



Australian
Human Rights
Commission

Ince v Commonwealth of Australia

[2013] AusHRC 62

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Ince v Commonwealth of Australia (Department of Immigration and Citizenship)

Report into arbitrary detention, the right to be treated with humanity and with respect for the inherent dignity of the human person and the right to be free from arbitrary interference with the family.

[2013] AusHRC 62

Australian Human Rights Commission 2013



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Contents

1	Introduction to this Report	3
2	Background	4
3	Legislative framework	5
3.1	Functions of the Commission	5
3.2	What is an 'act' or 'practice'?	5
3.3	What is a human right?	5
4	Arbitrary detention	6
4.1	Finding of arbitrary detention	9
5	Conditions of detention	10
5.1	The Department's response	10
5.2	Finding of cruel and degrading treatment	11
6	Interference with family	12
6.1	International law in relation to interference with family	12
6.2	The Department's response	14
6.3	Finding	14
7	Findings and recommendations	15
7.1	Findings	15
7.2	Compensation	16
7.3	Apology	18
8	Department's response to recommendations	18



**Australian
Human Rights
Commission**

April 2013

The Hon Mark Dreyfus QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

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

I have found that the acts and practices of the Commonwealth breached Mr Ince's right not to be subject to arbitrary detention, his right to be treated with humanity and with respect for his inherent dignity and his right to protection of, and freedom from arbitrary interference with, his family.

By letter dated 13 August 2012 the Department of Immigration and Citizenship provided its response to my findings and recommendations. I have set out the response of the Department in its entirety in part 8 of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the left.

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction to this Report

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint against the Commonwealth of Australia by Mr Mehmet Ince.
2. The complaint relates to his detention for nearly three years at Maribyrnong Immigration Detention Centre (MIDC) prior to his deportation to Turkey. In summary, Mr Ince says that detention seriously affected his health and that his pre-existing mental health condition, previously stabilized, was gravely exacerbated. He says that his detention was arbitrary because less restrictive alternatives were available. Mr Ince alleges that despite the documented serious deterioration in his mental health, the Department of Immigration & Citizenship (the department) failed to consider alternative treatment for him, such as detention in the community. His mother is an Australian citizen and he was separated from his family when he was deported to Turkey.
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. As a result of the inquiry, the Commission has found that the acts of the Commonwealth identified below were inconsistent with or contrary to human rights contained in the International Covenant on Civil and Political Rights (ICCPR).
5. The findings made in this report are that:
 - It was open to the Minister to exercise his powers under s 195A of the *Migration Act 1958* (Cth) (Migration Act) to grant Mr Ince a visa (for example, a bridging [removal pending] visa) or to make a residence determination pursuant to s 197AB of the Migration Act for community detention.
 - The prolonged detention of Mr Ince in MIDC was unjust and not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia. The failure to place Mr Ince in community detention or other less restrictive form of detention when he was released from prison, and his detention at MIDC for 33 months, were inconsistent with the prohibition of arbitrary detention in Article 9 of the ICCPR.
 - The continued detention of Mr Ince in a detention centre environment in circumstances where his mental health was seriously deteriorating was cruel, inhuman and degrading in breach of Articles 7 and 10 of the ICCPR.
 - It is not appropriate for me to reconsider matters already considered and dealt with by the Administrative Appeals Tribunal. Therefore I will not inquire into the aspect of the complaint relating to whether the cancellation of Mr Ince's visa and his removal to Turkey constituted an arbitrary interference with his family.
 - The failure to place Mr Ince in a less restrictive form of detention was arbitrary interference with his family in breach of Articles 17 and 23 of the ICCPR.
6. The recommendations made in this report are that:
 - (a) the Commonwealth pay to Mr Ince compensation in the amount of \$450 000; and
 - (b) the Commonwealth provide a formal written apology to Mr Ince.

2 Background

7. Mr Ince came to Australia from Turkey in 1995 at the age of 17 to join his mother, after having been granted a permanent Family Migration visa (child) (AH101). He was raised in a village in Turkey and his educational opportunities in that country, and subsequently in Australia given his difficulties with English, appear to have been limited.¹
8. Two years after Mr Ince arrived in Australia he shot and killed a man. The victim had been drunk and aggressive and had tried to climb into Mr Ince's car, grabbing hold of the open sunroof and hanging on as the car drove forward. Mr Ince took a gun from under his seat and fired two times up into the sunroof.² Mr Ince was subsequently diagnosed with paranoid schizophrenia. He was sentenced to fifteen years' imprisonment with a non-parole period of ten years.
9. Mr Ince was highly medicated for many years in prison before his paranoid schizophrenia was stabilised. In 1998 he made an attempt to hang himself.³
10. Mr Ince had prior criminal convictions and on 15 November 2004 his visa was cancelled on character grounds pursuant to s 501 of the Migration Act. His appeal to the Administrative Appeals Tribunal (AAT) against the visa cancellation was dismissed on 31 January 2005.
11. On 16 November 2008, at the expiry of his term of imprisonment, Mr Ince was transferred to MIDC.
12. Mr Ince's request to the Minister under s 195A of the Migration Act to grant him a visa was declined in August 2009. He was refused a protection visa on 4 January 2010, and on 9 April 2011 the Refugee Review Tribunal (RRT) affirmed this decision of the department. On 20 January 2011, the Federal Magistrates Court dismissed Mr Ince's application for judicial review.
13. On 4 March 2010, Mr Ince made a written complaint to the Commission about his ongoing detention at MIDC.
14. Mr Ince stated that:
 - His mental illness had worsened and doctors had increased his medication to double the amount that he was taking in prison. He was not able to sleep without strong medication that had severe side effects; for example, he was unable to eat although he wanted to, and had lost 13kg since entering detention. A psychiatrist recommended admission to a psychiatric unit at Toowong Hospital in Brisbane, however due to the department's security requirements, the hospital refused him admission.
 - Despite the documented deterioration in his mental health, the department did not consider any alternative option for the treatment of his mental health issues, such as the grant of a bridging (removal pending) visa or a residence determination for community detention.
 - All members of his immediate family, that is, his mother, sister and nephew, live in Melbourne. His mother is an Australian citizen. If he was deported to Turkey, there would be no family to provide him with the support he requires given his mental health issues.
 - In Turkey he would not be able to access his current medication for schizophrenia, or if it was available it would be unaffordable.
15. Mr Ince was detained at MIDC for 33 months before being deported to Turkey on 4 August 2011.

3 Legislative framework

3.1 Functions of the Commission

16. Section 11(1)(f) of the AHRC Act empowers the Commission to inquire into any act or practice that may be inconsistent with or contrary to any human right.
17. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

3.2 What is an ‘act’ or ‘practice’

18. 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.
19. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
20. 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; that is, where the relevant act or practice is within the discretion of the Commonwealth.⁴

3.3 What is a human right?

21. The phrase ‘human rights’ is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
22. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.⁵ The following articles of the ICCPR are relevant to this inquiry.
23. Article 7 of the ICCPR provides:

[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.
24. 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.
25. Article 10(1) of the ICCPR provides:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
26. 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.
27. 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.

4 Arbitrary detention

28. 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;⁶
 - (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;⁷
 - (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;⁸ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁹
29. 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.¹⁰
30. The UN Human Rights Committee 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.¹¹
31. The department's response to the complaint noted that Mr Ince's case was reviewed by his Case Manager each month, and the Detention Review and Complex Complaints Section (DRCC) conducted two reviews of Mr Ince's case: an initial six-month report and a twelve-month report. The department submits that both the six month and twelve month DRCC reports state that Mr Ince is not an appropriate candidate for community detention because of character concerns; because he is considered a risk to the community; because he is non-co-operative and there is a concern he will abscond.¹² I note however that only the initial six-month DRCC report makes such statements.
32. The department also notes that it conducted 18 month, 24 month and 30 month reviews which were forwarded to the Commonwealth Ombudsman.
33. The Ombudsman expressed concern that the department may have been unduly influenced by the hostile media publicity surrounding Mr Ince's criminal record, as well as by the perceptions of the Detention Service Provider (DSP). The Ombudsman noted: '...it would be a concern if the DSP's view that a person becomes a flight risk due to length of detention were to gain currency as a general proposition.'¹³ The Ombudsman noted that a negative news story about Mr Ince was printed in *The Herald Sun* and *The Australian* on 3 August 2009 and that, on the same day, the Minister made his decision not to intervene.¹⁴
34. The Ombudsman raised concerns about Mr Ince's risk assessment, and recommended that the risk assessment focus on current evidence such as medical advice and behaviour, rather than on his criminal behaviour prior to 1998. The Ombudsman pointed to the recent favourable psychiatric assessments which described Mr Ince as controlled and stable, and as posing no risk to himself or the community. The Ombudsman also noted that there had been no reported incidents involving Mr Ince during his time at MIDC.¹⁵

35. In 2009, Mr Ince was initially permitted 3 escorted visits from MIDC to his mother's home in Melbourne and one escorted visit to his sister's home. These visits stopped after the media became aware in advance of Mr Ince's visit to his mother in September 2009. This visit resulted in a number of negative news stories in the media about the 'privileges' afforded to Mr Ince. The Ombudsman noted that 'there appears to be no reason why Mr Ince should not be allowed to resume regular escorted home visits with appropriate steps taken to ensure confidentiality.'¹⁶

36. The Case Manager noted that she:

forwarded information confirming that the client's behaviour whilst in detention has been consistently cooperative, with nil incidents to report. The Parole Board took into account the fact that whilst in prison he was committed to rehabilitation a[n]d self-development. Members of the medical profession spoke positively about his development and were happy with his progress. Based on Mr Ince's detailed medical records, the parole board documentation and discussions with the client, the Case Manager considers that his good behaviour whilst in prison, contributed in the decision to release him on parole 5 years earlier. During his time in prison, he clearly demonstrated his commitment to self-development and rehabilitation...

Case Management concurs that Mr Ince has been fully co-operative with all interactions... The CM would like to see that the client be placed on CD [community detention] pending resolution of his case.¹⁷

37. The Case Manager also noted:

The Case Manager believes that this client would benefit from CD [community detention] but the Case Manager also expressed concern that not all relevant information had been included in the Department briefing memorandum submitted to the Minister in May 2009. In the July 2009 Monthly Case Plan Review, the Case Manager notes that despite relaying a significant amount of information to the Case Escalation Liaison Section (CELS) in relation to Mr Ince, she was advised that the Ministerial submission was prepared in January / February 2009 and remained unchanged until it was submitted in May 2009. The Case Manager also stated she was not convinced that the submission should have recommended a negative decision:

CM [Case Manager] received confirmation that despite all information being relayed to CELS, the submission remains unchanged since Jan/Feb 2009; Also the CM is not convinced that the Submission should be presented to the Minister in such a way that is it recommending a negative decision.

If the Minister intervenes, the client will be released from the MIDC and resume life with his family. If the Minister does not intervene, there is no other visa pathway and Removal action will commence...

Are you satisfied that timely progress is being made towards an outcome? If not, what is wrong? What is needed to address this?

Yes. Ministerial Intervention Request is pending.

I can't really say no because I am satisfied that Victoria has done enough to escalate this case to date...¹⁸

38. The Case Manager also noted that a report of the Auditors stated that the Ombudsman's recommendation to refresh the client's risk assessment had not been addressed, and that when it is, it may be appropriate to submit a new submission to the Minister.

39. In February 2009, consultant psychiatrist Dr Walton reported that:

Mr Ince has long forsaken drug abuse and his mental state has normalised... I do not see the Australian community as being at significant risk from Mr Ince at present and the probability is that he would actually be able to make a positive contribution to the community, especially in relation to his own family.¹⁹

40. In September 2010, after Mr Ince had spent 22 months in immigration detention, the medical service provider at MIDC sought advice regarding the ongoing management of his serious mental health issues from Dr Walton. Dr Walton's report stated that Mr Ince now qualified for a parallel diagnosis of a major depressive disorder, and there had been a 'very significant deterioration in his mental state. At present he is physically wasted, entertaining suicidal thoughts and actively psychotic.'²⁰ Dr Walton recommended that Mr Ince be admitted to a hospital psychiatric unit. He did not make any suggestions in regards to Mr Ince's medication at MIDC, noting that, 'I doubt that ongoing tinkering with his medication while he remains at the Detention Centre will prove fruitful', and that he was confident that if Mr Ince 'were removed from the Detention Centre and placed in a community setting, then that would be of considerable benefit to his mental state, especially the depressive component'.²¹
41. The department responded that Toowong Private Hospital is the only establishment that has to date accepted people in immigration detention for voluntary psychiatric admission. The department noted, however, that Toowong Private Hospital does not accept people in immigration detention who require accompanying security staff. The possibility of referring Mr Ince to a public hospital was also considered, however his treating psychiatrist concluded that he would not meet the admission criteria.
42. On 1 July 2010, the United Nations' Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health sent an allegation letter to the Commonwealth in relation to a complaint from Mr Ince. On 16 May 2011, the Special Rapporteur reported that regrettably, despite the elapsed ten months, the Australian Government had not transmitted a reply.²²
43. I have been provided with a medical report which appears to respond to the complaint to the United Nations' Special Rapporteur. It states:

The alleged facts in the summary provided by Anand Grover, in the complaint lodged... with regards to Mr Ince's increase in psychotropic medication to maintain his mental state whilst in immigration detention are correct...

It is correct that medication doses were increased as this was necessary to adequately treat Mr Ince's deteriorated mental health. Mr Ince was stable on a dose of 300mg amisulpride upon discharge from Port Philip Prison and admission to MIDC on the 16/11/2008. He is now [20 months later] on 600mg amisulpride, 100mg quetiapine, and 10mg escitalopram to manage his mental illness diagnoses.

A combination of factors including his ongoing detention, family concerns and uncertainty regarding his future have all contributed to a decline in mental health.

Mr Ince's weight and sleep have been adversely affected by the deterioration in his mental health, not the medication he is prescribed. The alleged weight loss of more than 13kg is incorrect, with a fluctuating range of 8kg (highest weight 78kg, lowest 70kg).

Mr Ince's deportation would mean a change in antipsychotic medications, as amisulpride is not available, and quetiapine is unaffordable...²³

4.1 Finding of arbitrary detention

44. In considering whether Mr Ince's detention was arbitrary, I have taken into account:
- the length of Mr Ince's detention;
 - whether his detention was subject to regular review;
 - the adequacy of treatment of his mental health issues at MIDC;
 - consideration of alternatives to detention at MIDC; and
 - the length of time taken by the Department and/or the Minister in making decisions in respect of Mr Ince's case.
45. The medical report of 29 July 2010 and Dr Walton's September 2010 assessment support Mr Ince's claim that his mental health significantly deteriorated during his 33 months in detention at MIDC. This deterioration was particularly pronounced during 2010 when he had been detained for over two years. I note Dr Walton's recommendation that, for Mr Ince's mental health to improve, he needed to be removed from the immigration detention environment and that 'tinkering' with his medication while he remained at MIDC would not assist him.
46. As the department notes, Mr Ince's detention was subject to monthly review by his Case Manager. However, the Case Manager noted on numerous occasions her concerns about the suitability of Mr Ince's detention placement. The Case Manager was not able to action her concerns and it appears that they were not included in the submission to the Minister.
47. The Ombudsman also recommended exploring alternatives to detention at MIDC. It is also apparent from the Case Manager's notes that the auditor was critical of the limited departmental response to the Ombudsman's reports and recommendations.
48. Mr Ince's visa was cancelled pursuant to s 501 of the Migration Act. For this reason the only alternatives to detention were the grant of a visa by the Minister pursuant to s 195A (for example, a bridging (removal pending) visa), or a residence determination by the Minister pursuant to s 197AB for Community Detention. I note that both of these powers are to be exercised by the Minister personally when he considers it is in the public interest to do so;²⁴ but that he is not under a duty to consider whether to exercise the power.²⁵
49. Mr Ince made two applications to the Minister. His first application was made in November 2008 when he requested the Minister to exercise his powers under s 195A of the Migration Act. On 13 May 2009, some six months after the application was made, the department referred this request to the Minister. The Case Manager's notes of 14 May 2009 record that she has already been advised that the Minister may not intervene in Mr Ince's case. The Minister determined on 3 August 2009 not to intervene in Mr Ince's case.
50. Mr Ince made his second application to the Minister on 27 February 2010. On this occasion he requested the Minister to exercise his powers under either s 195A or s 197AB of the Migration Act. The department did not refer this second application to the Minister. It says that it did not meet the criteria for referral, and the Minister had recently been fully briefed on Mr Ince's circumstances (in January 2010) and maintained the view that it was not in the public interest to intervene in Mr Ince's case. On 21 April 2010 Mr Ince was notified that the Minister would not intervene.
51. On 19 November 2010, the department referred a further submission to the Minister. This submission was based on advice that Mr Ince's mental health had declined and sought the Minister's view as to whether he was inclined to intervene. On 22 November 2010, the Minister declined to consider intervention.

52. I find that it was open to the Minister to exercise his powers under s 195A to grant Mr Ince a visa (for example, a bridging (removal pending) visa) or to make a residence determination pursuant to s 197AB for community detention.
53. I find that the prolonged detention of Mr Ince in MIDC was unjust and not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia.
54. I find that the failure to place Mr Ince in community detention or other less restrictive form of detention when he was released from prison and placed in the custody of the department, and his detention at MIDC for 33 months, were inconsistent with the prohibition of arbitrary detention in article 9 of the ICCPR.

5 Conditions of detention

55. Mr Ince also claims that his detention was in breach of articles 7 and 10 of the ICCPR.
56. There is an overlap between article 7 and article 10(1) in that inhuman or degrading treatment or punishment under article 7 will also constitute a failure to treat that person with humanity and respect for the inherent dignity of the human person under article 10. The assessment of whether the treatment of a person is inconsistent with article 7 or 10 depends on all the circumstances of the case, including the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim. Factors such as the victim's age and mental health can aggravate the effect of certain treatment so as to bring that treatment within article 7 or 10.²⁶
57. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons. However, a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.²⁷
58. The UNHRC has indicated that the threshold for establishing a breach of article 7 is higher than the threshold for establishing a breach of article 10.²⁸

5.1 The department's response

59. The department submits that Mr Ince's treatment in detention has been in accordance with relevant departmental standards, which have been developed consistently with human rights (including those under article 10 of the ICCPR). It emphasises the provision of appropriate medical care.
60. In the department's view, Mr Ince has been treated with humanity and respect for his dignity during his immigration detention. The department submits that it did consider the appropriateness of community detention, but decided it was not appropriate for a range of reasons, including that Mr Ince was receiving appropriate medical treatment at MIDC and has had an individual health plan drawn up.
61. The department further submits that each of the reviews of Mr Ince's detention have found that his health needs are being met at MIDC. I note, however, that this is only accurate in respect of the department's DRCC reports. Neither of the Ombudsman's reports draws this conclusion. In the second report the Ombudsman queries the appropriateness of Mr Ince's continued detention in light of the circumstances of his case.

62. The department argues that Mr Ince had a pre-existing mental illness for which he received adequate treatment. The department states that the IHMS has advised that, in their view, a combination of factors including ongoing detention, family concerns and uncertainty regarding his future all contributed to a decline in Mr Ince's mental health.
63. The department states that Mr Ince has been managed with ongoing review by a psychiatrist, psychologist and mental health nurse; that he has had scheduled mental state examinations, suicide and self-harm observations as required; and that he has been treated with anti-depressant and anti-psychotic medications. At times of acute exacerbation, Mr Ince was assessed and treated externally, for example by the Enhanced Crisis Assessment Treatment Team in Western General (Footscray) Hospital on 24 March 2010.
64. The department maintained that it explored the possibility of a voluntary admission for Mr Ince to Toowong Private Hospital but, amongst other considerations, security arrangements meant that this was not possible. In addition, consideration was given to referring Mr Ince to a public hospital. However Mr Ince's treating psychiatrist was of the opinion that he would not meet the admission criteria.

5.2 Finding of cruel and degrading treatment

65. Under Article 10, the department is obliged to take positive actions to prevent inhumane treatment of detained persons, such as providing appropriate medical treatment, including mental health care facilities.²⁹ The question to be answered is whether the facts of this case demonstrate a failure to treat Mr Ince humanely and with respect for his inherent dignity as a human being.
66. The department states that it determined that community detention was not appropriate in Mr Ince's case and that Mr Ince's medical needs were appropriately met within the detention environment at MIDC. This directly contradicts the psychiatric report of Dr Walton, who recommended that Mr Ince receive a period of specialist treatment in a psychiatric unit, and that he needed to be released from detention in order for his mental health to improve.
67. I also note that Mr Ince's treating psychiatrist Dr Susan Weigall wrote to the department on 27 October 2010:

In November 2008 Mehmet came to MIDC. When I first saw him in July 2009 he was becoming depressed, but not psychotic. Mehmet went on to develop major depression requiring antidepressant medication. His mental state has become more fragile as his detention has continued. At times he is primarily psychotic and at others more depressed. He is often withdrawn refusing to see me.

Mehmet is receiving antidepressant medication and antipsychotic medication. After a period of stability in prison, I have had to progressively increase his dosage of antipsychotic medication on 6 occasions. In spite of this, it has not been possible to improve Mehmet's mental state for any length of time. This is because medication is only one aspect of treatment for schizophrenia and major depression...

As Mehmet's treating psychiatrist, I am advocating urgent consideration of moving Mehmet to a less restrictive environment, increased family contact and the opportunity to engage in meaningful activities as essential components of effective treatment. Mehmet's ongoing detention at MIDC is not compatible with recovery and I am concerned about its detrimental effect on his long term prognosis.

68. These psychiatric reports document Mr Ince's deteriorating and 'fragile' mental state. Therefore I am satisfied that the Commonwealth's failure to remove Mr Ince from the detention centre environment, where such removal was lawful and reasonably available, denied Mr Ince an effective mental health intervention. My finding is that this constituted a failure to treat Mr Ince humanely and with respect for his inherent dignity as a human being in breach of article 10 of the ICCPR.
69. In *C v Australia*³⁰ the UNHCR made a finding of 'cruel, inhuman and degrading treatment' under article 7 of the ICCPR where an immigration detainee's prolonged arbitrary detention was reported as contributing to his mental health problems and the authorities were aware of this but delayed releasing the detainee from immigration detention.
70. My additional finding is that the continued detention of Mr Ince in a detention centre environment in circumstances where his mental health was seriously deteriorating was cruel and degrading in breach of article 7 (see the majority view in *C v Australia*).

6 Interference with family

71. Mr Ince claims that his removal to Turkey constitutes an interference with his family contrary to article 17 of the ICCPR because his mother, sister and nephew all live in Australia and he has no family members in Turkey.
72. The report of child psychiatrist Dr Robert Chazn dated 23 December 2008 states that Mr Ince has a very close relationship with his nephew:
- [Mr Ince's nephew] is like an orphan even though he is with his mother, who did not bring him up and only became properly known to him when he was 11 years old. His [nephew's] paternal grandparents, who were like parents to him, are both deceased. He has become attached to his uncle, who in spite of being in prison, is a major role model and source of guidance in life. Mehmet is the only close male figure in [his]'s life...
- The bond he has with Mehmet is not replaceable. He has no other kin or kin equivalent.
73. As noted above, I do not consider that the deportation of Mr Ince is a discretionary act or practice that I may review under s 11(1)(f) of the AHRC Act. However, I find that the Minister's refusal to grant Mr Ince a visa under s 501(2) of the Migration Act was an exercise of a discretionary power and therefore an act of the Commonwealth into which I may inquire.
74. I find that the failure by the Minister to place Mr Ince in a less restrictive form of detention also amounts to an 'act' that I may review under the AHRC Act.

6.1 International law in relation to interference with family

75. Article 17(1) of the ICCPR provides:
- No one shall be subjected to arbitrary or unlawful interference with his ... family...
76. Article 23(1) provides:
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

77. For the reasons set out in *Australian Human Rights Commission Report 39*, 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).³¹ If this breach is made out, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).
78. The general principle expressed by the Human Rights Committee is that a State may regulate the circumstances in which non-citizens are permitted to stay in its territory and may require the departure of non-citizens who remain unlawfully in its territory, provided that such action by the state is not an unlawful or arbitrary interference with human rights otherwise protected by the Conventions.³²
79. In its General Comment on Article 17(1), the UNHRC confirmed that a lawful interference with a person's family may still be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.³³ It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness. In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:
- 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.³⁴
80. In the cases of *Stewart v Canada* and *Canepa v Canada*,³⁵ the Committee considered that the serious criminal records of the applicants justified expulsion and found no violation of articles 17 and 23 of the ICCPR, despite the applicants' longstanding residence in Canada and established family ties in that country.
81. In *Stewart v Canada*, Stewart was to be removed to the United Kingdom due to his extensive criminal record. The HRC appeared to agree that the 'nature and quality' of Stewart's family relationships 'could be adequately maintained through correspondence, telephone calls and visits to Canada'.³⁶ The decision to deport Stewart was found not to be arbitrary interference as it was taken in pursuit of 'a legitimate State interest' and due consideration had been given to the impact on family life.³⁷
82. In *Canepa v Canada*, again based on extensive criminal record, Canepa was to be removed to Italy. Canepa had come to Canada with his immediate family when he was five years old, and had lived there for over 20 years. The Committee found that the decision to remove him was not arbitrary in the absence of children or a spouse in Canada, the existence of extended family in Italy, and no evidence that his immediate family in Canada would provide support to help him overcome his drug addiction.³⁸
83. In contrast, in *Nystrom v Australia*,³⁹ where the applicant was also deported due to criminal convictions, the Committee found that the Minister's decision to deport the applicant to Sweden, a country which he left when he was just three weeks old, did constitute arbitrary interference with his family. The Committee found that deportation would have irreparable consequences which would be disproportionate to the legitimate aim of protecting the community from further criminal acts. In addition, the applicant's family would not have the means to visit the author in Sweden, and some 14 years had lapsed since his last conviction.
84. In both *Nystrom* and in *Madafferi v Australia*⁴⁰ it was found that in order to maintain family life, it would be necessary for Australian citizens to relocate to far distant countries whose customs and language were wholly alien. In each case the Committee found breaches of articles 17 and 23 of the ICCPR.

6.2 The department's response

85. The department notes that at the time Mr Ince's visa was cancelled in 2005, his only family in Australia was his mother. Since then, his sister and nephew have come to Australia and are now Australian permanent residents. The department states that Mr Ince's family in Australia has been considered in its reviews of the appropriateness of Mr Ince's detention and noted in its information briefs to the Minister.
86. The department states that the impact on his family of his detention was weighed against consideration of his conviction for murder and the need for protection of the Australian community.
87. The department claims that Mr Ince's removal from Australia did not represent a breach of Article 17 of the ICCPR as any interference with Mr Ince's family unit would be in pursuance of legitimate and appropriate aims and therefore not arbitrary.

6.3 Finding

88. I make the following findings in relation to the complaint of arbitrary interference with family.

(a) The cancellation of Mr Ince's visa pursuant to s 501 of the Migration Act

89. The decision of a delegate of the Minister for Multicultural and Indigenous Affairs to cancel Mr Ince's Class AH101 (Child Migrant) visa was made on 15 November 2004. At this time, Mr Ince's mother was the only family member resident in Australia. I note the evidence that Mr Ince is very close to his mother.
90. The decision to cancel Mr Ince's visa was considered by Deputy President S A Forgie of the Administrative Appeals Tribunal in *Ince v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 92 (31 January 2005). Her decision sets out in great detail the evidence before her. This includes Mr Ince's family background, criminal convictions, mental condition at the time of the murder, Mr Ince's activities and outlook since being imprisoned, his psychiatric and general health care since 1998, and the health of his mother.
91. Deputy President S A Forgie concluded:
 137. I accept Dr Walton's evidence that Mr Ince is continuing to mature psychologically and that substantial control of his paranoid schizophrenia has been achieved...
 139. I do not, however, accept that, in the context of my reviewing the Minister's decision, Mr Ince may have resort to his illness or rely upon it as he seeks to do...
 141. By resorting to illness when asked about his offences, Mr Ince does not give an indication that he has addressed the issues that led him to commit those crimes... He has shown regret for his actions but his expression of regret does not reveal any understanding of his behaviour. His regret is expressed in terms of his hurting himself as well as killing Mr Broadbent and hurting others. It does not reveal any understanding of the errors he has made... Mr Ince's lack of understanding discounts his statement that it [is] impossible that he will re-offend. Taking all of these matters into account, I consider that the risk of Mr Ince's reoffending is quite high...
 - 146 I find that Mr Ince and his mother, Mrs Engez, enjoy a very close relationship. They have maintained that while he has been imprisoned... Mrs Engez in particular feels a dependency on her son...

152. There are issues in this case that cause me great difficulty. The possibility that mother and son will be separated is one of them and Mr Ince's mental illness and its continuing treatment is another... I consider that the risk of Mr Ince's re-offending and committing further crimes... is such that the need to protect the community outweighs the undeniable difficulties that will face Mr Ince in Turkey and those of his mother in Australia.

92. For the reasons set out in this decision, the decision to cancel Mr Ince's visa under s 501 of the Migration Act was affirmed.
93. After careful consideration my finding is that, whether or not I would have reached the same conclusion as the learned Deputy President, it would not be appropriate for the Commission to inquire into this aspect of Mr Ince's complaint as its subject matter has already been fully considered and dealt with by the AAT.

(b) Detaining Mr Ince at MIDC

94. The second aspect of Mr Ince's claim of arbitrary interference with his family relates to his detention at MIDC for 33 months.
95. I consider that detaining Mr Ince at MIDC for 33 months was an arbitrary interference with his family life. I find that this lengthy period of immigration detention was not reasonable and was not proportionate to the department's legitimate aim of protecting the community from non-citizens who pose a risk to the community.
96. Risk assessments for s 501 criminal record detainees should focus on evidence, such as a person's recent pattern of behaviour, rather than suspicion or discrimination based on prior criminal record, for which they have already served a term of imprisonment, or mental illness. The department's concerns in this regard could have been addressed by way of community detention conditions.
97. I find that the failure to place Mr Ince in a less restrictive form of detention was arbitrary interference with his family in breach of Articles 17 and 23 of the ICCPR.

7 Findings and recommendations

7.1 Findings

98. I find that:
 - (a) It was open to the Minister to exercise his powers under s 195A to grant Mr Ince a visa (for example, a bridging (removal pending) visa) or to make a residence determination pursuant to s 197AB for community detention.
 - (b) The prolonged detention of Mr Ince in MIDC was unjust and not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia. The failure to place Mr Ince in community detention or other less restrictive form of detention when he was released from prison, and his detention at MIDC for 33 months, were inconsistent with the prohibition of arbitrary detention in Article 9 of the ICCPR.
 - (c) The continued detention of Mr Ince in a detention centre environment in circumstances where there his mental health was seriously deteriorating was cruel, inhuman and degrading in breach of Articles 7 and 10.

- (d) It is not appropriate for me to reconsider matters already considered and dealt with by the Administrative Appeals Tribunal. Therefore I will not inquire into the aspect of the complaint relating to whether the cancellation of his visa and his removal to Turkey constituted an arbitrary interference with his family.
 - (e) The failure to place Mr Ince in a less restrictive form of detention was arbitrary interference with his family in breach of Articles 17 and 23 of the ICCPR.
99. 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.⁴¹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁴²
100. The Commission may also recommend:⁴³
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person.

7.2 Compensation

101. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
102. However, in considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.⁴⁴
103. I am of the view that this is the appropriate approach to the present matter. Accordingly, 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.⁴⁵

(a) Principles relating to compensation for detention

104. I have been asked to consider compensation for Mr Ince for being arbitrarily detained in contravention of Article 9(1) of the ICCPR.
105. 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 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.
106. 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) of the ICCPR. This is because the damages that are available in false imprisonment matters provide an indication of how the courts have quantified compensation for loss of liberty.
107. 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).⁴⁶

108. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case.
109. In *Taylor v Ruddock*,⁴⁷ the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in New South Wales prisons.
110. Although the award of the District Court was ultimately set aside by the High Court, it provides useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.
111. The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him \$50 000 for the first period of 161 days and \$60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of \$110 000.
112. In awarding Mr Taylor \$110 000 the District Court took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.⁴⁸
113. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.⁴⁹ The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.⁵⁰
114. In *Goldie v Commonwealth of Australia & Ors (No 2)*,⁵¹ Mr Goldie was awarded damages of \$22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.
115. In *Spautz v Butterworth*,⁵² Mr Spautz was awarded \$75 000 in damages for his wrongful imprisonment as a result of failing to pay a fine. Mr Spautz spent 56 days in prison and his damages award reflects the length of his incarceration. His time in prison included seven days in solitary confinement.
116. In *El Masri v Commonwealth*⁵³ President Branson recommended that the Commonwealth should pay the complainant \$90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention. In *Al Jenabi v Commonwealth*⁵⁴ President Branson recommended that the Commonwealth should pay the complainant \$450 000 as compensation for the 16 months he was arbitrarily detained in immigration detention.
117. I have found that on or about 14 November 2008, on his release from prison, Mr Ince should have been placed in community detention. The detention of Mr Ince at MIDC for 33 months was inconsistent with his right not to be arbitrarily detained in breach of article 9(1) of the ICCPR. It also arbitrarily interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR.
118. I have also found that the continued detention of Mr Ince in a detention centre environment when the medical evidence recommended that he be moved into the community, given his mental health had so seriously deteriorated, was cruel, inhuman and degrading in breach of Articles 7 and 10.

(b) Compensation for detention

119. On the issue of compensation, Mr Ince submitted:

I am not experienced in matters of putting a dollar value on my suffering and the humiliation received by Australian institution and the Australian people to whom I was portrait [sic] as the most evil murderer in history by the media, courtesy of Mr Hinch. If I have to name a dollar value, then I honestly believe a sum of no less than AUD 1.5 to 2 million is not beyond reasonable for all I have endured and been exposed.⁵⁵

120. The department submitted that it did not intend to pay compensation to Mr Ince.⁵⁶ I note that the Adult Parole Board of Victoria found in 2008 that incarceration was unnecessary, and decided to release Mr Ince from prison on parole after serving ten years of a fifteen year sentence. Despite this, The department contends that:

Mr Ince's detention was justified on the basis of him being on a removal pathway... and due to the risk of him absconding pending removal... his detention was justified due to him posing an unacceptable risk to the community because of his criminal record involving violent crime..... Psychological assessments found that Mr Ince was suffering from paranoid schizophrenia which contributes to his violent behaviour... The impact on his family [of his detention] was considered along with Mr Ince's record of violent crime and the protection of the Australian community...⁵⁷

121. The department also submits that:

Mr Ince had a pre-existing mental illness, for which he was receiving adequate treatment...⁵⁸

122. Had Mr Ince been placed in community detention on his release from prison on 16 November 2008, it is likely that he would have experienced some curtailment of his liberty as a result of the imposition of conditions upon which he would have been allowed to reside in the community. I have taken this into account when assessing his compensation.
123. I have also taken into account the fact that Mr Ince's detention in MIDC followed directly from a lengthy period of imprisonment within the Victorian Correctional system. In this regard, I note His Honour's statement in *Ruddock v Taylor*, that 'as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish'.⁵⁹
124. Assessing compensation in such circumstances is difficult and requires a degree of judgment. I have considered the particular circumstances of Mr Ince's case including his age, his lengthy period of imprisonment, the place in which he was detained and the length of time for which he was detained. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of \$450 000 is appropriate.

7.3 Apology

125. I have been asked to consider recommending that the Commonwealth provide a formal written apology to Mr Ince for breaching his human rights.
126. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Ince. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.⁶⁰

8 The department's response to recommendations

127. On 26 July 2012 President Branson provided a Notice under s 29(2)(a) of the AHRC Act outlining her findings and recommendations in relation to the complaint made by Mr Mehmet Ince.
128. By letter dated 13 August 2012 the department provided the following response to President Branson's findings and recommendations:

The Department's response on behalf of the Commonwealth of Australia to the recommendations of the Australian Human Rights Commission with regard to Mr Mehmet Ince.

1. *That the Commonwealth pay to Mr Ince compensation in the amount of \$450 000.*

The Department disagrees with this recommendation.

In the Department's view Mr Ince was detained lawfully in accordance with the Migration Act 1958 (the Act) and further his detention was not arbitrary.

Accordingly, the Department advises the Commission that there is no basis for the payment of compensation and therefore there will be no action taken with regard to this recommendation.

2. *That the Commonwealth provide a formal written apology to Mr Ince.*

The Department disagrees with this recommendation.

Mr Ince did not hold a valid visa to remain in Australia due to the cancellation of his visa under section 501 of the Act. His immigration detention was lawful in accordance with section 189 of the Act. The Minister considered the circumstances of Mr Ince's case, including his mental health and community links, as well as his record of violent crime and the protection of the Australian community, and decided that it was not in the public interest to exercise his Ministerial intervention powers.

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

129. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

April 2013

- 1 *R v Ince* [2000] VSC 118 (8 February 2000) at [13].
- 2 *Ibid* at [2] to [5].
- 3 *Ibid* at [7].
- 4 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 5 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. On 22 October 1992, the Attorney-General made a declaration under s 47 that the 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*.
- 6 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.
- 7 UN Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- 8 *Manga v Attorney-General* [2000] 2 NZLR 65 at [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.
- 9 *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.
- 10 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 11 *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.
- 12 Email dated 2 July 2010 from Sally Lavers, Assistant Director, Ombudsman and Human Rights Coordination, Department of Immigration and Citizenship, attaching response to Mr Ince's complaint.
- 13 Report by the Commonwealth and Immigration Ombudsman to the Secretary of the Department of Immigration and Citizenship dated 23 March 2010, p 2.
- 14 *Ibid*.
- 15 *Ibid*.
- 16 *Ibid*, p 3.
- 17 The Department of Immigration and Citizenship, *Monthly Case Plan Review – Mehmet Ince*, 1 September 2009.
- 18 The Department of Immigration and Citizenship, *Monthly Case Plan Review – Mehmet Ince*, 16 July 2009.
- 19 Report of Dr Walton dated February 2009, quoted in Report by the Commonwealth and Immigration Ombudsman to the Secretary of the Department of Immigration and Citizenship dated 4 August 2009, p 2.
- 20 Report of Dr Walton dated 20 September 2010.
- 21 Report of Dr Walton dated 20 September 2010.
- 22 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Addendum, Summary of communications sent and replies received from States and other actors, United Nations General Assembly A/HRC/17/25/Add.1*.
- 23 Medical report of Rafaela Rivera of IHMS, MIDC Mental Health Team Leader, dated 29 July 2010.
- 24 *Migration Act 1958* (Cth), ss 195A(2) and (5).
- 25 *Migration Act 1958* (Cth), s 195A(4).
- 26 *Vuolanne v Finland*, Communication no 265/1987: CCPR/C/35/D/265/1987 at [9.2]; *Brough v Australia*, Communication no 1184/2003: CCPR/C/86/D/1184/2003 at [9.4]. See also *Keenan v United Kingdom* [2001] ECHR 242 (3 April 2001), with respect to the meaning of the equivalent provision in the *Convention for the Protection of Human Rights and Fundamental Freedoms*.
- 27 *C v Australia* Communication no 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2]. See also *D and E v Australia* Communication no 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication no 1014/2001 UN Doc CCPR/C/78/D/1014/2001 [7.2], *Bakhtiyari v Australia* Communication no 1069/2002 UN Doc CCPR/C/79/D/1069/2002 [9.2].
- 28 '[...]it is...stressed that the requirement of humane treatment pursuant to Article 10 goes beyond the mere prohibition of inhuman treatment under Article 7 with regard to the extent of the necessary "respect for the inherent dignity of the human person".' See M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 247-8.
- 29 UN Human Rights Committee, General Comment 21 (1992) and UN Human Rights Committee, General Comment 9 (1982).
- 30 *C v Australia*, Communication no 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), [8.4]. Commentators have suggested that there is 'little doubt' that the majority's decision was linked with its finding that the detention was arbitrary. S Joseph, J Shultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004) [9.51].
- 31 Australian Human Rights Commission, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2007] AusHRC 39, [80]-[88].
- 32 See *Winata v Australia* [2001] UNHRC 24; UN Doc CCPR/C/72/D/930/2000.
- 33 United Nations Human Rights Committee, General Comment 16 (Thirty-second 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].

34 *Toonen v Australia* Communication no 488/1992 UN Doc CCPR/C/50/D/488/1992 at [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.

35 *Stewart v Canada*, Communication no 538/1993 UN Doc CCPR/C/59/D/558/1993, *Canepa v Canada*, Communication no 558/1993 UN Doc CCPR/C/59/D/558/1993.

36 *Ibid*, para 9.4.

37 *Ibid*, para 12.10.

38 *Canepa*, as above, at para 11.5

39 *Nystrom v Australia*; UN Doc CCPR/C/102/D/1557/2007.

40 *Madafferi v Australia* [2004] UNHRC 24; UN Doc CCPR/C/81/D/1011/2001.

41 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).

42 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).

43 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).

44 *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).

45 *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217 at 239 (Lockhart J).

46 *Cassell & Co Ltd v Broome* (1972) AC 1027 at 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999) at [87].

47 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).

48 *Ibid* at [140].

49 *Ruddock v Taylor* [2003] NSWCA 262 at [49]-[50].

50 *Ibid* at [49].

51 *Goldie v Commonwealth of Australia & Ors (No 2)* [2004] FCA 156.

52 *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA).

53 *El Masri v Commonwealth* [2009] AusHRC 41 at [376].

54 *Al Jenabi v Commonwealth* [2011] AusHRC 45 at [101].

55 Letter from Mr Ince to the AHRC dated 27 December 2011.

56 Letter from Andrew Metcalfe to President, AHRC dated 10 February 2012.

57 Response from DIAC under cover of letter from Andrew Metcalfe to President, AHRC, dated 13 February 2012.

58 *Ibid*.

59 (2003) 58 NSWLR 269 [49].

60 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

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