



Australian
Human Rights
Commission

CB v

**Commonwealth
of Australia (DIBP)**

[2014] AusHRC 79

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

Report into arbitrary interference with
family and failure to treat best interests
of a child as the primary consideration

[2014] AusHRC 79

Australian Human Rights Commission 2014



**Australian
Human Rights
Commission**

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**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 Mr and Mrs CB on behalf of themselves and their son against the Commonwealth of Australia – Department of Immigration and Border Protection (Department).

I have found that the Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention amounts to an arbitrary interference with his family contrary to articles 17(1) and 23(1) of the *International Covenant of Civil and Political Rights*. I have also found that the Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention in a way that was consistent with the best interests of his child amounts to a breach of article 3 of the *Convention on the Rights of the Child*. I made five recommendations in relation to these findings which are set out in Part 5 of my report.

By letter dated 16 May 2014, the Minister for Immigration and Border Protection provided a response to my first recommendation and by letter dated 15 May 2014 the Department provided a response to my findings and to recommendations 2 to 5. I have set out the Minister's and Department's response in Part 6 of my report.

I enclose 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

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission. It follows an inquiry into a complaint against the Commonwealth of Australia by Mr CB and his wife Mrs CB, on behalf of themselves and their son, Master CC.
2. Mr CB is one of a group of Sri Lankan refugees in immigration detention with adverse security assessments who complained that their detention was arbitrary contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR). Former President Catherine Branson reported on her inquiry into their complaints in Australian Human Rights Commission Report 56.¹
3. Mr CB's complaint that the Commonwealth arbitrarily interfered with his family in breach of articles 17 and 23 of the ICCPR and failed to treat the best interests of his child as a primary consideration in breach of article 3 of the *Convention on the Rights of the Child* (CRC) was not dealt with in that report and has been the subject of separate consideration by the Commission. I now set out my findings in relation to this inquiry.
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. As a result of the inquiry, I have found that the act of the Commonwealth identified below was inconsistent with or contrary to human rights contained in the ICCPR and the CRC.
6. The findings made in this report are that:
 - (a) The Commonwealth failed to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention, including community detention;
 - (b) The Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention amounts to an arbitrary interference with his family contrary to articles 17(1) and 23(1) of the ICCPR; and
 - (c) The Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention in a way that was consistent with the best interests of his child amounts to a breach of article 3 of the CRC.
7. In this report, I repeat certain of the recommendations made to the Commonwealth in Australian Human Rights Commission Report 56.

2 Background

8. Mr CB, Mrs CB and their now five year old son, Master CC, arrived as Irregular Maritime Arrivals at Christmas Island in July 2009. They were detained on Christmas Island until June 2010, when the family was transferred to Sydney Immigration Residential Housing (SIRH).
9. Mr CB, Mrs CB and their son were found to be refugees within the meaning of the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* through the Refugee Status Assessment (RSA) process.
10. In February 2011, Mrs CB and her son were granted protection visas and released from immigration detention. However, on 1 February 2011, Mr CB received an adverse security assessment from ASIO and remains in detention at Villawood Immigration Detention Centre (VIDC).

11. Mr CB and Mrs CB complain that as a result of the requirement that Mr CB remain in immigration detention at VIDC he has been separated from his family since February 2011, in breach of their human rights. He and his wife and son are extremely distressed by this ongoing separation.
12. The complainants have asked for Mr CB to be permitted to reside in the community with his wife and son. Mrs CB has indicated that the family is willing to comply with any reporting requirements or electronic monitoring; anything to allow them to be together.
13. On 4 December 2012, Mrs CB gave birth to their second child.

3 Relevant law

3.1 Functions of the Commission

14. The Commission has the function, pursuant to s 11(1)(f) of the AHRC Act, of inquiring into any act or practice that may be inconsistent with or contrary to any human right.
15. The Commission is required to perform that function when a complaint is made to it in writing alleging such an act or practice (s 20(1)(b) of the AHRC Act).

3.2 What is a human right?

16. The rights and freedoms recognised by the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.² Article 3 of the CRC and articles 17(1) and 23(1) of the ICCPR are relevant to this inquiry.
17. Article 3 of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
18. 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.
19. 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.
20. Professor Manfred Nowak has noted that:³

[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.

21. For the reasons set out in Australian Human Rights Commission Report 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).

3.3 What is an 'act' or 'practice'

22. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
23. Section 3(3) provides that the reference to an act, or to the doing of an act, includes a reference to a refusal or failure to do an act.
24. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;⁴ that is, where the relevant act or practice is within the discretion of the Commonwealth.

4 Findings

4.1 Act or practice

25. For the purposes of this inquiry, and for the reasons set out below, the act of the Commonwealth to which I have given consideration is the failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention, including community detention.
26. I have considered this act in the context of articles 17(1) and 23(1) of the ICCPR and article 3 of the CRC.

4.2 Arbitrary interference with family

27. The first question relevant to whether Mr CB's rights have been breached under articles 17(1) and 23(1) of the ICCPR is whether there has been an interference with his family. The second question is whether that interference was arbitrary.
28. In its General Comment on article 17(1), the United Nations Human Rights Committee (UNHRC) confirmed that a lawful interference with a person's family may be arbitrary unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.⁵ In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:⁶

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

29. Mr CB and his family arrived as Irregular Maritime Arrivals at Christmas Island in July 2009. After two months in detention on Christmas Island, a residence determination was made in favour of Mr CB and his wife and child and they were placed in community detention on Christmas Island for eight months. On 19 June 2010, the Minister revoked their residence determination and they were transferred to SIRH.
30. Mr CB, Mrs CB and Master CC were found to be refugees through the RSA process.
31. On 1 February 2011 Mr CB received an adverse security assessment from ASIO. As set out in Australian Human Rights Commission Report 56 at [48] – [70], at this time most classes of visas, including protection visas, contained a requirement that the applicant meet public interest requirement 4002 (the security requirement). The Department had asked ASIO to perform a security assessment against public interest criteria 4002 in relation to the potential grant of a visa to Mr CB. The Department did not ask ASIO to conduct an assessment to determine the suitability of community based detention for Mr CB.⁷
32. Prior to 1 February 2011, the Department had assessed Mr CB's case as meeting the guidelines for referral to the Minister for consideration of the making of a residence determination pursuant to s 197AB of the *Migration Act 1958* (Cth).
33. However, once the Department received the adverse security assessment in relation to the potential grant of a visa, it discontinued its consideration of referring Mr CB's case to the Minister for consideration of a community detention placement. The Department did not seek specific advice from ASIO about whether it would be consistent with the requirements of security for a residence determination to be made in favour of Mr CB.⁸ Rather, it discontinued its consideration of a referral to the Minister based on a government policy. This was the policy that individuals who receive an adverse security assessment in relation to the potential grant of a visa, should remain in secure facilities until such time as resettlement in a third country or removal is practicable.⁹
34. The Commission's concerns in relation to this policy are set out in Australian Human Rights Commission Report 56 at [80]–[84].
35. On 8 February 2011, Mrs CB and Master CC were granted protection visas and released into the community. Mr CB remains in detention at VIDC. Since July 2012, Mr CB has been permitted a weekly four hour visit to his family's home.
36. For the reasons set out in Australian Human Rights Commission Report 56 at [71]–[95], I find that once the Commonwealth received an adverse security assessment from ASIO in relation to the potential grant of a visa to Mr CB, it failed to assess whether he could be placed in a less restrictive form of detention in light of his individual circumstances. The Commonwealth made its own assessment about the security risk of community detention based on a security assessment carried out for another purpose.
37. The Commonwealth's failure to consider less restrictive forms of detention, taking into account Mr CB's individual circumstances, resulted in Mr CB remaining in detention in VIDC whilst his wife and son were released into the community on protection visas. I am satisfied that the Commonwealth's act, or failure to act, interfered with Mr CB's family.
38. It may well be that there are alternative options to prolonged detention in secure facilities which could be appropriately provided to Mr CB despite his adverse security assessment. These alternatives may include less restrictive places of detention than immigration detention centres as well as community detention, with conditions to mitigate any identified risks if required. Conditions could include a requirement to reside at a specified location, curfews, travel restrictions, regular reporting and possibly even electronic monitoring.

39. However, no comprehensive or individualised assessment was undertaken in relation to Mr CB to assess whether the specific risk he poses to the Australian community (if any) could be addressed (for example by the imposition of conditions) without him being required to remain in a secure facility.
40. I find that the failure to consider Mr CB's suitability for less restrictive forms of detention in light of his individual circumstances amounts to an arbitrary interference with his family in breach of articles 17(1) and 23(1) of the ICCPR. The Commonwealth's act results in Mr CB's ongoing separation from his family without adequate consideration of alternative options to prolonged detention in secure facilities. As set out above, the alternatives may include community detention, with conditions to mitigate any identified risks if necessary.
41. In making this finding, I point out that the Department was aware of the impact of the separation from his family on Mr CB and his wife and child.
42. A case review for Mr CB conducted by the Department and dated 15 March 2011 includes information that Mrs CB's health is deteriorating, that she is experiencing chest pain from dealing with stress and looking after her son on her own and that Master CC is crying throughout the night as he misses his father. Master CC was referred to a psychologist because of his emotional distress. He has not wanted to attend school because he wants his father to take him there. In February 2011, Mr CB was transferred to the Murray unit of VIDC and placed in Psychological Support Program (PSP) monitoring. An International Health and Medical Services (IHMS) report dated 3 March 2011 states that he continued on PSP monitoring and recommends that a community detention order may be beneficial to his mental health given his wife and child are in the community.¹⁰
43. By letter dated 1 November 2011 the Case Manager from NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) expressed concerns about Master CC's development and well-being. In this letter to the Case Manager at the Department, STARTTS strongly recommends reuniting the family to help reduce further trauma for Master CC due to separation from his father.¹¹
44. The Ombudsman's report dated 7 September 2012 notes that Mr CB has ongoing issues with headaches, anxiety, chest pain, poor appetite, sleeplessness and breathing difficulties at night. He told Ombudsman staff that he is always worrying about his son 'because he talks like a three year old, even though he is five', and that he would agree to any condition in order to live in community detention, suggesting police supervision, reporting conditions or house arrest.
45. The Ombudsman goes on to note with concern that without changes to current policy and practice, it appears that Mr CB will remain in a restrictive form of immigration detention for an indefinite period:

30. The Ombudsman recommends that the Government give priority to finding a solution that reconciles the management of any security threat with its duty of care to immigration detainees, including considering alternative avenues for managing any security threat. Given the impact of Mr CB's detention on his son and wife, we think this is particularly important in this case.

4.3 Best interests of the child

46. The UNICEF *Implementation Handbook for the Convention on the Rights of the Child* provides the following commentary on article 3:¹²

The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests ...

The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.

47. Similarly, Mason CJ and Deane J noted in *Minister for Immigration and Ethnic Affairs v Teoh* that article 3 of the CRC is:¹³

careful to avoid putting the best interests of the child as the primary consideration; it does no more than give those interests first importance along with such other considerations, as may, in the circumstances of a given case, require equal, but not paramount, weight.

48. The first step in analysing whether article 3 has been complied with is to identify what the best interests of the child require. The Department states that it 'held significant concerns' about the fact that the grant of a Protection Visa to only Mrs CB and their son would result in the family being separated. The Department notes that it 'is making every effort to facilitate visits and other forms of contact for the family' in accordance with the CRC and ICCPR. However, it also notes that during discussions with Mrs CB prior to her release from detention, she 'raised no concerns over the arrangement or made any indications that this would not be in the best interests of their son.'¹⁴

49. The letter from STARRTS dated 1 November 2011 states that Master CC is experiencing emotional difficulties, regression in his behaviour and possible developmental delays as a result of the trauma his family has experienced and the ongoing separation from his father. The letter strongly recommends that Mr CB be considered favourably for a permanent visa or community detention, stating:¹⁵

This will help to reduce further trauma for [Master CC], assist in his trauma recovery, and enable his parents to assist him with resuming normal patterns of development. This will also help to prevent longer term mental health disorders.

50. I find that this letter accurately describes what is in the best interests of Master CC; that is, for the family to live together in the community. I note that prior to Mrs CB and Master CC's release into the community, Mr CB had not been separated from his son (for example, to go to work, for Master CC to attend child care, other incidences of normal family life) in the child's memory. The family were together almost constantly in immigration detention, and the evidence before me is that Master CC has a strong attachment to his father and is very distressed by his father's absence, and this separation is compounding the other traumas he has experienced.

51. An identification of what the best interests of Master CC require, and the recognition by the decision maker of the need to treat such interests as a primary consideration, do not lead inexorably to a decision to adopt a course in conformity with those interests.¹⁶

52. It is open to a decision maker to depart from the best interests of Master CC. However, in order to do so there are two requirements:

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

53. Based on the Department's submissions to the Commission, I find that the Commonwealth did not adhere to these requirements. The Department states that it is aware of the advice from STARRTS and information relating to the ongoing welfare of Master CC was provided to the Minister.¹⁷

54. However, as set out above, it appears that the Commonwealth did not give any separate or specific consideration to whether Mr CB could be reunited with his family in the community, if necessary with conditions attached. Rather, it appears that the Commonwealth made the decision about the ongoing detention of Mr CB in secure facilities based on advice from ASIO that he not be granted a permanent visa, which resulted in the consequential separation of Mr CB from his son on a prolonged and ongoing basis.
55. It may well be that there are alternative options to prolonged detention in secure facilities which could be appropriately provided to Mr CB despite his adverse security assessment. These alternatives may include community detention, if necessary with conditions to mitigate any identified risks. These alternatives may have allowed the family to live together in the community.
56. I find that there was a failure to consider available alternatives to closed detention for Mr CB in a way that was consistent with the best interests of his son, Master CC. I find that this amounts to a breach of article 3 of the CRC.

5 Findings and recommendations

57. I find that:
- (a) The Commonwealth failed to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention, including community detention;
 - (b) The Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention amounts to an arbitrary interference with his family contrary to articles 17(1) and 23(1) of the ICCPR; and
 - (c) The Commonwealth's failure to assess on an individual basis whether Mr CB could be placed in a less restrictive form of detention in a way that would be consistent with the best interests of Master CC amounts to a breach of article 3 of the CRC.
58. 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.¹⁸ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁹
59. In Australian Human Rights Commission Report 56, the Commission made a number of recommendations about the processing of people in immigration detention with adverse security assessments. I repeat below certain of these recommendations.
60. However, before making these recommendations again in the context of the present inquiry, I note that steps have been taken by the Government since the Commission's last report to address the situation of people in immigration detention with adverse security assessments.

61. I note that the Hon Margaret Stone commenced in the role of Independent Reviewer of Adverse Security Assessments on 3 December 2012. The role of the Independent Reviewer is to review ASIO adverse security assessments given to the Department in relation to people who remain in immigration detention and engage Australia's protection obligations under international law. The Independent Reviewer examines all material relied upon by ASIO in making the security assessment, as well as other relevant material, and forms an opinion on whether the assessment is an appropriate outcome. The applicant may also submit material for the Independent Reviewer's consideration. The Independent Reviewer provides her recommendations to the Director-General of Security. The Director-General must respond to the Independent Reviewer and may determine whether to take action if he agrees with the Independent Reviewer's opinion. The Independent Reviewer also has a role to conduct a periodic review of adverse security assessments for eligible persons every 12 months.
62. While this review is undertaken, the Minister has stated that he is not inclined to consider exercising his Ministerial Intervention power under section 46 of the Act. However it is unclear how long it will take for the Independent Reviewer to complete her review.
63. The Commission is very concerned that people are detained while awaiting review by the Independent Reviewer. Where the Independent Reviewer confirms an adverse security assessment, it appears that person may be detained indefinitely.
64. The Commission is also concerned that this review process is not equivalent to that offered to other people in Australia who have received adverse security assessments, such as permanent residents and special purpose visa holders, who have access to the Security Appeals Division of the Administrative Appeals Tribunal.
65. Given review by the Independent Reviewer may take some time, the Commission again encourages the Government to conduct a fresh individual assessment of Mr CB's circumstances, as soon as possible.

5.1 Recommendation to the Minister for Immigration and Border Protection

66. I repeat the recommendation made to the Minister in Australian Human Rights Commission Report 56:

Recommendation 1

The Minister for Immigration and Border Protection indicate to his Department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the Department has received advice from ASIO that the person not be granted a visa on security grounds.

5.2 Recommendations to the Department

67. I repeat most of the recommendations made to the Department in Australian Human Rights Commission Report 56. Minor amendments have been made to the form (not the substance) of the recommendations to ensure their application to this inquiry.

68. As stated in Report 56, it is important that an individualised assessment be undertaken about the level of risk that Mr CB would pose to the community if he was in a less restrictive form of detention or if he was in the community subject to conditions. If there is any risk, it is also important that an assessment is undertaken of whether there are conditions that could be imposed on a residence determination that would ameliorate or mitigate such risk.²⁰
69. I note again that the Inspector-General of Intelligence and Security has drawn attention to the function of ASIO under s 17(1)(c) of the ASIO Act 'to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities'.²¹ She noted that it would be consistent with this provision for ASIO to advise the Department on conditions that might serve to mitigate any risk to security involved in a community detention placement:

In my view, this requirement would not necessarily be satisfied merely by providing the security assessment and the grounds for the assessment to DIAC. Further dialogue between ASIO and DIAC is required to provide a proper basis for DIAC to devise risk mitigation strategies and conditions.²²

Recommendation 2

The Department refer the complainant to ASIO and request that ASIO provide a security assessment pursuant to s 37(1) of the ASIO Act relevant to the following prescribed administrative actions:

- (a) granting the complainant a temporary visa and imposing additional conditions necessary to deal with any identified risk to security, for example, a requirement to reside at a specified location, curfews, travel restrictions, reporting requirements or sureties;*
- (b) making a residence determination under s 197AB of the Migration Act in favour of the complainant;*
- (c) making a residence determination in favour of the complainant, if necessary subject to special conditions to ameliorate any identified risk to security, for example, curfews, travel restrictions, reporting requirements or sureties.*

Recommendation 3

To the extent that the security assessment carried out in Recommendation 2 would result in an adverse security assessment, the Department ask ASIO to advise it of any measures that could be taken to allow the complainant to be placed in a less restrictive form of detention consistently with the requirements of national security.

Recommendation 4

As the Department receives advice sought from ASIO in relation to Recommendations 2 and 3, the Department refer the complainant's case to the Minister for consideration of the exercise of appropriate public interest powers. The submissions accompanying the referrals should include details of how any potential risk identified by ASIO can be mitigated. The submission should address what the best interests of the child require.

Recommendation 5

The Commonwealth continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for the complainant, and for other people in immigration detention who are facing the prospect of indefinite detention. The Commonwealth inform each of these individuals on a regular basis of the steps taken to secure alternatives to detention and the Commonwealth's assessment of the prospects of success of these steps.

6 The Commonwealth's response to my findings and recommendations

70. On 26 June 2013, I provided a notice to the Minister and the Department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to this complaint. I asked the Department to advise the Commission whether the Commonwealth has taken or is taking any action as a result of the findings and recommendations outlined in the Notice and, if so, the nature of that action. Despite numerous follow up requests, and assurances from the Department that a response was forthcoming, a response was not received for nearly 11 months.

71. By letter dated 16 May 2014, the Minister for Immigration and Border Protection responded to my first recommendation:

I do not accept this recommendation.

It is Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

Given the serious nature of the assessment by ASIO, and in light of Government policy, I am not minded to exercise my Ministerial intervention powers in respect of individuals with adverse security assessments.

72. By letter dated 15 May 2014, the Department provided a response to my findings and recommendations:

Response to finding 1

[Mr CB] and his family were placed in the least restrictive detention options available throughout their time in detention including a community detention placement while they were on Christmas Island. Following the receipt of [Mr CB's] adverse security assessment and his wife and child's subsequent release from detention, he has resided in the least restrictive accommodation options available at Villawood Immigration Detention Facility (VIDF) and Sydney Immigration Residential Housing.

Community detention placement decisions can only be made by the Minister for Immigration and Border Protection personally, using his or her non compellable power to make a residence determination under section 197AB of the *Migration Act 1958* (the Act). The Department continues to provide the current Minister for Immigration and Border Protection with advice regarding people with adverse security assessments, including the AHRC's recommendations for alternative management options.

Response to finding 2

As per the Department's response to the AHRC's preliminary views, exceptions on national security grounds feature in a number of international instruments including the ICCPR and the Refugees Convention. The Department believes that national security provides a legitimate basis for the refusal of a visa, even where this has the consequence that family members cannot reside together.

The Department does not consider that this separation constitute an unlawful or arbitrary interference with the family. [Mrs CB] and their son were allowed to lodge Protection Visa applications by the Minister because the Department had assessed them to be owed protection obligations under the Refugees Convention.

[Mrs CB] applied for a Protection Visa for herself and their son after being notified of the adverse security assessment for her husband, and, as all other requirements for visa grant were met, they were granted Protection Visas. It was made clear to the family that [Mr CB] would not be allowed to lodge a Protection Visa application, or be otherwise released from detention, because of his adverse security assessment.

The Department is making every effort to facilitate visits and other forms of contact for the family in accordance with these articles and the family unity principles in CRC and ICCPR more broadly.

The Department will continue to take into account family unity principles and the best interests of both of [Mr CB's] children in making case, management decisions affecting this family.

Response to finding 3

The Department is making every effort to facilitate contact between family members and will continue to take into account family unity principles and the best interests of both of [Mr CB's] children in making case management decisions affecting this family.

The Department does not accept that its actions amount to a breach of Article 3 of the CRC.

...

Response to Recommendations 2 to 4

The Department notes recommendations 2 to 4 of the AHRC in this case.

It is Government policy that individuals who have been assessed to be directly or indirectly a risk to Australia's security will remain in held immigration detention until such time that a durable solution for individuals with adverse security assessments is found that is consistent with Australia's international obligations.

The Department is aware that the same threshold is applied to a security assessment whether it is requested for the purpose of Public Interest Criterion 4002 (PIC4002) or for community detention purposes. This means that recipients of an adverse security assessment for permanent visa purposes would receive a further adverse response to any subsequent requests for security advice. As such, the Department does not consider there to be any utility in making a further request for information in circumstances where the outcome is already known.

The Department notes that ASIO and the Independent Reviewer of Adverse Security Assessments are currently reviewing all adverse security assessments. [Mr CB's] assessment will be reviewed as part of this process.

Response to Recommendation 5

The Department continues to explore options for these people, including third country resettlement, together with taking prompt action regarding any independent reviewer assessments that may change the status of a security assessment. As a result of the independent review process, seven people who formerly held adverse security assessments have been granted visas and released from detention.

Case managers have regular discussions with people in detention to advise them of the outcome of detention placement decisions and other steps that are being pursued to resolve their case.

73. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

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- 1 *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments* [2012] AusHRC 56.
 - 2 The *International Covenant on Civil and Political Rights* (ICCPR) is referred to in the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). On 22 October 1992, the Attorney-General made a declaration under s 47 that the *Convention on the Rights of the Child* (CRC) is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child*.
 - 3 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
 - 4 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 5 UNHRC, General Comment 16 (Twenty-third session, 1988), *Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [4].
 - 6 Communication No. 488/1992 UN Doc CCPR/C/50/D/488/1992 at [8.3]. While this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
 - 7 [2012] AusHRC 56 at [54].
 - 8 [2012] AusHRC 56 at [58].
 - 9 [2012] AusHRC 56 at [79].
 - 10 [2012] AusHRC 56 at [79].
 - 11 Letter dated 1 November 2011 by Rosemary Signorelli, Psychotherapist, Music Therapist, Occupational Therapist, NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), to the family's Case Manager at the Department.
 - 12 United Nations Children's Fund (UNICEF) *'Implementation Handbook for the Convention on the Rights of the Child'* (2008), pp 38-39. Note Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
 - 13 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (Teoh) at 289 (Mason CJ and Deane J).
 - 14 Response dated 2 August 2011 from Department of Immigration and to the Commission, response 5 at paragraphs 6 and 7.
 - 15 Letter dated 1 November 2011 from Rosemary Signorelli, Psychotherapist, Music Therapist, Occupational Therapist, NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS), to the family's Case Manager at DIAC.
 - 16 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [32].
 - 17 Letter dated 3 August 2012 from Department to the Commission, Attachment A, point 3.
 - 18 AHRC Act s 29(2)(a).
 - 19 AHRC Act s 29(2)(b).
 - 20 *Report of an inquiry into complaints by Sri Lankan refugees in immigration detention with adverse security assessments* [2012] AusHRC 56 at [167].
 - 21 Inspector-General of Intelligence and Security Annual Report 2011-2012, at page 77.
 - 22 Inspector-General of Intelligence and Security Annual Report 2011-2012, at page 77.

Further Information

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