



Australian
Human Rights
Commission

Mai v Commonwealth of Australia (DIBP)

[2014] AusHRC 73

© Australian Human Rights Commission 2014.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to the Australian Human Rights Commission and abide by the other licence terms.

Design and layout Dancingirl Designs

Printing Masterprint Pty Limited

Electronic format

This publication can be found in electronic format on the website of the Australian Human Rights Commission:
www.humanrights.gov.au/publications/index.html.

Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Communications Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Mai v Commonwealth of Australia (Department of Immigration and Border Protection)

Report into arbitrary detention

[2014] AusHRC 73

Australian Human Rights Commission 2014



Australian
Human Rights
Commission

Contents

1	Introduction	3
2	Summary of findings	3
3	Summary of recommendations	3
4	The complaint by Ms Mai	3
4.1	Background	3
4.2	Findings of fact	3
5	The Commission's human rights inquiry and complaints function	5
5.1	The Commission can inquire into acts or practices of the Commonwealth	5
5.2	'Human rights' relevant to this complaint	6
6	Forming my opinion	7
7	Arbitrary detention	7
7.1	Failure to detain the complainant in the least restrictive manner possible	7
8	Recommendations	9
8.1	Recommendation that alternatives to closed detention be considered	9
8.2	Consideration of compensation	9
8.3	Recommendation that compensation be paid for loss of liberty	11
9	Response to finding and recommendations	12



Australian
Human Rights
Commission

June 2014

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Ms Thi Binh Mai against the Commonwealth of Australia – Department of Immigration and Border Protection (the Department) alleging a breach of her human rights.

I have found that the failure to place Ms Mai in community detention or another less restrictive form of detention (if necessary with conditions) is arbitrary and inconsistent with her right to liberty in article 9(1) of the *International Covenant on Civil and Political Rights*.

By letter dated 4 March 2014 the Department provided a response to my finding and recommendations. I have set out the Department's response in Part 9 of my report.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
Telephone: 02 9284 9600
Facsimile: 02 9284 9611
Website: www.humanrights.gov.au

1 Introduction

1. This is a Report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint lodged by Ms Thi Binh Mai.
2. Ms Mai alleges that her treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.

2 Summary of findings

3. I find that the failure to place Ms Mai in community detention or another less restrictive form of detention (if necessary with conditions) is arbitrary and inconsistent with her right to liberty in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

3 Summary of recommendations

4. In light of my findings regarding the acts and practices of the Commonwealth, I recommend that the Department of Immigration and Border Protection (Department) refer the matter to the Minister for consideration under sections 195A and 197AB of the *Migration Act 1958* (Cth) (Migration Act). I also recommend that the Minister consider exercising his powers under section 195A and/or under section 197AB, if necessary with conditions.
5. I further recommend that the Department pay compensation to Ms Mai in the amount of \$200,000.

4 The complaint by Ms Mai

4.1 Background

6. Ms Mai made a written complaint to the Commission on 15 February 2012 alleging that her detention by the Commonwealth was arbitrary within the meaning of article 9(1) of the ICCPR.
7. Ms Mai and the Commonwealth have had the opportunity to respond to my preliminary view of 4 September 2013 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.

4.2 Findings of fact

8. Ms Mai is a national of Vietnam who arrived on Christmas Island on 22 June 2010 as an undocumented Irregular Maritime Arrival (IMA). She was detained by the Commonwealth pursuant to s 189(3) of the Migration Act immediately on her arrival.

9. On 11 January 2011, Ms Mai was found not to be a refugee as a result of the Refugee Assessment process. An Independent Merits Reviews (IMR) also found Ms Mai not to be a refugee. Ms Mai has not sought judicial review.
10. On 9 June 2011, Ms Mai was transferred to the Northern Immigration Detention Centre (NIDC). On 28 June 2011, Ms Mai was transferred to the Darwin Airport Lodge.
11. On 25 August 2011, the Minister intervened under section 197AB of the Migration Act to approve Ms Mai's placement in community detention.
12. On 9 September 2011, Ms Mai was transferred to community detention in South Australia.
13. On 28 September 2011, the Minister revoked Ms Mai's community detention placement. The Department recommended this revocation citing 'a number of significant behavioural concerns' and that Ms Mai 'is unwilling to cooperate with her removal from Australia and as such, it would be preferable to have the client placed back in a detention facility ahead of her return to Vietnam due to the risk of the client escaping'.
14. On 30 September 2011, Ms Mai was transferred to the Adelaide Immigration Transit Accommodation (ITA). On 1 October 2011, Ms Mai was transferred to Maribyrnong Immigration Detention Centre (MIDC).
15. On 24 October 2011, the Department lodged an application for Ms Mai's travel documents at the Embassy of Vietnam in Canberra. This process is ongoing.
16. On 13 January 2012, Ms Mai was assessed as not engaging Australia's international law obligations by the International Treaty Obligation Assessment (ITOA).
17. On 14 May 2012, Ms Mai was referred for assessment under the guidelines for referral to the Minister under section 195A and 197AB of the Migration Act.
18. On 30 August 2012, Ms Mai was assessed as not meeting the guidelines for referral to the Minister under sections 195A or 197AB of the Migration Act. The Department's assessment against the guidelines noted a number of issues including:
 - a report from International Health and Medical Services (IHMS) dated 20 June 2012 which stated that Ms Mai had reported depressive symptoms as well as suicidal thoughts, and recommended that Ms Mai be placed in community detention to prevent further mental health deterioration
 - that Ms Mai's previous community detention placement was revoked for a breach of conditions and an alleged breach of the law (however, she was not charged).
19. In reaching its decision the Department stated:

On balance, Ms Mai does not meet the guidelines for referral under sections 195A or 197AB. This assessment is made on the basis of her having no ongoing processes, no health matters that cannot be managed in a held detention facility and the department's ongoing removal planning. If Ms Mai's mental health deteriorates significantly, her case manager can re-refer.
20. On 25 November 2012, Ms Mai applied for Ministerial Intervention under section 46A of the Migration Act. This application is pending. However, in its response dated 4 December 2013, the Department advised that Ms Mai's pending Ministerial Intervention request under s 46A(2) of the Migration Act will be reassessed as a priority 'to ensure that she is provided an opportunity to have her claims against Australia's complementary protections obligations re-considered in accordance' with the Full Federal Court's decision in *Minister of Immigration and Citizenship v SZQRB*.
21. Ms Mai is currently detained at Wickham Point Detention Centre.

5 The Commission's human rights inquiry and complaints function

22. Section 11(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) identifies the functions of the Commission. Relevantly section 11(1)(f) gives the Commission the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
23. 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 is inconsistent with or contrary to any human right.
24. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

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

25. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that the reference to, or the doing of, an act includes the reference to the refusal or failure to do an act.
 26. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.¹
- (a) **Failure to detain in the least restrictive manner possible**
27. Ms Mai has been detained by the Commonwealth since she arrived on Christmas Island on 22 June 2010.
 28. Ms Mai was detained under section 189(3) of the Migration Act while on Christmas Island and later under section 189(1) once she arrived at the NIDC on 9 June 2011.
 29. At the time Ms Mai was detained on Christmas Island section 189(3) of the Migration Act stated that '[i]f an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer *may* detain the person' (emphasis added). There was no requirement for the Commonwealth to detain Ms Mai while she was on Christmas Island.
 30. When Ms Mai was transferred from Christmas Island to the mainland she was detained under section 189(1) of the Migration Act. Whilst section 189(1) requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens are detained in an immigration detention facility.
 31. 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).

32. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'. Accordingly, Ms Mai could have been placed in community detention or the Minister could have approved another place in the community as a place of detention.

5.2 'Human rights' relevant to this complaint

33. Section 3(1) of the AHRC Act defines 'human rights' to include the rights and freedoms recognised by the ICCPR. Article 9(1) (prohibition on arbitrary detention) of the ICCPR is relevant to this complaint.
34. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
35. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

(a) Article 9(1) of the ICCPR

36. 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.
37. The following principles relating to arbitrary detention under article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention;²
 - (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;³
 - (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;⁴ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵ Every decision to keep a person in detention should be open to periodic review, in order to reassess the necessity of detention.⁶
38. In *Van Alphen v The Netherlands*, the UN Human Rights Committee (UNHRC) found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.⁷ Similarly, the UNHRC considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.⁸
39. The UNHRC has held in several cases 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.

6 Forming my opinion

40. 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 the parties in connection with this matter.

7 Arbitrary detention

7.1 Failure to detain the complainant in the least restrictive manner possible

41. Ms Mai has been detained in immigration detention facilities for about three and a half years, save for a three week period in community detention.
42. The Department has advised that the resolution of Ms Mai's status has become protracted due to delays in obtaining her travel documentation from the Vietnamese Embassy. At times during Ms Mai's period of detention, case managers and the IHMS have noted her deteriorating mental health and wellbeing and recommended variation to her detention placement.
43. It is of significant concern that Ms Mai's first case review was on 13 June 2011 (12 months after being detained) and she was not placed into community detention until 9 September 2011 (15 months after she had been in detention). This delay is inconsistent with the Commonwealth's obligation to detain Ms Mai in the least restrictive manner possible.
44. The Department states that 'Ms Mai's continued detention is considered appropriate as she has not been accepted as a refugee, nor has she been security cleared and her identity has not yet been established by the department'. The Department states that Government policy is that 'unauthorised arrivals be detained for the purpose of managing health, identity and security risks to the community'.
45. However I note that the Minister has previously approved Ms Mai to be placed into community detention. At the time of approving Ms Mai's community detention placement, the Department was satisfied (in reference to all persons being recommended for community detention at that time) that the individuals were assisting to resolve their identities and that their identities would be confirmed as part of the processing of their claims. The Department was also satisfied that there were no objections to Ms Mai's release on security grounds. I also note that neither of these issues were considered as reasons for the Department's negative assessment of Ms Mai on 30 August 2012 for referral under the section 195A or 197AB Guidelines.
46. Ms Mai's first community detention placement was revoked due to 'significant behavioural concerns... which impacts on the client's suitability for an ongoing community detention placement'. These concerns included allegations of prostitution with other detainees in community detention and formerly while at both Christmas Island and the Darwin Airport Lodge.
47. In its recommendation to the Minister to revoke Ms Mai's community detention placement, the Department stated that Ms Mai is unwilling to cooperate with her removal from Australia and as such 'it would be preferable to have the client placed back in a detention facility ahead of her return to Vietnam due to the risk of the client escaping'.

48. In *A v Australia* the UNHRC noted that there may be factors ‘particular to the individual’ such as the likelihood of absconding and lack of cooperation which may justify detention for a period.¹⁰ There is no evidence before me that Ms Mai attempted to abscond during her first community detention placement. Rather, the Department has simply submitted that Ms Mai advised she was unwilling to cooperate with her removal from Australia and on this basis the Department ‘considered that there was an elevated risk of Ms Mai failing to maintain contact with the [D]epartment and disappearing in the community’. There is no evidence before me that the Department has considered whether any risk of absconding could be mitigated by appropriate conditions such as reporting requirements.
49. In the Department’s submission of 4 December 2013, the Department states:
- On 30 August 2012, consideration was given by the Department to return Ms Mai to Community Detention. The [D]epartment determined at that time that Ms Mai’s case did not meet the guidelines for a referral to the then Minister, for his consideration under Sections 195A and 197AB of the Act, due to continuing behavioural concerns.
50. The Department has not provided evidence in support of this statement. On the contrary, the document dated 30 August 2012, that contains the Department’s consideration of Ms Mai’s case against the community detention guidelines, makes no reference to ‘continuing behavioural concerns’. The document does refer to Ms Mai’s first placement in community detention being revoked in September 2011 because of a number of behavioural concerns – but does not state that these concerns are ongoing some twelve months later in August 2012. Rather, in the document dated 30 August 2012, the Department states:
- On balance, Ms Mai does not meet the guidelines for referral under sections 195A or 197AB. This assessment is made on the basis of her having no ongoing processes, no health matters that cannot be managed in a held detention facility and the department’s ongoing removal planning. If Ms Mai’s health deteriorates significantly, her case manager can re-refer.
51. While it is not clear from the Department’s submissions, it may be that the Department’s references to ‘continuing behavioural concerns’ could relate to allegations of assault made by Serco Officers. These allegations are noted in Ms Mai’s case reviews but are not included as relevant in the Department’s consideration of Ms Mai’s case against the community detention guidelines. In any event, we note that no charges were laid in relation to these allegations.
52. I note that 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. However, Ms Mai has been detained for over three years. I do not consider that allegations of behavioural concerns in September 2011 (in respect of which no charges have been laid) justify Ms Mai’s ongoing detention in an immigration detention centre. The Commonwealth has not appropriately justified why she was not able to reside in the community or in a less restrictive form of detention (if necessary, with appropriate conditions imposed to mitigate any identified risks) while her immigration status was initially resolved and for an ongoing basis during the period her travel documents are being arranged with the Vietnamese Embassy.
53. This is of particular concern in light of the IHMS previously noting (on 20 June 2012) that Ms Mai had reported depressive symptoms as well as suicidal thoughts and its recommendation that she be placed in community detention to prevent further mental health deterioration. I do note the Department’s submission of 4 December 2013 that Ms Mai has engaged in regular support counselling with IHMS and that IHMS has advised Case Management on 9 September 2013 that Ms Mai presented with no acute risks of self-harm or suicide.

54. On the material before me I am not satisfied that the ongoing detention of Ms Mai in an immigration detention centre is proportionate to the aims of the Commonwealth's immigration policy. I find that the failure to place Ms Mai in community detention or another less restrictive form of detention (if necessary with conditions) is arbitrary and inconsistent with her right to liberty in article 9 of the ICCPR.

8 Recommendations

55. 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.¹¹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹²

56. 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.¹³

8.1 Recommendation that alternatives to closed detention be considered

57. Ms Mai requested that I recommend that she be released into community detention immediately.

58. I recommend that the Department refer the matter to the Minister for consideration under sections 195A and 197AB of the Migration Act. I further recommend that the Minister consider exercising his powers under section 195A and under 197AB, if necessary with conditions, while the Department finalises the outcomes of her immigration processes. Ms Mai should not be returned to closed immigration detention unless it is necessary, reasonable and proportionate.

8.2 Consideration of compensation

59. Ms Mai has also sought compensation for the period of her immigration detention, except for the period in community detention.

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

61. 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.

62. 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.

63. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is a 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.
64. 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.
65. 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).¹⁴
66. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁵ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁶

...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.¹⁷
67. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).¹⁸ In that case at first instance¹⁹, 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.
68. 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'.
69. 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.²⁰
70. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.²¹ Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested". (*Thompson; Hsu v Commissioner of Police of the Metropolis [1998] QB 498 at 515*.) As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.²²

71. 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,²³ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando's claim if his findings in respect of the Commonwealth's argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando's evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando's evidence did not suggest that in immigration detention he was subjected to the harsh 'strict protection' regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.²⁴

8.3 Recommendation that compensation be paid for loss of liberty

72. I have found that Ms Mai's detention was arbitrary within the meaning of article 9(1) of the ICCPR.
73. Ms Mai has been detained for a period of almost three and a half years in closed immigration detention. There is no evidence before me as to whether Ms Mai was aware of Australia's policy of detaining unauthorised maritime arrivals or in relation to the level of shock she experienced at being placed in immigration detention upon arrival in Australia.
74. There is also no evidence before me that the conditions of her detention in the immigration detention centres were particularly harsh²⁵ or that Ms Mai had any reason to fear for her life or safety.²⁶
75. The information before me indicates that immigration detention had an adverse impact on Ms Mai's mental health. I take this factor into account in the quantum of compensation that I have recommended.
76. Ms Mai has variously stated that she is scared, worried and that her mental health is deteriorating. The Department advises that a report from the IHMS dated 20 June 2012 states that Ms Mai has reported depressive symptoms as well as suicidal thoughts. The IHMS Report recommended that Ms Mai should be placed in community detention to prevent further mental health deterioration. The Department has also advised that since being placed back in held detention Ms Mai has threatened self-harm on three occasions, although one occasion appears to be a misunderstanding due to language barriers. The Department further advises that on 24 April 2013, an IHMS psychiatrist reported that Ms Mai was suffering from stress related to protracted detention. I also note above that the Department's submission of 4 December 2013 states that Ms Mai has engaged in regular support counselling with IHMS and IHMS has advised Case Management on 9 September 2013 that Ms Mai presented with no acute risks of self-harm or suicide.
77. I accept the evidence that Ms Mai has experienced high levels of anxiety and stress during her detention and that this has impacted on her mental health. I have taken this into account in the quantum of compensation awarded.
78. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above, I consider that payment of compensation in the amount of \$200,000 is appropriate.

9 Response to finding and recommendations

79. By letter dated 4 March 2014, the Secretary of the Department provided the following response to my recommendations:

- (1) That the Department refer the matter to the Minister for consideration under sections 195A and 197AB of the *Migration Act 1958* and further recommend that the Minister consider exercising his power under section 195A and under 197AB.**

Consideration was given by the department to return Ms Thi Binh Mai to community detention in two instances. In both instances, Ms Mai did not meet the guidelines under sections 195A and 197AB to enable referral to the then Minister.

The first assessment, finalised on 30 August 2012, found that Ms Mai's circumstances were such that she had no ongoing matters before department or courts, her previous community detention placement was revoked due to behavioural issues, and as the department had commenced removal planning, Ms Mai did not meet the guidelines for referral to the Minister under either section 195A or section 197AB of the Act.

The second assessment, finalised on 14 January 2014, found that as Ms Mai continued to remain on a removal pathway, she again did not meet the guidelines for referral to the Minister under the Act.

The department notes that, pursuant to section 197AB, Residence Determinations are made at the discretion of the Minister if the Minister thinks that it is in the public interest to do so. Section 195A also contains a discretionary power to grant a visa if the Minister thinks that it is in the public interest to do so. In the present circumstances, as Ms Mai does not meet the Minister's guidelines, the department has not referred the matter to the Minister for further consideration.

Ms Mai's placement at the Maribyrnong Immigration Detention Centre was reviewed and a decision was made that a transfer to a low risk security facility would be considered appropriate. Ms Mai was therefore transferred to Wickham Point Alternative Place of Detention on 24 January 2014.

- (2) The Commonwealth pay compensation to Ms Mai in the amount of \$200,000.**

The department notes the President's recommendations in regards to compensation payable to Ms Mai. The Commonwealth maintains its position that Ms Mai's immigration detention was carried out in accordance with applicable statutory procedure prescribed under the *Migration Act 1958* and that Ms Mai's detention was not arbitrary within the meaning of article 9(1) of the International Covenant on Civil and Political Rights.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2005*. The *Legal Services Directions 2005* provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice.

The department is of the view that Ms Mai's immigration detention was lawful and that there is no meaningful prospect of liability under Australian domestic law and as such, no proper basis to consider a payment of compensation. The department therefore is unable to pay compensation to Ms Mai on this basis and the department advises that no further action will be taken in relation to this recommendation.

80. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

-
- 1 See, *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 2 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.
- 3 UN Human Rights Committee, General Comment 31 (2004) [6]. See also Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004) 308 [11.10].
- 4 *Manga v Attorney-General* [2000] 2 NZLR 65, [40]–[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.
- 5 *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/76/D/900/1993; *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.
- 6 *Shafiq v Australia*, Communication No 1324/2004, UN Doc CCPR/C/88/1324/2004, para 7.2.
- 7 *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.
- 8 United Nations Human Rights Committee, Concluding Observations on Switzerland, UN doc CCPR/A/52/40 (1997), [100].
- 9 *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* UN Doc CCPR/C/90/D/1255; *Baban v Australia* CCPR/C/78/D/1014/2001; *D and E v Australia* CCPR/C/87/D/1050/2002.
- 10 *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988, para 9.4.
- 11 *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) s 29(2)(a).
- 12 AHRC Act s 29(2)(b).
- 13 AHRC Act s 29(2)(c).
- 14 *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].
- 15 [2013] FCA 901.
- 16 [2003] NSWSC 1212.
- 17 [2013] FCA 901 at [121].
- 18 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 19 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 20 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
- 21 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 22 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 23 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].
- 24 *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [139].
- 25 Compare *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 26 Compare *Nye v State of New South Wales* [2003] NSWSC 1212.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
www.humanrights.gov.au

To order more publications from the Australian Human
Rights Commission download a Publication Order Form at:
www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

