determination in relation to the family which was eventually revoked on 6 June 2014. The second time was on 27 October 2015 when, upon granting a bridging visa to Ms OR and their children, the Minister declined an invitation to consider granting a bridging visa to Mr OS.

107. The department found that Mr OS had been involved in two behavioural incidents since being detained. The last incident occurred in October 2014 and at the time of making the assessment in October 2015 there were no outstanding incidents in relation to Mr OS. The department has also found that Mr OS does not represent a direct or indirect risk to security and that he has agreed to abide by the department's Code of Behaviour if he were to be granted a bridging visa and released into the community. Based on these findings, it is difficult to see what risk he poses to the Australian community that could not be managed either on a bridging visa or in community detention.

Recommendation 1

108. I recommend that the department promptly make a further submission to the Minister for him to consider exercising his power under s 195A to grant Mr OS a bridging visa, subject to any conditions as may be necessary.

Recommendation 2

109. I recommend that the department review the efficiency and effectiveness of its current guidelines and procedures regarding the separation of family members in circumstances where a parent is separated from his/her children and partner, and in circumstances where an individual in detention is separated from other family members also in detention.

7.3 Compensation

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

111. 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.
112. 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.

(a) Compensation for arbitrary detention

113. I have considered whether to recommend compensation for Ms OR and her family being arbitrarily detained in contravention of article 9(1) of the ICCPR and article 37(b) of the CRC.
114. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is a lawful justification for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary irrespective of legality.
115. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for a breach of article 9(1) of the ICCPR. This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.
116. 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).¹⁹
117. In the case of *Fernando v Commonwealth of Australia (No 5)*,²⁰ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Justice Siopis referred to the case of *Nye v State of New South Wales*:²¹
- ...the *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognized by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.²²
118. Justice Siopis noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).²³ In that case, at first instance,²⁴ the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.

119. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
120. The Court also took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.²⁵
121. On appeal, the New South Wales Court of Appeal considered that the award was low but in the acceptable range. The Court noted that 'as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish'.²⁶
122. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth's argument that Mr Fernando was only entitled to nominal damages,²⁷ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Justice Siopis accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.²⁸ On appeal, the Full Federal Court noted that although 'the primary judge's assessment seems to us to be low', it was not so low as to indicate error.²⁹
123. Ms OR and her children were held in closed immigration detention from April 2013 to October 2015. This is a period of approximately 2.5 years. I have found that the failure to make appropriate and timely referrals to the Minister for consideration of whether to grant Ms OR and her children bridging visas and to release them from detention prior to October 2015 resulted in their arbitrary detention.
124. Mr OS has been in closed immigration detention from April 2013 and remains detained to date. He has now been held in closed immigration detention for approximately 4 years. I have found that Mr OS's detention is arbitrary.
125. I consider that the Commonwealth should pay to Ms OR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined above.

Recommendation 3

126. I recommend that the Commonwealth pay to Ms OR an appropriate amount of compensation to reflect the loss of liberty caused by the family's detention in accordance with the principles outlined above.

(b) Compensation for arbitrary interference with the family

127. I have considered whether to recommend compensation for Ms OR and her family because of Mr OS's separation from Ms OR and their children since October 2015, in contravention of articles 17 and 23 of the ICCPR.
128. Ms OR and her two children have now been living separately to their father since October 2015, approximately 17 months to date. Except for a brief period between April 2016 and August 2016, Ms OR and her two children have not had the opportunity to visit their father as they are living in the community in Brisbane and Mr OS was held at Wickham Point in Darwin prior to April 2016, and has been held on Christmas Island since August 2016.
129. In this case, Mr OS's separation from the family has caused emotional distress to its members and has resulted in significant hardship to Ms OR who is caring for her children alone, without the support of Mr OS. Information before the Commission indicates that although Ms OR has a bridging visa with work rights, she cannot work because she is caring for her two young children. As such, she is struggling to support them. In these circumstances, the continued separation of the family is arbitrary, as the hardship and distress faced by the family appears disproportionate to the purpose of enforcing the Commonwealth's immigration policy by continuing to detain Mr OS. This is especially so given that there is no evidence before the Commission to indicate that Mr OS would pose a risk to the Australian community if he were to be permitted to re-unite with his wife and children and reside in the community with them.
130. I have also considered whether to recommend compensation for Mr ON for his separation from the family for a period of approximately 15 months, in contravention of article 17 and 23 of the ICCPR.
131. The fact that the family made multiple requests for Mr ON to be transferred to the same place of detention so that the family could be re-united, is a strong indication of the emotional distress caused by his separation from them.

Recommendation 4

132. I recommend that the Commonwealth pay to Ms OR an appropriate amount of compensation to reflect the emotional distress, psychological impact, and practical hardship caused to her and her family as a result of being separated from Mr OS since October 2015.

Recommendation 5

133. I recommend that the Commonwealth pay to Ms OR and Mr ON, an appropriate amount of compensation to reflect the emotional distress and psychological impact on the family, as a result of Mr ON being detained separately from the family for a period of approximately 15 months.

(c) Department's failure to take into account the best interests of Miss OP and Master OQ as a primary consideration

134. I have considered whether to recommend compensation for Ms OR and her family for the department's failure to take into account the best interests of the two children, Miss OP and Master OQ, as a primary consideration, in contravention of article 3 of the CRC.
135. With reference to paragraphs 78-80 above, I have found that the department failed to prioritise the best interests of the two children to reside in less restrictive forms of detention to closed immigration detention, prior to their release into the community in October 2015. I have also found that the department continues to fail to prioritise the best interests of the children as they remain separated from their father.

Recommendation 6

136. I recommend that the Commonwealth pay to Ms OR an appropriate amount of compensation to reflect the impact that the department's failure to take into account the best interests of Miss OP and Master OQ as a primary consideration in handling this case, has had on the children and on the family.

8 The department's response to my recommendations

137. On 8 May 2017 I provided a notice to the department under section 29(2) of the AHRC Act setting out my findings and recommendations in relation to the complaint dealt with in this report.
138. By letter dated 12 June 2017 the department provided the following response to my findings and recommendations:

Response to Recommendation 1

Mr [OS] has no ongoing matters before the Department, the tribunal, or the courts, and he is considered to be on a removal pathway. There are no grounds upon which the grant of a Bridging visa could be recommended as appropriate for Mr [OS]'s circumstances. As such, the Department will not be referring Mr [OS] to the Minister to consider the grant of a Bridging visa and arrangements are currently being made for his removal to Vietnam.

Response to Recommendation 2

The Department notes the recommendations of the AHRC relation to guidelines and procedures regarding the separation of family members. The Department advises that they relevant guidelines and procedures are continuously monitored to ensure that they are efficient and effective, but that at this time, a formal review will not be undertaken.

Response to Recommendations 3-6

Any consideration by the Commonwealth to pay compensation on a legal liability basis must be made in accordance with the *Legal Services Directions 2005*. The *Legal Services Directions 2005* provide that a monetary claim may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principles and practice.

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

The Department therefore holds the view that there is no basis for any payment of discretionary compensation to Ms [OR] and her family.

139. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

July 2017

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 2 The ICCPR is referred to in the definition of 'human rights' in section 3(1) of the AHRC Act.
- 3 UN Human Rights Committee, General Comment 8 (1982) *Right to liberty and security of persons* (Article 9). See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
- 4 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (Oxford University Press, 2nd ed, 2004) 308 [11.10].
- 5 *Manga v Attorney-General* [2000] 2 NZLR 65 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
- 6 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community was not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
- 7 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 8 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
- 9 United Nations Human Rights Committee, General Comment 35 (2014), *Article 9: Liberty and security of person*, UN Doc CCPR/C/GC/35 [18].
- 10 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P Engel, 2nd ed, 2005) 518.
- 11 *Migration Act 1958* (Cth) s 5.
- 12 *Guidelines on the Minister for Immigration and Border Protection's residence determination power under section 197AB and section 197AD of the Migration Act*, issued by the Hon. Peter Dutton on 29 March 2015, 4.
- 13 United Nations Human Rights Committee, General Comment 16 (1988), *Article 17: Right to privacy*, UN Doc HRI/GEN/1/Rev.1.
- 14 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (N.P. Engel, 2nd ed, 2005) 517.
- 15 *Canepa v Canada*, Communication No. 558/1993, UN Doc CCPR/C/59/D/558/1993 (1997).
- 16 AHRC Act s 29(2)(a).
- 17 AHRC Act s 29(2)(b) and (c).
- 18 AHRC Act s 29(2)(c).
- 19 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) [87].
- 20 [2013] FCA 901.
- 21 [2003] NSWSC 1212.
- 22 [2013] FCA 901 [121].
- 23 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 24 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 25 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 26 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 27 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 28 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [98]-[99].
- 29 *Fernando v Commonwealth of Australia* [2014] FCAFC 181 [113].

Further Information

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