Australian Human Rights Commission

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El Masri v Commonwealth (Department of Immigration and Citizenship)

(2009) AusHRC 41

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El Masri v Commonwealth (Department of Immigration and Citizenship)

Report into unlawful and arbitrary detention and the right of people in detention to humane treatment

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August 2009

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

Dear Attorney

I attach my report of an inquiry into the complaints made pursuant to section 11(1)(f)(ii) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Mrs Cheryle El Masri on behalf of Mr Ahmed El Masri.

I have found that the acts and practices of the Commonwealth breached Mr El Masri's right not to be subject to unlawful or arbitrary detention and his right to be treated with humanity and dignity while in detention. These fundamental human rights are protected by article 9(1) of and article 10(1) of the *International Covenant on Civil and Political Rights.*

By letter dated 10 July 2009 the Department of Immigration and Citizenship provided the following response to my findings and recommendations:

> The department has reviewed the findings and accepts that certain acts and/or practices were inconsistent with and contrary to human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
>
> The department acknowledges the President's recommendation to:
>
> - pay compensation in the amount of $105,000.00 to Mr El Masri;
> - provide a formal written apology to Mr El Masri for the breaches of human rights identified in the report; and
> - amend the Migrations Series Instructions 411: Establishing immigration status – in the field and in detention to require officers to reassess the lawfulness of a person's detention where the basis for that person's detention may be affected by recent legal developments, including court decisions affecting a class of people.
>
> The issue of compensation is complicated by Mr El Masri's ongoing damages claim in the NSW Supreme Court involving the Commonwealth and the detention service providers. The Commonwealth is currently considering the President's recommendation in light of that litigation.
>
> The department accepts the President's recommendation to provide a formal written apology and we will forward you a copy once it is sent.

Human Rights and Equal Opportunity Commission

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Migration Series Instruction 411 has been updated to require compliance and detention staff to consider relevant case law when assessing whether or not a person may be unlawful and liable to be detained. In recognition of the significance of the issue, the department has also implemented a Chief Executive Instruction (CEI 33). CEI 33 provides direction to all staff requiring certain processes to be followed where adverse litigation outcomes have potential implications for detention and/or removal. The CEI requires the involvement of departmental officials at the highest levels to ensure that the processes outlined in the CEI are followed. A copy of CEI 33 is enclosed for your information.

CEIs are binding on departmental staff and staff can be sanctioned under the Australian Public Service Code of Conduct in the event of a breach.

At the date this report was finalised, the Department had not provided further advice about the outcome of their consideration of my recommendation that Mr El Masri be paid compensation. I have been provided with a copy of the letter of apology from the Department to Mr El Masri.

Yours sincerely

The Hon Catherine Branson QC
President
Australian Human Rights Commission

Contents

Introduction

1. This report is about the detention of Mr El Ahmed Masri and his right to liberty and humane treatment.
2. The report finds that the failure to conduct a timely and thorough review of the legality of Mr El Masri's detention significantly delayed his release from immigration detention. It investigates why Mr El Masri, who has been diagnosed with schizo-affective disorder, was kept in isolation in what is known as the 'Management Support Unit' of the Villawood Immigration Detention Centre for 77 days. Finally, it examines the administrative failures that led to Mr El Masri being again detained a year after his release from detention despite being the holder of a valid visa.
3. Mr El Masri has lived in Australia since 1976. He was twelve years old when he arrived here from Lebanon with his family. He has lived in Australia ever since but he is still a citizen of Lebanon. In 1992 he married Cheryle El Masri. They have five children.
4. Mr El Masri has a long criminal record. In 2002 his visa was cancelled on character grounds and he was taken into immigration detention.
5. When Mr El Masri had been in detention for over two years, the Full Federal Court made a decision about a man called Mr Nystrom who had lived in Australia from a young age before having his visa cancelled on character grounds. The Court decided that the decision to cancel Mr Nystrom's visa was legally wrong because the Minister did not consider whether Mr Nystrom had been absorbed into the Australian community.
6. The decision in *Nystrom* cast doubt on whether an identifiable class of people should continue to be detained. Identifying and reviewing the case of individuals who may have held visas and be entitled to be released from detention should have been an urgent priority. People's liberty depended upon it.
7. Following the Court's decision, the Department of Immigration and Citizenship should have urgently sought to identify whether the type of error that was made in Mr Nystrom's case had been made in the cases of other people who were still in immigration detention. I have found that the Department took too long to identify that Mr El Masri may have been 'Nystrom-affected'.
8. Once Mr El Masri was identified as someone who may have been 'Nystrom-affected', an urgent review of his individual case should have been commenced – and completed – within 10 days. The person conducting the review should have made reasonable inquiries – including giving Mr El Masri to the chance to put his case – before completing the review. This did not happen.

9. Instead, it took three months and 13 days for the Department to identify that, in light of the decision in *Nystrom*, the reasonable suspicion that Mr El Masri was an unlawful non-citizen had been lost. By the time Mr El Masri was released from immigration detention on 14 October 2005 he had been in immigration detention for two years and eleven months. His mental health had deteriorated. His discharge summary said he required 'ongoing psychiatric care'.

10. During his last three months in detention Mr El Masri was detained for 77 days in isolation in the Management Support Unit. He was diagnosed with schizoaffective disorder and frequently transported from Villawood Immigration Detention Centre to Bankstown Hospital for psychiatric assessment and treatment.

11. The failure of the Department to conduct a timely and thorough review of Mr El Masri's case prevented his early release at a time when medical experts agreed that the best place to treat his mental illness was in the community. This Report finds that this failure was inconsistent with Mr El Masri's right not to be arbitrarily detained.

12. After Mr El Masri was released, a Federal Court judge (Justice Allsop) made an order that Mr El Masri had a valid visa. Although the Department had lodged an appeal to the High Court against the decision in Nystrom, the Department did not record the fact that Mr El Masri held a valid visa by reason of the order of Justice Allsop.

13. This meant that when the High Court decided on 8 November 2006 that the Full Federal Court's decision in Nystrom was wrong, the Department thought this decision meant that Mr El Masri was again an unlawful non-citizen. It did not. The order made by Justice Allsop made clear that Mr El Masri held a valid visa.

14. Nevertheless, on the 28 November 2006, over a year after Mr El Masri was released from detention, police and departmental officers went to his home. His daughter answered the door. Police officers led Mr El Masri out onto the street in his t-shirt and underwear and took him to Villawood Immigration Detention Centre.

15. Seven hours later Mr El Masri was released from detention.

16. Asked why Mr El Masri was detained on 28 November 2006, the Department has said it had failed to update its record-keeping system.

17. Section 189 of the *Migration Act 1958* (Cth) (Migration Act) is expressed in mandatory terms – a departmental officer must detain a person who they reasonably suspect is an unlawful non-citizen. However, the mandatory requirement to detain a person under s 189 does not deprive the Department of its power to do other acts (for example, to continue to review the legality of a person's ongoing detention and to keep up-to-date and accurate records). Doing these acts can protect a person's right to liberty. Failing to do these acts may result in a breach of Australia's obligations under the *International Covenant of Civil and Political Rights*.

18. This report finds that two administrative failures – the failure to conduct a prompt and thorough review of the legality of Mr El Masri's ongoing detention and the failure to record the fact that he had a valid visa – resulted in the unnecessary and arbitrary detention of a mentally ill man.

19. I have recommended that Mr El Masri be paid a total of $105 000 in compensation and that the Commonwealth apologise to Mr El Masri. The Department has accepted my findings that Mr El Masri's human rights were breached and implemented policies and procedures that I believe will help prevent such breaches occurring in the future.

Part A:
Structure of this report

20. This report concerns the human rights of Mr Ahmad El Masri while in immigration detention. I have found that Mr El Masri's human rights were breached by the actions of the Department of Immigration and Citizenship (the Department) (formerly known as the Department of Immigration and Multicultural and Indigenous Affairs).[1]

21. I have also inquired into the actions of GSL (Australia) Pty Ltd (GSL) which at the relevant time was contracted to manage the Villawood Immigration Detention Centre (VIDC) where Mr El Masri was detained. I made this inquiry because I accepted these actions were taken on behalf of the Commonwealth. I have not found that the actions of GSL on behalf of the Commonwealth breached the human rights of Mr El Masri.

22. The complaints relate to the following events:

    (a) The detention of Mr El Masri in VIDC from 14 November 2002 to 14 October 2005.

    (b) The detention and treatment of Mr El Masri in the Management Support Unit from 29 July 2005 to 14 October 2005.

    (c) An incident on 8 August 2005 where Mr El Masri was allegedly assaulted by GSL officers.

    (d) The circumstances in which Mr El Masri's visits from his family occurred.

    (e) The restrictions placed on Mr El Masri's ability to contact his lawyer and family while in immigration detention.

    (f) The detention of Mr El Masri in VIDC for approximately seven hours on 28 November 2006.

23. Following the summary of my findings and recommendations in **Part B**, **Part C** of this report sets out the background to the complaints. **Part D** explains the special nature of the Commission's functions of inquiring into complaints of human rights breaches. **Parts E-J** of this report explain my conclusion regarding the allegations of breaches of human rights and **Part K** sets out my findings and recommendations.

24. I have also included a glossary at the end of my report that explains the abbreviations I have used in the report.

25. 'Human rights' for the purposes of this report means the human rights protected by the *International Covenant on Civil and Political Rights* (ICCPR).[2]

Part B:
Summary of findings and recommendations

(a) Detention of Mr El Masri from 16 July 2005 to 14 October 2005 inconsistent with art 9(1) of the ICCPR

26. I find that the failure of the Department to conduct a timely and thorough review of Mr El Masri's immigration status following the Full Federal Court's decision in *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (*Nystrom*)[3] on 1 July 2005 resulted in his unlawful detention and was inconsistent with his right not to be arbitrarily detained.

27. A timely and thorough review would have identified that Mr El Masri held an absorbed person visa. This conclusion was ultimately reached on 14 October 2005 and Mr El Masri was released from detention.

28. In my view, it is reasonable to expect that a review of Mr El Masri's immigration status following *Nystrom* should have been completed no later than 16 July 2005. I therefore conclude that Mr El Masri should have been released from immigration detention no later than 16 July 2005.

29. I therefore find that Mr El Masri's detention from 16 July 2005 to 14 October 2005 was unlawful in breach of art 9(1) of the ICCPR and the failure of the Department to act promptly to review Mr El Masri's case was inconsistent with his right not to be arbitrarily detained.

(b) Failure to treat Mr El Masri with humanity and dignity inconsistent with art 10(1) of the ICCPR

30. I find that the placement of Mr El Masri in the Management Support Unit (MSU) of VIDC for substantially the entire period from 29 July 2005 to 14 October 2005 breached Mr El Masri's right to be treated with humanity and dignity under art 10(1) of the ICCPR.

31. It was inappropriate for a person with Mr El Masri's mental health problems to be kept in the restrictive and isolated conditions of MSU. The conditions and circumstances in which Mr El Masri found himself in MSU caused him anxiety or mental suffering over and above that otherwise caused by his detention.

(c) Detention of Mr El Masri on 28 November 2006 inconsistent with art 9(1) of the ICCPR

32. I find Mr El Masri was unlawfully detained on 28 November 2006. There were two causal factors for Mr El Masri's detention on this date: the failure properly to record the decision of Justice Allsop

on 24 November 2005 to restore Mr El Masri's transitional (permanent) visa; and the failure to conduct appropriate searches of court orders relating to Mr El Masri. These failures by the Department to act were inconsistent with Mr El Masri's right not to be arbitrarily detained.

(d) Other allegations of breaches of human rights not upheld

33. I find that Mr El Masri's initial detention on 14 November 2002 pursuant to s 189 of the Migration Act was not a discretionary act or practice of the Department and therefore falls beyond the scope of my power of inquiry under s 11(1)(f) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act).

34. There is also insufficient evidence to conclude that Mr El Masri's detention became arbitrary during the period between 14 November 2002 and 16 July 2005 when I have found that a review of Mr El Masri's immigration status should have been completed.

35. The evidence before me does not support a finding that Mr El Masri was assaulted on 8 August 2005. I therefore find there was no breach of the prohibition on cruel, inhumane or degrading treatment (art 7 of the ICCPR) or the obligation to treat detainees humanely (art 10(1) of the ICCPR) arising out of the incident on that date.

36. I am not satisfied that the evidence is sufficient to establish that the restrictions placed upon Mr El Masri's telephone calls were arbitrary and in breach of Mr El Masri's human rights under arts 10, 17(1) and 23 of the ICCPR.

37. Nor am I satisfied that the evidence is sufficient to establish that Mr El Masri was denied adequate access to his family or that the conditions in which visits by his family occurred constituted a breach of Mr El Masri's right to humane treatment under art 10(1) of the ICCPR or an arbitrary interference with, or failure to protect, Mr El Masri's right to family under arts 17(1) and 23 of the ICCPR.

Part C:
The complaints by Mr El Masri

Background

38. This inquiry is the result of a complaint by Mrs Cheryle El Masri (the Complainant) on behalf of her husband, Mr Ahmad El Masri, against the Commonwealth of Australia (the Department).

39. This complaint can be divided into six allegations:

- Mr El Masri was unlawfully detained in immigration detention from 14 November 2002 to 14 October 2005: **Part E.**
- Mr El Masri was unlawfully detained on 28 November 2006: **Part F**.
- Mr El Masri's prolonged detention in MSU breached his human rights: **Part G.** The allegation that Mr El Masri received inadequate medical care while in MSU is also dealt with in **Part G.**
- Mr El Masri was assaulted by guards on 8 August 2005: **Part H.**
- Mr El Masri's phone calls to his family and his legal representative were restricted: **Part I.**
- Mr El Masri's children were required to visit him when he was detained 'in a cage': **Part J.**

40. Both the Complainant and the Department have provided submissions in this matter. A summary of the submissions and evidence provided in this matter is contained at **Appendix 1.**

41. The Department and the Complainant have also had the opportunity to respond to my tentative view dated 19 January 2009.

42. In response to my tentative view, the Department submitted that the Commission should not continue to inquire into the acts or practices complained of by Mr El Masri pursuant to s 20(2)(c)(iv) of the HREOC Act, 'as it is clear that Mr El Masri is seeking a more appropriate remedy in relation to the subject matters of the complaint by way of litigation in the Supreme Court of New South Wales'.[4]

43. I decided not to discontinue my inquiry. As I explained in my letter to the Department, there were a number of factors I considered in making this decision. One important factor was that complaints of breaches of human rights are, by their nature, different from common law claims. For example, determining a complaint of being subjected to arbitrary detention contrary to art 9(1) can be

distinguished from an action in a case of false imprisonment. The tort of false imprisonment will occur when the unlawful conduct of one person deprives another person of their liberty. A breach of art 9(1) will occur where a person's detention occurs as a result of unlawful acts or where a person's detention becomes arbitrary as a result of unjust or unreasonable acts or the unjust or unreasonable application of the law.

44. My function in investigating complaints of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.

45. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of international instruments and by international jurisprudence about their interpretation.

Findings of fact

46. I consider the following statements about the circumstances which have given rise to Mr El Masri's complaints to be uncontentious.

47. Mr El Masri is a citizen of Lebanon. He was born in 1964 and arrived in Australia with his family in 1976 when he was 12 years old. He has lived here ever since.

48. In 1992, Mr El Masri married Mrs Cheryle El Masri, who brought this complaint to the Commission on his behalf. Together they have five children.

49. Mr El Masri has a criminal record. Mr El Masri's first criminal offence occurred when he was thirteen years old, and other convictions followed.

50. Mr El Masri has a history of mental illness that predates his entry into immigration detention.

51. In 2000, Mr El Masri was convicted of three counts of armed robbery and sentenced to a minimum term of two years and an additional term of two years.

52. On 25 August 2002, Mr El Masri's transitional (permanent) visa was cancelled on character grounds under s 501(2) of the Migration Act. By virtue of Mr El Masri's convictions, he was considered to have a 'substantial criminal record' within the meaning of s 501(6)(a) of the Migration Act and therefore did not pass the character test in s 501(2).

53. On 14 November 2002, Mr El Masri was taken into immigration detention. On 15 August 2003, he was transferred from Metropolitan Reception and Remand Centre (MRRC) at Silverwater to VIDC.

54. On 1 July 2005, the Full Federal Court handed down its decision in *Nystrom.*[5] The Full Federal Court considered whether the decision of the Minister to cancel Mr Nystrom's transitional (permanent) visa on character grounds pursuant to s 501 of the Migration Act was affected by jurisdictional error. The Court held that the Minister committed a jurisdictional error by failing to take into consideration the fact that Mr Nystrom also held an absorbed person visa. Alternatively, if Mr Nystrom held only an absorbed person visa and not a transitional (permanent) visa, as Mr Nystrom contended, the Minister had cancelled a non-existent visa, which was not a valid exercise of power.

55. On 29 July 2005, Mr El Masri was placed in the MSU, a short term facility in VIDC where people who are disruptive or at risk of self-harm are detained in isolation under frequent observation.

56. On a date no later than 29 August 2005, Mr El Masri was identified by the Department as a person who may be *Nystrom* affected.

57. On 30 August 2005, a departmental officer sent an email stating that the question of whether Mr El Masri held an absorbed person visa was 'legally tricky' and that it may be appropriate to seek external advice.[6]

58. Over two weeks later on 16 September 2005, the same departmental officer sent an email titled 'PRELIMINARY ADVICE – NOT FINAL – NOT YET SECOND COUNSELLED' that stated 'on balance, I think it is open for the view to be taken that Mr A S El Masri probably never 'ceased to be an immigrant' before the critical date of 2 April 1984 and therefore is not deemed to have held an absorbed person visa by operation s 34 of the Migration Act 1958'.[7]

59. On 28 September 2005 Mr El Masri's lawyer, Ms Michaela Byers, sent an email to the Director of the Detention Case Co-ordination stating Mr El Masri had instructed her to 'make a habeas corpus application in the Federal Court to seek his release from detention'. Ms Byers stated Mr El Masri should be released pursuant to the Federal Court's authority in *Nystrom*.[8]

60. On 4 October 2005 Ms Byers wrote to Australian Government solicitors advising that she had filed an application on behalf of Mr El Masri in the Federal Court, a directions hearing had been set down for 19 October 2005, and her client would be 'making an application for injunction for release this week'.

61. On 14 October 2005, Mr El Masri was released from VIDC on the basis that he met the objective criteria for the granting of an absorbed person visa under s 34 of the Migration Act. The same day an email from a departmental officer asked that Mr El Masri be advised that '[h]aving regards to the information now available, including the letter of today, the 14 October 2005, from your legal representative Ms Michaela Byers, we are releasing you from immigration detention on the basis that you may hold an absorbed person visa by operation of section 34 of the Migration Act 1958 and may also hold a transitional (permanent) visa'.[9]

62. On 24 November 2005, Justice Allsop ordered that a writ of certiorari be issued, quashing the decision of the Minister to cancel Mr El Masri's transitional (permanent) visa.[10] Both Mr El Masri and the Minister agreed that the decision to cancel Mr El Masri's transitional (permanent) visa was vitiated by jurisdictional error on the authority of *Nystrom*.[11]

63. At the time of the order of Justice Allsop, the Department had lodged a High Court appeal against the decision in *Nystrom.*

64. As a result of the decision of Justice Allsop, Mr El Masri's transitional (permanent) visa was re-instated. However, departmental systems were not updated with the information that Mr El Masri's transitional (permanent) visa had been restored to him.

65. On 8 November 2006, the High Court upheld an appeal from the decision of the Full Federal Court in *Nystrom*.[12] The High Court said that when the Minister cancelled a transitional (permanent) visa on character grounds, the Minister automatically cancelled the person's *absorbed person* visa, whether the Minister considered cancelling this visa or not.

66. The decision of the High Court to overturn the Full Federal Court's decision in *Nystrom* did not validate the original cancellation of Mr El Masri's transitional (permanent) visa because, by virtue of the order of Justice Allsop, Mr El Masri's transitional (permanent) visa had been reinstated.

67. On 28 November 2006, Mr El Masri was detained in VIDC. The duration of his detention from the time of his arrest at 5:50 am to his release at 1:00 pm on the same day was approximately 7 hours.

Part D:
The Commission's human rights inquiry and complaints function

68. Section 11(1)(f) of the HREOC Act gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right.

69. Section 20(1)(b) of the HREOC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

70. The phrase 'inconsistent with or contrary to any human right' in the HREOC Act is not defined or otherwise explained in the HREOC Act. I understand the phrase 'inconsistent with or contrary to' be a composite expression with the consequence that the Commission has the function of inquiring into any act or practice that may be inconsistent with or contrary to a person's human rights, as recognised in international human rights jurisprudence.[13]

The Commission can inquire into acts or practices done by or on behalf of the Commonwealth

71. The Commission has the function of inquiring into any act or practice that may be inconsistent or contrary to 'human rights', as defined in the HREOC Act.

72. The expressions 'act' and 'practice' are defined in s 3(1) of the HREOC Act as follows to include an act done or a practice engaged in 'by or on behalf of the Commonwealth', or under an enactment.

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

74. An 'act' or 'practice' only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

75. As a judge of the Federal Court, in *Secretary, Department of Defence v HREOC, Burgess & Ors* ('Burgess'),[14] I found that the Commission can not, in conducting its inquiry, disregard the legal obligations of the Secretary in exercising a statutory power. Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, its officers or its agents, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission's human rights inquiry jurisdiction.[15]

76. It is clear that decisions about Mr El Masri's treatment and accommodation within the immigration detention system while he was detained in VIDC are acts and practices to which the HREOC Act applies.

77. In the circumstances of this complaint, some of the alleged acts (or omissions) were performed by officers employed by GSL, a private company contractually engaged by the Commonwealth to provide immigration detention centre services on behalf of the Commonwealth. In my view, the acts of GSL are acts done 'by or on behalf of the Commonwealth' for the purposes of s 3(1).[16]

78. The situation is not so clear in respect of Mr El Masri's complaint that his detention was unlawful or arbitrary contrary to art 9(1) of the ICCPR. Mr El Masri was detained under s 189(1) of the Migration Act, which provides:

> If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

79. Where an officer has a 'reasonable suspicion' that a person is an unlawful non-citizen, they are required under s 189 to detain them. They have no discretion in relation to that decision and it accordingly falls beyond the scope of Commission's human rights inquiry jurisdiction.

80. However, officers retain a degree of discretion in relation to their statutory powers and functions concerning a person who is held in mandatory immigration detention. It is not the case that all acts, including failures to act, in relation to a person who is in immigration detention are beyond the scope of the Commission's human rights inquiry jurisdiction.

81. Relevant to this case, s 189 does not prevent an officer from reconsidering their suspicion or checking the bases upon which that suspicion has been formed to consider its reasonableness. In my view, a failure to do so is an 'act' into which I can inquire.

82. I therefore consider that the Commission has the power to inquire into the discretionary administrative acts and practices of officers of the Commonwealth – including failures to act – which may have the effect of unjustly or inappropriately prolonging a person's detention in breach of art 9(1) of the ICCPR.

'Human rights' relevant to these complaints

83. The expression 'human rights' is defined in s 3 of the HREOC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the HREOC Act.

84. The allegations in this matter raise questions about whether acts or practices of the Commonwealth are inconsistent with the rights of Mr El Masri under the ICCPR. The articles that are of particular relevance to the complaint are:

- Art 9(1) (prohibition on arbitrary detention);
- Art 10(1) (humane treatment of people deprived of their liberty);
- Art 7 (prohibition on cruel, inhumane and degrading treatment);
- Art 17(1) (prohibition against arbitrary interference with family) and art 23 (protection of family).

(a) Article 9(1) of the ICCPR

85. Mr El Masri's allegation that his detention was unlawful raises for consideration art 9(1) of the ICCPR, which provides:

> Everyone has the right of 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 procedures as are established by law.

86. The right to liberty in art 9(1) guarantees that 'no one shall be subjected to arbitrary arrest or detention'. Detention includes immigration detention.[17]

87. The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that a detention be lawful. In *Van Alphen v The Netherlands,*[18] the United Nations Human Rights Committee (UNHRC) said:

> [A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[19]

88. A similar view was expressed in *A v Australia,*[20] in which the UNHRC said:

> [T]he Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.[21]

89. In *MIMIA v Al Masri*,[22] the Full Federal Court stated that art 9(1):

> …. requires that arbitrariness is not to be equated with 'against the law' but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust.[23]

90. This broad view of arbitrariness has also been stated in the case of *Manga v Attorney-General,*[24] where Hammond J concluded that:

> The essence of the position taken in the tribunals, the case law, and the juristic commentaries is that under [the ICCPR] all unlawful detentions are arbitrary; ***and* lawful detentions *may also* be arbitrary**, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality (emphasis added)….
>
> It has also been convincingly **demonstrated that the reason for the use of the word 'arbitrary' in the drafting of the international covenant was to ensure that both 'illegal' and 'unjust' acts are caught**. The (failed) attempts to delete the word 'arbitrary' in the evolution of art 9(1), and replace it with the word 'illegal' are well documented (emphasis added).[25]

91. In another New Zealand case dealing with arbitrary arrest and detention, *Neilsen v Attorney-General,*[26] it was held that:

> An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.[27]

92. In the context of the European Convention on Human Rights, a broad view has also been taken as to the scope of the term arbitrary. The European Court of Human Rights has held that:

> [I]t is a fundamental principle that no detention which is arbitrary can be compatible with [art] 5(1) and the notion of 'arbitrariness' in [art] 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[28]

93. The Court further held that 'one general principle established in the case law is that detention will be 'arbitrary' where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities'.[29]

94. A person's detention that is initially not unlawful or arbitrary may come to breach art 9(1) by reason of subsequent events which change the nature of the detention. This may occur where a person's detention is prolonged in circumstances which are inappropriate, unjust, or lack predictability or proportionality.

95. Determining if prolonged detention has become arbitrary involves the application of a 'proportionality test'.[30] Detention may become arbitrary in circumstances where the limitation imposed upon a person's right to freedom is no longer demonstrably necessary and proportionate to the pursuit of legitimate aims.[31]

96. Even a short period of detention may be considered arbitrary. For example, in *Spakmo v Norway*,[32] the UNHRC accepted that the police were justified in arresting and detaining Mr Spakmo in order to stop him carrying out demolition work that they considered to be disturbing the peace. The UNHRC was not, however, satisfied that he needed to be detained for a period of eight hours in order to achieve this aim and, as such, the detention was arbitrary, in violation of art 9(1).

(b) Article 10(1) of the ICCPR

97. The allegations regarding Mr El Masri's detention and medical treatment in the MSU, as well as the allegations concerning restrictions placed on Mr El Masri's contact with his family, raise potential breaches of art 10(1) of the ICCPR, which provides:

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

98. Article 10(1) of the ICCPR requires States to treat all persons deprived of their liberty 'with humanity and respect for the inherent dignity of the human person'.[33] This requirement is generally applicable to persons deprived of their liberty – including in immigration detention.[34]

99. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.[35] However, a complainant must demonstrate that he or she has suffered more than just the condition of detention to substantiate a breach of the right to be treated humanely in detention under art 10(1) of the ICCPR.[36]

100. In particular, the alleged breach of art 10(1) must impact on one or more human needs other than liberty or freedom.[37] For example, failing to respect the rights and interests of detainees to maintain family connections,[38] know one's own personal information,[39] hunger,[40] company, light, sanitation and bedding[41] as well as personal space.[42]

101. In the Commission's 2009 Report into complaints by immigration detainees, the Commission expressed the view that arranging for Chinese officials to interview asylum seekers without explaining the purpose of the interview, causing fear and distress, was a violation of art 10 of the ICCPR.[43]

102. In this report, the Commission expressed the view that ultimately, whether there has been a breach of art 10(1) will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.[44]

103. In determining this question regard should be had to the jurisprudence of the UNHRC; the Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules);[45] and the Body of Principles for the Protection of all Persons under Any Form of Detention (the Body of Principles).[46]

104. The UNHRC has indicated that compliance with the Standard Minimum Rules and the Body of Principles is the minimum requirement for compliance with the obligation imposed under art 10(1) that people in detention be treated humanely.[47]

(i) Standards of medical care

105. Art 10(1) places a positive obligation on Australia to provide a certain level of basic services, including medical care.

106. The content of this obligation is informed by principle 24 of the Body of Principles, which states:

> A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

107. The Standard Minimum Rules state:

> 22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.
>
> (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
>
> …..

> 24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation; and the determination of the physical capacity of every prisoner for work.
>
> 25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.
>
> (2) The medical officer shall report to the director whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
>
> 26. (1) The medical officer shall regularly inspect and advise the director upon:
>
> (a) The quantity, quality, preparation and service of food;
>
> (b) The hygiene and cleanliness of the institution and the prisoners;
>
> (c) The sanitation, heating, lighting and ventilation of the institution;
>
> (d) The suitability and cleanliness of the prisoners' clothing and bedding; and
>
> (e) The observance of the rules concerning physical education and sports, in cases where there are no technical personnel in charge of these activities.
>
> (2) The director shall take into consideration the reports and advice that the medical officer submits according to rules 25 (2) and 26 and, in case he concurs with the recommendations made, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the medical officer to higher authority.

108. The *United Nations principles for the protection of persons with mental illness and the improvement of mental health care* make it clear that people with mental illness should have the right to be treated and cared for, as far as possible, in the community in which they live.[48]

109. Standard Minimum Rule 82 specifically addresses the situation of mentally ill persons who are held in detention. It provides:

> B. INSANE AND MENTALLY ABNORMAL PRISONERS
>
> 82. (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
>
> (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
>
> (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.
>
> (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
>
> 83. It is desirable that steps should be taken, by arrangement with the appropriate agencies, to ensure, if necessary, the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care.

(ii) Interaction between article 7 and article 10(1)

110. The allegation concerning the use of force against Mr El Masri by GSL officers on 8 August 2005 raises for consideration the application of arts 7 (prohibition on cruel, inhuman and degrading treatment) and 10(1) (requirement to treat detainees humanely) of the ICCPR.

111. Art 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

112. In the case of detained persons, there is an overlap between art 7 and 10(1) in that inhuman or degrading treatment or punishment will also constitute a lack of treatment with humanity and respect for the inherent dignity of the human person. However, the UNHRC has said that the threshold for establishing a breach of art 10(1) is lower than the threshold for establishing 'cruel, inhuman or degrading treatment' within the meaning of art 7 of the ICCPR.[49]

113. In the case of *C v Australia,* a finding of 'cruel, inhumane and degrading treatment' under art 7 of the ICCPR was made 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 they delayed releasing the detainee from immigration detention.[50]

114. Standard Minimum Rule 54(1) describes the circumstances in which force may be used against detainees as follows:

> Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.

(iii) Minimum standards for communication with family and legal counsel

115. Principle 15 of the Body of Principles provides:

> Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

116. Principle 18 of the Body of Principles sets out a detained person's right to communicate with his or her lawyer:

> A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
>
> A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

117. The wording of Principle 18 is strict. It provides that a detained person is entitled to communicate with his legal counsel without delay. This right may not be suspended or restricted except in extremely limited circumstances. Even then, Principle 15 provides that access to a detainee's legal counsel shall not be denied for more than a matter of days.[51]

118. Principle 19 further provides that:

> A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

(c) Article 17(1) and 23(1) of the ICCPR

119. The complaints that Mr El Masri's phone contact with his family was restricted and his children were required to visit him in a cage raise a potential breach of art 17(1) and art 23 of the ICCPR, as well as art 10(1). These articles provide:

> **Art 17(1)**
>
> 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.
>
> **Art 23(1)**
>
> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

120. Professor Manfred Nowak has noted that:

> [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.[52]

121. For the reasons set out in *Nguyen and Okoye,*[53] I consider that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under art 17(1). If an act is assessed as breaching the right not to subjected to an arbitrary interference with a person's family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of art 23(1).

122. In its General Comment on art 17(1), the UNHRC confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.[54]

123. It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness.[55] In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonan v Australia*:[56]

> 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.[57]

124. The relevant issue is whether there was an arbitrary interference with Mr El Masri's family life. There is no clear guidance in the jurisprudence of the UNHRC as to whether a particular threshold is required in establishing that an act or practice constitutes an 'interference' with a person's family.

125. In *Estrella v Uruguay*,[58] the UNHRC found that art 17(1) encompasses a general right of prisoners to receive regular visits by family members.[59]

Forming my opinion

126. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have been guided by the well-known statement of Dixon J in *Briginshaw v Briginshaw,*[60] as explained by the High Court in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.[61]

127. I have had regard to the seriousness of each allegation made, the inherent unlikelihood of an occurrence of the kind alleged and the gravity of the consequences that would flow from any particular finding.

128. I have taken particular care to assess the whole of the evidence before reaching a final determination of the issues in dispute in this matter. I note I have carefully considered the further evidence and submissions received from the parties in response to my tentative view.

Part E:
Mr El Masri's detention from14 November 2002 to 14 October 2005

Complaint

129. The Complainant alleges that her husband's detention from 14 November 2002 to 14 October 2005 was unlawful.

130. I consider that the submissions of the Complainant involve two distinct arguments:

(a) First, the Complainant argues that Mr El Masri has always held a valid *absorbed person* visa and that his visa should never have been cancelled under s 501; and

(b) Secondly, the Complainant contends that, after the decision of the Full Federal Court in *Nystrom,*[62] the Department should have immediately released Mr El Masri.

131. I have considered whether all or parts of Mr El Masri's detention are inconsistent with the right not be arbitrarily detained (art 9(1) of the ICCPR).

132. As I have explained, this involves considering whether Mr El Masri's detention was *lawful* and whether it was *arbitrary*.

Chronology of Mr El Masri's detention

133. I have set out a chronology of the dates Mr El Masri was detained and released from detention and the dates of Court decisions that the Complainant has raised in seeking to argue that all, or alternatively, part, of Mr El Masri's detention was unlawful.

Date	Event
25 August 2002	Mr El Masri's transitional (permanent) visa was cancelled on character grounds under s 501 (2) of the Migration Act.
14 November 2002	Mr El Masri was taken into immigration detention pursuant to s 189(1) of the Migration Act.
19 August 2003	An application by Mr El Masri for judicial review of the decision to cancel his visa under s 501(2) was unsuccessful.[63]

1 July 2005	The Full Federal Court handed down its decision in *Nystrom*. The Court held that the Minister's decision to cancel Mr Nystrom's transitional (permanent) visa on character grounds pursuant to s 501 of the Migration Act was affected by jurisdictional error, due to the Minister's failure to take into consideration the fact that Mr Nystrom also held an absorbed person visa. Alternatively, if Mr Nystrom held only an absorbed person visa and not a transitional (permanent) visa, as Mr Nystrom contended, the Minister had cancelled a non-existent visa, which was not a valid exercise of power.
29 July 2005	Mr El Masri was placed in the MSU at VIDC.
29 August 2005	The Department states this was the latest date by which Mr El Masri was identified as *Nystrom*-affected.
30 August 2005	A senior officer of the Department, who was examining whether Mr El Masri was *Nystrom*-affected, observed that the question was 'legally tricky'.
16 September 2005	On 16 September 2005 the officer furnished preliminary advice that on balance it was open for the view to be taken that Mr El Masri was not an absorbed person as at the critical date of 2 April 1984 and did not have an *absorbed person* visa. The advice is titled 'PRELIMINARY ADVICE – NOT FINAL – NOT YET SECOND COUNSELLED'. The advice appears to have been written without seeking submissions or information from Mr El Masri or his legal representative.
22 September 2005	Michaela Byers visited Mr El Masri in detention and took instructions to act as his legal representative.
28 September 2005	Ms Byers wrote to the Department seeking the release of Mr El Masri.
29 September 2009	A solicitor from Australian Government Solicitors sent an email to Ms Byers stating that the solicitor was currently seeking instructions in relation to the matters raised by Ms Byers.
4 October 2005	Ms Byers sent a letter to the Director of Detention Case coordination. It states: *I respectfully submit that Mr El Masri is the holder of an absorbed person visa in accordance with section 34 of the Migration Act. He entered Australia on 21 September 1976 and was absorbed into Australian community by 2 April 1984 and ceased to be an immigrant. I also rely on the Federal Court decision in the matter of Nystrom that was delivered on 1 July 2005.* Ms Byers also sent an email to the Department's legal representative advising she had filed an application in the Federal Court and would be making an application for injunction for release 'this week'.

14 October 2005	The Department received a letter from Ms Byers. The officer who previously considered whether Mr El Masri was *Nystrom*-affected wrote an email that asked for the following written advice to be provided to Mr El Masri: *Having regards to the information now available, including the letter of today, the 14 October 2005, from your legal representative Ms Michaela Byers, we are releasing you from immigration detention on the basis that you may hold an absorbed person visa by operation of section 34 of the Migration Act 1958 and may also hold a transitional (permanent) visa.* *We have identified your case as one which is similar to the case which was the subject of the decision of the Full Federal Court in Nystrom v Minister for Immigration and Multicultural Affairs [2005] FCAFC. According to that decision, if you held an absorbed person visa (as well as a transitional (permanent) visa), that visa needed to be identified and considered by the Minister in making the decision to cancel your transitional (permanent) visa under section 501 of the Migration Act 1958. This was not done in your case.* Mr El Masri was released from immigration detention.
24 November 2005	The Federal Court (Justice Allsop) quashed the Minister's decision to cancel Mr El Masri's transitional (permanent) visa. The Court reinstated Mr El Masri's transitional (permanent) visa.
8 November 2006	The High Court upheld an appeal against the decision of the Full Federal Court in *Nystrom*.[64] The High Court held that: (1) Mr Nystrom held two visas simultaneously; (2) by operation of s 501F of the Migration Act, the Minister's cancellation of Mr Nystrom's transitional (permanent) visa automatically cancelled his absorbed person visa as well; and (3) there were no material considerations which the Minister should have taken into account in cancelling Mr Nystrom's absorbed person visa compared with his transitional (permanent) visa.
28 November 2006	Mr El Masri was detained in VIDC. The duration of his detention from the time of his arrest at 5:50 am to his release at 1:00 pm on the same day was approximately 7 hours.
17 July 2008	The Full Federal Court in *Sales v Minister for Immigration and Citizenship (Sales)*[65] found that s 501(2) of the Migration Act does not authorize the cancellation of a visa that is simply 'held' by a person. It only permits cancellation of a visa that had been 'granted' or deemed by express statutory provision to 'have been granted' to a person. Therefore, a transitional (permanent) visa that is simply 'held' by virtue of the Migration Reform (Transitional Provisions) Regulations of 1994 is neither granted, nor deemed to be granted, and thus cannot be cancelled under s 501(2).

Relevant statutory provisions in the Migration Act

(a) The power to cancel Mr El Masri's visa

134. Mr El Masri's transitional (permanent) visa was cancelled on 25 August 2002, pursuant to s 501(2) of the Migration Act. This section provides that the Minister may cancel a person's visa if the Minister reasonably suspects that the person does not pass the character test and if the person does not satisfy the Minister that they pass the character test. Section 501G(1) and (2) provide that a person must be provided with notice of the cancellation of their visa under s 501 of the Migration Act.[66]

135. On 19 August 2003, Mr El Masri's application for judicial review of the decision to cancel his visa under s 501(2) was dismissed.[67]

(b) The power to detain Mr El Masri

136. A person whose visa has been cancelled under s 501 becomes an unlawful non-citizen and is then subject to mandatory detention under s 189 and removal from Australia under s 198 of the Migration Act.

137. Section 189(1) of the Migration Act provides that 'if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person'.[68]

138. Section 196 of the Migration Act provides:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
> (b) deported under section 200; or
> (c) granted a visa.
>
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
>
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.
>
> (4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.
>
> (4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.
>
> (5) To avoid doubt, subsection (4) or (4A) applies:
>
> (a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and
>
> (b) whether or not a visa decision relating to the person detained is, or may be, unlawful.
>
> (5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.
>
> (6) This section has effect despite any other law.
>
> (7) In this section:
>
> ***"visa decision"*** means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

(c) *Goldie v Commonwealth*

139. In *Goldie v Commonwealth of Australia & Ors,*[69] the Full Federal Court placed a strict onus on an official detaining a person pursuant to s 189(1) of the Migration Act to justify his or her suspicion as reasonable. In this case, an officer, Mr Cain, formed the view that Mr Goldie should be detained under s 189(1) on the basis that computer records showed that the last visa issued to Mr Goldie had ceased. The officer did not make any further searches to verify this view and the computer records were incorrect.

140. In determining what is meant by 'reasonable suspicion', Gray and Lee JJ stated:

> The definitions of the words "suspect" and "suspicion" in the Macquarie Dictionary make it plain that a suspicion may be formed "with insufficient proof or with no proof", or "on little or no evidence", or "on slight evidence or without evidence". By itself, the word "suspects" would be capable of being construed to include the formation of an imagined belief, having no basis at all in fact, or even conjecture. Plainly, to empower an arrest on the basis of an irrational suspicion would offend the principle of the importance of individual liberty underlying the common law. It would also allow the possibility of arbitrary arrest, with the consequence that Australia would be in breach of its international obligations pursuant to [a] rt 9 of the International Covenant on Civil and Political Rights 1966 [adopted in] New York on 19 December 1966. To avoid these consequences, the word "reasonably" has been placed before the word "suspects" in s 189(1). The adverb makes it clear that, in order to justify arrest and detention, the suspicion that a person is an unlawful non-citizen must be justifiable upon objective examination of relevant material. Given that deprivation of liberty is at stake, such material will include that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances.[70]

141. Therefore, according to Gray and Lee JJ, 'an officer, in forming a reasonable suspicion, is obliged to make due inquiry to obtain material likely to be relevant to the formation of that suspicion'.[71] In this case, the evidence revealed that there was 'an absence of a sufficient search or inquiry to make the formation of the suspicion justifiable on objective examination'. The computer records were 'plainly, not up to date' and Mr Cain only conducted 'a partial search of the relevant record'.[72] Mr Cain did not conduct a search of visas granted after Mr Goldie entered the country. Further, at the time Mr Cain made his decision, he had in his possession other documents that showed Mr Goldie held a valid visa.[73]

142. Gray and Lee JJ concluded that, having regard to all the circumstances, Mr Cain's suspicion that Mr Goldie was an unlawful non-citizen was not reasonable. Their Honours said:

> **It is unnecessary to speculate but perhaps, if the only facts known to Mr Cain at the time had been those contained in the computer record, it may have been that his suspicion would have been reasonable.** However, Mr Cain had other facts before him. He chose to prefer to base his state of mind on the computer record, the information in which was incomplete and older, than the other materials available to him. He chose to disregard the other facts and rely on the information obtained from a partial search of the record. In choosing to form a suspicion on the basis of a computer record two years old, without making inquiries or checking more recent records, Mr Cain did not act reasonably (emphasis added).[74]

143. The Court held that Mr Goldie's arrest 'was precipitate and not justified by section 189(1) of the Migration Act'.[75] His detention was unlawful and he had a right to damages from the Commonwealth.[76]

(d) *Ruddock v Taylor*

144. In *Ruddock v Taylor,*[77] the High Court considered whether immigration officers could lawfully detain a person under s 189 of the Migration Act, even though the decision to cancel that person's visa was later found to be legally invalid.

145. In this case, British-born Mr Taylor was twice placed in immigration detention following two separate decisions by the Minister to cancel his visa on character grounds, pursuant to s 501 of the Migration Act. Both these decisions were subsequently quashed by the courts.

146. Mr Taylor successfully brought an action in the District Court of NSW claiming damages for false imprisonment. After this decision was upheld on appeal to the Court of Appeal of NSW, the Commonwealth appealed to the High Court.

147. The majority of the High Court held that, provided an officer had the requisite knowledge or reasonable suspicion that a person was an unlawful non-citizen, detention was required by s 189 of the Migration Act. The High Court stated:

> What constitutes reasonable grounds for suspecting a person to be unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time.[78]

148. A belief or suspicion was capable of being reasonable even though founded on a mistake of law. The majority stated:

> [Section] 189 may apply in cases where the person detained proves, on later examination, not to have been an unlawful non-citizen. So long as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189. And if the Minister brought about a state of affairs where an officer knew or reasonably suspected that a person was an unlawful non-citizen by steps which were beyond the lawful exercise of power by the Minister, it does not automatically follow that the resulting detention is unlawful. Rather, separate consideration must be given to the application of s 189 – separate, that is, from consideration of the lawfulness of the Minister's exercise of power.[79]

149. The lawfulness of Mr Taylor's detention therefore turned on whether the exercise of power under s 189 was lawful. The High Court said this question must be given separate consideration from that of whether the exercise of power by the Minister to cancel the visa under s 501 was lawful. Demonstrating that a person is not an unlawful non-citizen does not necessarily make detention pursuant to s 189(1) unlawful.[80]

150. On the basis of this reasoning, the majority of the High Court found that Mr Taylor's detention was lawful and required by the Migration Act. The majority noted:

> [N]othing was said to have occurred during either period of detention that would affect the conclusions that, until an order was made quashing the relevant decision to cancel the respondent's visa, those who detained the respondent reasonably suspected that he was an unlawful non-citizen, and that accordingly, his detention was lawful and required by the Act.[81]

(e) *Coleman v Minister for Immigration & Citizenship*

151. In *Coleman v Minister for Immigration & Citizenship,*[82] the Minister cancelled Mr Coleman's visa on character grounds. Mr Coleman was subsequently detained as an unlawful non-citizen.

152. It was contended on behalf of Mr Coleman that the effect of the High Court's decision in *Re Patterson*[83] was that s 501 of the Migration Act could not apply to him as he was a British subject.

153. The argument put forward on behalf of Mr Coleman was that until the subsequent High Court decision in *Shaw v Minister for Immigration & Multicultural Affairs* (*Shaw*)[84] his detention was unlawful.

154. In dismissing this application as having no reasonable prospects of success, Edmonds J accepted the following distinction between 'knowing' a person was an unlawful non-citizen and 'reasonably suspecting' a person was an unlawful non-citizen:

> (a) where the officer believes the person to be an unlawful non-citizen and is ultimately correct in that belief – [the officer] 'knows'; and
>
> (b) where the officer believes the person to be an unlawful non-citizen, ultimately is not correct about that but had reasonably [sic] grounds for the belief – [the officer] 'reasonably suspects'.[85]

155. Edmonds J noted that the judgment in *Shaw* had put it beyond argument that Mr Coleman was at all material times an alien and, not having a valid visa, was therefore an unlawful non-citizen (under s 14 of the Migration Act). His Honour concluded:

> The short answer to the applicant's case is that the officer was correct in forming the view that the deceased was an unlawful non-citizen – the officer relevantly "knew" him to be such. In these circumstances, the detention was authorised under s 189 of the Act and the applicant's present application must fail.[86]

156. His Honour added that there were a number of hurdles in the way of raising unlawful detention to a level of being a cause of action with reasonable prospect of success:

> [T]he idea that Mr Coleman's detention was unlawful from 10 March 2003 until the High Court handed down its decision in Shaw on 9 December when the applicant effectively conceded that it thereupon became lawful, flies in the face of the principle of the retrospective operation of judicial lawmaking, so that even if Re Patterson changed the law, Shaw changed it back with retrospective operation. As Sackville J, with whom Foster and Lehane JJ agreed in Torrens Aloha Pty Ltd v Citibank NA (1997) 72 FCR 581, observed at 594:
>
> > In the absence of a doctrine of prospective overruling, changes in the law offered by judicial decisions are not confined to events or transactions occurring after the date of the decision changing the law. Doubtless from a historical perspective, this owes a good deal to the declaratory theory of the law…[87]

157. With respect, this aspect of the reasoning in *Coleman* appears to be inconsistent with that of the High Court in *Ruddock v Taylor*. In *Ruddock v Taylor*, the High Court held that it was necessary to consider 'what was known or reasonably capable of being known at the relevant time'. Section 189 of the Migration Act operates by reference to the state of mind of the relevant officer as to the person's migration status, irrespective of the person's migration status in law. The latter may change as a result of subsequent judicial determination. The former, in my view, does not.

158. In other words, an officer's actual state of mind cannot be altered by the subsequent declaration of a court as to the state of the law. What is relevant is the state of the law as was known (or should reasonably have been known) to an officer acting under the Migration Act. An officer cannot 'know' what is yet to be decided by a court. Nor can they, in my view, 'reasonably suspect' that which is contrary to the state of the law as it stands.

(f) Reviewing the basis for detention

159. While s 189 is expressed in mandatory terms, it does not prevent departmental officers from reviewing the 'reasonable suspicion' upon which the person's detention is based.

160. In particular, when new information is acquired or the state of the law changes following a decision by a court, it may be necessary for the Department to take action to check that the suspicion a person is an unlawful non-citizen can still be reasonably held.

161. The continuing obligation to review the continuing validity of a person's immigration detention is now reflected in *Migration Series Instruction (MSI) 411: Establishing Immigration status – in the field and in detention.* This MSI was registered in December 2005.

162. The MSIs give officers 'an understanding of the legal requirements and policy guidelines that apply when deciding whether a person must or may be detained, or kept in detention, under the Migration Act'.[88]

163. The MSIs explain that although the power to detain under s 189 is 'mandatory in nature, its exercise depends wholly upon whether an officer knows or reasonably suspects that a person is a non-citizen'.[89] They further state:

> [T]he requirement to detain a person only comes into play once an officer has formed one of the following states of mind: knowledge that the person is an unlawful non-citizen or reasonable suspicion that the person is an unlawful non-citizen. Similarly, the continued detention of a person will only be lawful if an officer continues to either know or reasonably suspect that the person is a non-citizen.[90]

164. The MSIs also state that the 'the exercise of power under section 189 involves not only taking a person into immigration detention but also keeping a person in immigration detention'. According to the MSIs:

> [There is] an ongoing obligation to continue to reassess the lawfulness of the detention where a person has been detained under section 189 based on a reasonable suspicion that they were a non-citizen… if an officer goes from reasonably suspecting that a detainee is an unlawful non-citizen to no longer reasonably suspecting it, then the person must be released from immigration detention immediately.[91]

165. The MSIs are not legally enforceable and they were not registered in September 2005. However, they confirm that it was within the power of officers to take such actions to resolve questions that arose about a person's immigration status and to review detention cases to ensure that the reasonable suspicion that a person was an unlawful non-citizen remained valid.

The initial decision to detain Mr El Masri on 14 November 2002

166. I accept the Department's submissions that the decision of the Minister to cancel Mr El Masri's visa under s 501 created a reasonable suspicion that Mr El Masri was an unlawful non-citizen. The relevant departmental officer was obliged to detain Mr El Masri under s 189 of the Migration Act.

167. I do not accept the Complainant's argument that by reason of the decision of the Full Federal Court in *Nystrom* and the subsequent decision of the Full Federal Court in *Sales,*[92] the entire period of Mr El Masri's detention was unlawful because his visa was not validly cancelled.

168. The question of whether the act of detaining Mr El Masri was lawful depends on whether the immigration officer knew or reasonably suspected that Mr El Masri was an unlawful non-citizen on 14 November 2002. The lawfulness of the exercise of power under s 189 has to be determined by reference to what was known or reasonably capable of being known at the relevant time.

169. The Complainant submitted that a reasonable compliance officer would have known that s 501 visa cancellation decisions had been quashed by the courts and therefore, that there was an obligation to review regularly Mr El Masri's detention after 14 November 2002 to ensure that the 'reasonable suspicion continued to be valid'.[93]

170. The Complainant also claimed that the Department became aware that Lebanon refused to accept Mr El Masri on 30 December 2004. The Complainant argued that 'at this point in time deportation became impossible and [the Department] should have reviewed Mr El Masri's file and discovered he was an absorbed person and made arrangements for alternative detention'.[94]

171. The Department has not responded to the claim that there was no reasonable prospect of removing Mr El Masri to Lebanon. However, even if there had been no reasonable prospect of removing Mr El Masri to Lebanon, the discovery of the fact would not have led to the loss of the reasonable suspicion that Mr El Masri was an unlawful non-citizen. This is because s 189 can operate to oblige an immigration officer to detain a person even if there is no reasonable prospect of that detention ending in the foreseeable future.

172. Therefore, prior to the decision of the Full Federal Court in *Nystrom* there would not appear to be an intervening event that, in the event of a review of the continuing validity of Mr El Masri's detention, would have been likely to lead to the conclusion that the reasonable suspicion that Mr El Masri was an unlawful non-citizen could not be maintained.

173. I conclude that the initial detention of Mr El Masri on 14 November 2002 was required by s 189 of the Migration Act. It therefore does not constitute a discretionary act or practice of the Department and falls beyond the scope of my power to inquire under s 11(1)(f) of the HREOC Act.

174. I further find that that Mr El Masri's continued detention until 1 July 2005 did not breach his human rights. Prior to the decision of the Full Federal Court in *Nystrom* there was no material change in Mr El Masri's circumstances that would have altered the reasonable suspicion that he was an unlawful non-citizen.

The ongoing detention of Mr El Masri after the decision in Nystrom

175. On 1 July 2005, the Full Federal Court in *Nystrom* held that the decision of the Minister for Immigration to cancel Mr Nystrom's transitional (permanent) visa on character grounds, pursuant to s 501 of the Migration Act, was not validly made.[95] The Court held that the Minister committed a jurisdictional error by failing to take into consideration the fact that Mr Nystrom also held an absorbed person visa.

176. Mr El Masri was ultimately released from immigration detention 105 days (3 months and 13 days) after the decision in *Nystrom* on the basis that he too held an absorbed person visa.

177. The Department states that following the decision of the Full Federal Court:

> [A] number of detainees were identified by the [D]epartment as likely to be holding an absorbed person visa (of whom Mr El Masri was one) and they were released from detention (as the reasonable suspicion required under s 189 had been lost). Mr El Masri was released from detention on 14 October 2005.[96]

178. The Department submits that the question of whether Mr El Masri had an *absorbed person* visa is 'an inherently complex question of fact and law'.[97]

(a) Determining whether Mr El Masri held an absorbed person visa

179. An absorbed person visa is a visa that enables the holder to remain in, but not to re-enter, Australia. Section 34 of the Migration Act provides that an absorbed person is deemed to have been granted to a person on and from 1 September 1994 if the conditions set out in s 34(2) are satisfied. These conditions are:

> (a) That the person was in Australia before 2 April 1984;
>
> (b) Before 2 April 1984, the person ceased to be an immigrant as a result of the doctrine of absorption;
>
> (c) The person had not left Australia between 2 April 1984 and 1 September 1994; and
>
> (d) Immediately before 1 September 1994, the person was not subject to s 20 of the Act as then in force.

180. The Department states:

> The absorbed person visa is provided for by s 34 of the [Migration] Act, which itself contains the criteria. Unlike most other visas, an absorbed person visa is not obtained as a result of a process of administrative decision-making. Nor is there any instrument or other physical document that proves that a person has an absorbed person visa – unless the person has obtained declaratory or similar relief from a Court determining that he/she has such a visa. Thus, whether a person has such a visa can not be answered by checking the files or database to see whether an administrative decision to grant has been made. Certainly, in this case, whether Mr El Masri has a visa could not be ascertained simply by checking the file.[98]

181. The Department continues:

> Given the nature of the criteria, it is simply not possible to specify a number of hours – or even months – within which it will always be possible to determine whether a person is deemed by s 34 of the Act to have an absorbed person visa. The question of how much time will be reasonable or necessary to

> complete that task ought to be seen as one to be addressed on a case by case basis. The difficulty of assessing how much time will be required is also compounded by the fact that important evidence will often be uniquely within the knowledge or access of the individual non-citizen, or other person known to the non-citizen but not the Department. The complex question of whether the individual moved beyond the immigration prior to 2 April 1984 by being absorbed into the Australian community is self-evidently one where relevant evidence will not always be 'on file' or readily available without inquiry from the non-citizen or others. Also, at least as a matter of administrative good practice, time may be necessary to give the non-citizen a reasonable opportunity to collect evidence, to put his/her case and to answer concerns that may exist. In some cases, application to a Court may also eventuate, or at least need to be considered.[99]

182. The Department states that while in *Nystrom* it was conceded the applicant held an absorbed person visa, in Mr El Masri's case 'there is no evidence of any such view being formed when Mr El Masri was taken into detention until it was decided to release him from immigration detention on 14 October 2005'.[100]

(b) Steps taken by the Department to reassess the reasonableness of the suspicion Mr El Masri was an unlawful non-citizen

183. There is no evidence before me about what steps, if any, the Department took in the days immediately following the publication of the decision in *Nystrom* on 1 July 2005 to identify *Nystrom*-affected detainees.

184. It is, however, clear that the Department did recognise that it was necessary to conduct such a review to reassess the lawfulness of continuing to detain people who may have been affected by the decision in *Nystrom*. Submissions on behalf of the Department state:

> We are instructed that early electronic searches by the Department identified 430 individuals who may possibly have been affected by the decision in Nystrom. We are further instructed that the average time to recover possible affected persons' files was 3 to 4 days. This time is an average only and can be significantly lengthened depending upon how many files were recorded and located. It is observed that many older files may have been destroyed in accordance with normal Commonwealth archival procedures.[101]

185. The Department also states that 'upon the delivery of the Full Court decision advice was sought and analysis undertaken by the Department as to the ramifications and implications of the decision. These considerations included the impact the decision would have upon the pending s 501 cases and previous s 501 cancellation decisions'.[102]

186. The Department has not submitted evidence about what date it began identifying individuals in immigration detention who may have been affected by the decision in *Nystrom.*

187. The Department states that it began considering if Mr El Masri held an absorbed person visa no later than 29 August 2005.

188. The Department states that:

> In *Nystrom* itself, it was conceded that the applicant held an absorbed person visa. In the present case, there is no evidence of any such view having been formed when Mr El Masri was taken into detention until it was decided to release him from immigration detention on 14 October 2005. In fact, on 30 August 2005, a senior officer of the department, who was then examining whether Mr El Masri held an absorbed person visa (at the request of another officer who

> approach him no later than 29 August 2005) observed that the question was uncertain and 'legally tricky'. He was not confident that he would be able to say, even in the future 'with any certainty … whether Mr El Masri held an absorbed person (visa)'.[103]

189. The Department has provided a copy of the email from the departmental officer dated 30 August 2005. The subject of the email is 'Possible *Nystrom*-affected cases: status of Mr El Masri'. In the email the officer states:

> [A]s discussed I'm still looking at the El Masri case. It is not a case where I am able to say with any certainty at this early stage – and perhaps not even in the future – whether Mr E held an absorbed person. As you know, absorption is a creation of the High Court and involves a lot of subjective judgment. I will continue with my consideration of the case and provide my more considered views on it as soon as I can…[104]

190. The officer goes on to state that '[i]n such legally tricky cases it may be appropriate that an external opinion be sought so that the Department is acting on the basis of an arms length legal opinion – Senior Counsel AGS may be suitable. Especially as I understand that there may be other similar cases to this in the pipeline'.[105]

191. The resolution of the question of whether Mr El Masri had an absorbed person clearly had profound consequences for Mr El Masri's liberty, as he was being detained in MSU at that time. However, there is no evidence that the question was addressed with urgency or with the thoroughness that it deserved.

192. On the 16 September 2005, over two weeks after Mr El Masri was identified as a person who may be *Nystrom* affected, the same departmental officer provided further preliminary advice that Mr El Masri was not an unlawful non-citizen. The email is titled 'PRELIMINARY ADVICE – NOT FINAL – NOT YET SECOND COUNSELLED'. It states, in part:

> This case illustrates the difficulties that can arise in making a determination whether in a particular case, the 'immigrant' can be said to have ceased to be an immigrant because of being absorbed into the Australia [sic] community. Such a determination requires the balancing of a number of factors in assessing whether the Australian community at the relevant time would have regarded that person as fully integrated into that community. In any court proceeding where that issue arose, it would be open to the judge to make that determination.
>
> On balance I think it is open for the view can [sic] be taken that Mr A S ElMasri probably never 'ceased to be an immigrant' before the critical date of 2 April 1984 and therefore is not deemed to have held an absorbed person visa by operation of s 34 of the Migration Act 1958.[106]

193. There is no evidence before the Commission that any efforts were made to confirm this preliminary advice, or to seek advice from Australian Government Solicitor as previously suggested as being appropriate.

194. I also find that the officer provided this advice without seeking information or submissions from Mr El Masri or his legal representative that may have assisted in resolving the question of whether Mr El Masri was an absorbed person. This is despite the fact that the Department has submitted that 'as a matter of good administrative practice, time may be necessary to give [a] non-citizen a reasonable opportunity to collect evidence, to put his/her cases and to answer concerns that may exist' on the complex question of whether an individual is an 'absorbed person'.[107]

195. The Complainant's legal representative initiated contact with the Department on 28 September 2005, when she sent an email to the Director of Detention Services. This email stated that Mr El Masri should be released from immigration detention because, 'like Nystrom, Mr El Masri holds an *absorbed person* visa as he entered Australia on 21 September 1976 and has not departed Australia since'.

196. Ms Byers proceeded to file an application in the Federal Court seeking Mr El Masri's release and on 4 October 2005 she sent an email to the Department stating these proceedings had been commenced and that her client would seek an injunction to be released from detention.

197. The Department states that:

> …upon receipt of Ms Byers email [of 28 September 2005, the Department] again reviewed Mr El Masri's circumstances and indeed sought further information and assistance in respect of Mr El Masri's family so as to inform the consideration of the absorption question. That review was finalised on 14 October 2005 and he was released on the same day.

198. The departmental officer asked for the following written advice to be provided to Mr El Masri:

> Having regards to the information now available, including the letter of today, the 14 October 2005, from your legal representative Ms Michaela Byers, we are releasing you from immigration detention on the basis that you may hold an absorbed person visa by operation of section 34 of the Migration Act 1958 and may also hold a transitional (permanent) visa.
>
> We have identified your case as one which is similar to the case which was the subject of the decision of the Full Federal Court in *Nystrom v Minister for Immigration and Multicultural Affairs* [2005] FCAFC. According to that decision, if you held an absorbed person visa (as well as a transitional (permanent) visa), that visa needed to be identified and considered by the Minister in making the decision to cancel your transitional (permanent) visa under section 501 of the Migration Act 1958. This was not done in your case.[108]

199. Mr El Masri was accordingly released from immigration detention on 14 October 2005.

Conclusion: detention after 16 July 2005 was inconsistent with Mr El Masri's human rights

(a) Was Mr El Masri's ongoing detention lawful?

200. The first issue I have considered in assessing whether Mr El Masri's ongoing detention following the decision in *Nystrom* was inconsistent with or contrary to art 9 of the ICCPR is whether that detention was lawful.

201. The relevant question is whether an officer held a reasonable suspicion that Mr El Masri was an unlawful non citizen. If such a reasonable suspicion was held, Mr El Masri's detention was required by s 189 of the Migration Act and there was no discretionary act into which I have the power to inquire, for the reasons set out above. On the other hand, if there was no such reasonable suspicion, detention was not required and Mr El Masri's continued detention is an act done by the Commonwealth into which I may inquire.

202. In my view, it was not reasonable to maintain a suspicion that Mr El Masri was an unlawful non-citizen for the entire 105 day period between the decision in *Nystrom* and the day of his release.

203. It was not reasonable because the Department failed promptly and thoroughly to reconsider Mr El Masri's situation despite the significant change in the circumstances relating to Mr El Masri. When proper consideration was given to his case, including the receipt of information from Mr El Masri that was vital to the issue of whether he was an 'absorbed person', the suspicion that he was an unlawful non-citizen was no longer held and he was released from detention.

204. I accept the Department's submission that the issue of whether Mr El Masri held an *absorbed person* visa was 'an inherently complex question of fact and law'. It was the Department's failure to act promptly to resolve that question, including seeking information from Mr El Masri on the relevant questions of fact, which resulted in the unlawfulness of Mr El Masri's detention.

205. This analysis is not altered by the High Court's ultimate decision in *Nystrom* or the Full Federal Court's decision in *Sales.* This is because the lawfulness of Mr El Masri's detention after 1 July 2005 and before his release on 14 October 2005 must be assessed by reference to what was reasonably capable of being known by an immigration officer at this time. As I have indicated above, an officer cannot 'know' what is yet to be decided by a court. Nor can they 'reasonably suspect' that which is contrary to the state of the law as it stands.

(b) Mr El Masri's detention became unlawful when the suspicion that he was an unlawful non-citizen could no longer be reasonably maintained

206. In my view it is possible to identify a point in time by which it can be said that Mr El Masri's detention had become unlawful. This is based on timeframes within which it was reasonable for Department to do the things necessary to reconsider the suspicion that Mr El Masri was an unlawful non-citizen following the decision in *Nystrom*.

207. In my view, a reasonable timeframe within which the Department should have identified that Mr El Masri *may* have been affected by the *Nystrom* decision was within four days of that decision being published on 1 July 2005. This takes into account the average time identified by the Department as necessary to recover possible affected persons' files.[109] There is no suggestion by the Department that there was any particular difficulty recovering Mr El Masri's files that would have meant that it would have taken more than four days to identify that Mr El Masri may have been affected by *Nystrom*. Such a timeframe reflects the importance of what is at stake – a person's liberty.

208. The Department identified that the following criteria would need to be assessed in determining whether a person was affected by *Nystrom*:

> (a) he/she had an absorbed person visa under s 34 of the Migration Act ('the Act');
>
> (b) he/she had a transitional (permanent) visa cancelled (or purportedly cancelled) under s 501 of the Act; and
>
> (c) the said cancellation decision had been taken without consideration of its effect on the person's absorbed person visa.

209. In my view, criteria (b) and (c) were not complicated questions and could have been resolved within the four days that I have decided was an appropriate time within which to recover the files of persons potentially affected. However, it is the first of these criteria – whether a person held an absorbed person visa – that the Department submits was a potentially complicated question.

210. I accept that whether a person holds an absorbed person visa is a potentially complicated question. However, in my view the circumstances required that urgent action be taken to determine whether persons in detention *may* have held such a visa.

211. In my view, it should have been possible for the Department to determine within four days whether a person was in Australia before 2 April 1984, a threshold question in determining whether a person held an absorbed person visa. Having determined this question in the affirmative, it was then necessary to consider further the individual's circumstances.

212. The Department states Mr El Masri was identified by the Department as a person who may be *Nystrom* affected no later than 29 August 2005, a period of 59 days from the decision in *Nystrom*. In my view this was a manifestly excessive period of time.

213. Upon a person being identified as potentially affected by *Nystrom*, immediate steps should have been taken to determine whether that person held an absorbed person visa. In Mr El Masri's case, my view is that such a decision could have been reached within 10 days. In this time information could have been sought from Mr El Masri on the relevant questions of fact and the legal issues could have been resolved. Again, given the importance of the decision for a person who was deprived of their liberty, I regard this as a reasonable period of time.

214. I therefore conclude that the suspicion that Mr El Masri was an unlawful non-citizen ceased to be reasonable after 14 full days had passed following the publication of the decision in *Nystrom*: ie Mr El Masri should have been released by no later than 16 July 2005 and his ongoing detention after this date until his release on 14 October 2005 (a period of 90 days) was unlawful.

215. In my view the 'preliminary advice' given by the departmental officer on 16 September 2005 that Mr El Masri did not have an absorbed person visa was not sufficient to maintain a reasonable suspicion that Mr El Masri was an unlawful non-citizen. This is because of the failure to seek information or submissions from Mr El Masri or his legal representative and the failure to take steps to finalise the advice such as seeking the advice of external counsel, as recognised as being appropriate on 30 August 2005. Such failures made any suspicion that Mr El Masri was an unlawful non-citizen unreasonable.

(c) Was Mr El Masri's ongoing detention arbitrary?

216. The second issue raised under art 9(1) concerning Mr El Masri's ongoing detention following the decision in *Nystrom* is whether that detention was arbitrary.

217. In my view, while the issues concerning arbitrariness are closely linked with those concerning lawfulness in this case, the questions are distinct ones. In my view, the failures of the Department to act in Mr El Masri's case were acts that were inconsistent with his right not to be arbitrarily detained.

218. The Department submits that lawful detention under s 189 cannot be arbitrary even if it is 'disproportionate'.[110] It submits that while proportionality may have some place in relation to discretionary detention, or where the limits of a purposive power are being identified, it does not assist in a case arising under s 189 where the requisite suspicion, or reasonable belief, exists. The Department states: 'Once an officer reasonably suspects that a person is an unlawful non-citizen in the migration zone, the officer *must* detain that person. There is no discretion'.[111]

219. I agree that where detention is required by law under s 189, the act or practice of detaining that person is not an 'act' or 'practice' that falls within the scope of the Commission's human rights complaints jurisdiction.

220. However, in my view, this does not mean the Commission can not inquire into the discretionary acts and practices of officers of the Commonwealth – including failures to act – which may have the effect of unjustly or inappropriately prolonging a person's detention.

221. In my view, where an officer of the Commonwealth fails to do an act that has the effect of prolonging a person's detention under the Migration Act, and such failure is unreasonable in all of the circumstances, it will be open to the Commission to find that the failure is an 'act' or 'practice' that is inconsistent with or contrary to a person's right not to be arbitrarily detained.

222. Not all delays or failures that prolong detention will be unreasonable and in some cases there may be appropriate and sufficient reasons for delay. This was not such a case.

(d) The failure of the Department to act was inconsistent with Mr El Masri's right not to be arbitrarily detained

223. I find that the failure to take action promptly to identify Mr El Masri as a person who was potentially affected by *Nystrom,* and to promptly and thoroughly review his immigration status to determine whether the 'reasonable suspicion' persisted, is an act or practice that was inconsistent with Mr El Masri's right not to be arbitrarily detained.

224. There is no explanation offered by the Department for the delay of 59 days from the date of the decision in *Nystrom* to the time at which Mr El Masri was identified by the Department as a person who may be *Nystrom* affected. I have found that this assessment should have been made within four days. In my view, the delay was unreasonable.

225. I also find unreasonable the Department's failure to conduct a prompt and thorough review of Mr El Masri's immigration status once he was identified as being potentially *Nystrom* affected. The Department failed to seek information or submissions from Mr El Masri on this issue that affected his liberty.

226. The Department also failed to finalise its consideration beyond the 'preliminary advice' finally provided on 16 September 2005. In particular, the Department failed to seek the opinion of external counsel despite this having been recognised as 'appropriate' on 30 August 2005, given the 'legally tricky' nature of the case.

227. Also relevant to the unreasonableness of the Department's failures and delays in Mr El Masri's case is the fact that between the decision in *Nystrom* and his release on 14 October 2005, Mr El Masri's prolonged detention was known to be exacerbating his mental health problems and medical experts had recommended that the best course of treatment would be to release him into the community. These circumstances added to the urgency of deciding questions upon which Mr El Masri's liberty depended.

228. I therefore find that the failures to take action to identify Mr El Masri as a person who was potentially affected by *Nystrom* and to promptly and thoroughly review his immigration status were acts that were inconsistent with Mr El Masri's right not to be arbitrarily detained. Had such action been taken promptly, Mr El Masri's detention would not have been prolonged. The decision that was ultimately reached on 14 October 2005 would have been made much earlier.

229. For the reasons set out above, I am of the view that it would have been appropriate to have reviewed Mr El Masri's case by 16 July 2005. Accordingly, I find that, as a result of the failure of the Department to act consistently with Mr El Masri's human rights his detention from 16 July 2005 until his release on 14 October 2005 (a period of 91 days) was arbitrary.

Part F:
The detention of Mr El Masri on 28 November 2006

Complaint

230. The Complainant alleges that Mr El Masri was unlawfully detained on 28 November 2006 in breach of art 9(1) of the ICCPR.

231. Further concerns expressed by the Complainant about the detention of Mr El Masri on 28 November 2006 include:

- The failure of the Department to check file and computer systems and maintain up to date files of court decisions;
- The failure of the Department to conduct an assessment about the appropriateness of alternative detention considering that Mr El Masri had schizophrenia and diabetes;
- The failure of the Department to conduct assessments as to 'whether detention and then deportation could occur as Lebanon's position in December 2004 was that Lebanon would not issue a travel document'; and
- The placement of Mr El Masri in Stage 1 during 'fighting between rival Asian and Arabic gangs'.[112]

Findings of Fact

232. On 24 November 2005, Justice Allsop ordered that a writ of certiorari be issued quashing the decision of the Minister for Immigration to cancel Mr El Masri's transitional (permanent) visa.[113]

233. Both Mr El Masri and the Minister for Immigration agreed that the decision to cancel Mr El Masri's transitional (permanent) visa was vitiated by jurisdictional error on the authority of the decision of the Full Federal Court in *Nystrom*.[114]

234. On 8 November 2006, the High Court upheld the appeal against the decision of the Full Federal Court in *Nystrom*.[115] Following this decision, Mr El Masri was again detained on 28 November 2006.

235. The duration of Mr El Masri's detention from the time of his arrest at 5:50 am to his release at 1:00 pm on the same day was approximately 7 hours.

236. The circumstances in which this detention occurred are set out in the submissions of the Department and the statements of Mr El Masri and his wife. I accept that:

(a) At 5:50 am, four NSW police, seven departmental officers, and a locksmith went to Mr El Masri's home. Two other officers were stationed in an adjacent street.

(b) Two police officers and two departmental officers went to the front door. One of Mr El Masri's daughters answered the door. She said her father was not home.

(c) The departmental officers entered the house and located and detained Mr El Masri. He was led to a departmental vehicle, without using handcuffs, in his t-shirt and underwear.

(d) The Department did not permit Mr El Masri to go back to the house to dress 'based on his history of violence'.

(e) Mr El Masri was calm and cooperative but his wife was distressed.

(f) When Mr El Masri was in detention, his legal representative contacted the Department.

(g) The Department then discovered that its records were incomplete and their legal division confirmed that Mr El Masri held a transitional (permanent) visa which had been restored to him as a result of the Federal Court order of 24 November 2005.

(h) Mr El Masri was released at 1:00 pm on 28 November 2006.[116]

237. The Department submits that departmental systems were not updated with information about the orders of Justice Allsop.[117] In an undated letter to Ms Byers, the Department denied that the Compliance Officer who caused Mr El Masri's detention was negligent. The Department said:

> A failure to update departmental systems and to keep accurate records, not [the Compliance Officer's] actions directly contributed to the detention of Mr El-Masri. At the time National [O]ffice reviewed Mr El Masri's case it would appear that Mr El Masri's client related paper records and system records did not contain any useful information that would have alerted the reviewing office to the existence of the consent orders. This review was undertaken to inform a compliance strategy in relation to the imminent High Court decision in Nystrom. Based on a reasonable belief that Mr El-Masri was released from detention as a result of being Nystrom affected, NSW [police] was advised accordingly and he was subsequently detained following the High Court's decision.

238. It is difficult to understand how information as important as Mr El Masri's Federal Court proceedings and the consequent reinstatement of his visa could have been omitted from his file. Nevertheless, I accept the Department's submission that departmental systems were not updated with a complete record of the orders made by Justice Allsop on 24 November 2005.

239. I find that there was a failure to update departmental systems and to record that Mr El Masri was, by reason of the orders of Justice Allsop, a lawful non-citizen.

Conclusion: Mr El Masri's detention on 28 November 2006 breached his right not to be arbitrarily detained

240. Mr El Masri was not affected by the High Court's decision in *Nystrom*. The effect of the decision of Justice Allsop on 24 November 2005 was that his transitional (permanent) visa was restored to him. When the Department discovered Mr El Masri was not affected by the High Court's decision in *Nystrom*, the Department released him.

241. The Department submitted that Mr El Masri's detention on 28 November 2006 was not arbitrary. The Department said '[t]he circumstances surrounding Mr El Masri being taken into custody would indicate that this was not an arbitrary detention but part of an action involving a group of people affected by the High Court decision in *Nystrom*'.[118]

242. I do not accept the Department's submission. Mr El Masri was not affected by the decision of the High Court because Justice Allsop had restored his transitional (permanent) visa. Further, for the reasons I set out below, I consider the failure of the Department to keep proper records was an act that was inconsistent with Mr El Masri's right not to arbitrarily detained.

243. I find that the detention of Mr El Masri on 28 November 2006 and the acts leading to it, were inconsistent with art 9(1) of the ICCPR. In my view, there two are alternative bases upon which this finding can be made.

(a) The failure to keep adequate records was inconsistent with Mr El Masri's right not to be arbitrarily detained

244. The Department has stated that the detention of Mr El Masri was a result of its failure to keep adequate records. Given that s 189 of the Migration Act requires a non-citizen to be detained if they do not hold a valid visa, the significance of failing to record details of a decision reinstating a person's visa is, and should have been, obvious. The fact that departmental record systems did not contain 'any useful information' concerning the orders of Justice Allsop is unacceptable.

245. Recording such information on Mr El Masri's file would have avoided his detention – the circumstances of which I accept were traumatic for both Mr El Masri and his family – on 28 November 2006.

246. The failure to keep adequate records was inconsistent with Mr El Masri's right not to be arbitrarily detained. The failure was unreasonable and had the clearly foreseeable consequence of Mr El Masri's detention, given the strict terms of s 189 of the Migration Act.

247. I note that when Mr El Masri was released, the letter informing him of his release foreshadowed that the appeal of *Nystrom* to the High Court may have resulted in his status and release from detention being revisited. The importance of the decision of the Federal Court to reinstate Mr El Masri's visa when his freedom was otherwise seen as conditional on the outcome of the High Court's decision in *Nystrom* should therefore have been obvious.

(b) Mr El Masri's detention was unlawful because the suspicion he was an unlawful non-citizen was not reasonable

248. To deprive a person of his or her liberty pursuant to s 189 of the Migration Act, an officer must hold a 'reasonable suspicion' that a person is an unlawful non-citizen. I am of the view that the orders made by Justice Allsop were on the public record and reasonably capable of being discovered.

249. Mr El Masri had been in the community for over a year and it was incumbent upon immigration officers to check Mr El Masri's immigration status, including whether there were any court orders restoring Mr El Masri's visa. I also find it difficult to accept that there was nothing on Mr El Masri's file that would have alerted an officer to the court proceedings before Justice Allsop. I therefore consider that the suspicion that Mr El Masri was an unlawful non-citizen was not reasonable in all the circumstances.

Part G:
The detention of Mr El Masri in MSU

Complaint

250. The Complainant alleges that placing Mr El Masri in the MSU breached his human rights. In particular, the Complainant has expressed concern about the impact of Mr El Masri's prolonged detention in MSU on his mental health.

251. The Complainant also alleges that the Department did not provide Mr El Masri with appropriate medical care whilst he was detained in MSU and that the Department refused him access to his long-standing treating psychiatrist, who I will refer to in this report as 'the first independent psychiatrist'.

252. These complaints raise the question of whether Mr El Masri's prolonged detention and treatment in MSU breached art 10(1) of the ICCPR, which places a positive obligation upon the Department to treat those in immigration detention humanely.

253. The decision to place Mr El Masri in MSU was taken by the Management team at VIDC, who also took responsibility for Mr El Masri's management while in MSU. The Department states that this management team consisted of 'DIAC, GSL, PSS (Professional Support Services) and IHMS'.

254. I am treating the act of placing Mr El Masri in MSU as an act of the Department, which I take to have ultimate responsibility for the decisions relating to Mr El Masri's ongoing placement in MSU.

The purpose of MSU

255. VIDC is divided into Stages 1, 2 and 3. Stage 1 has been described by the Department as a 'purpose built facility which accommodates single males, predominantly in large dormitories'.[119] It provides the most secure facility of the VIDC stages.

256. MSU is a short term facility that is used for 'separation detention'.[120] It is a short term facility where detainees are segregated from other detainees and kept under frequent observation. It is the most restrictive detention environment in VIDC.

257. The Department states detainees are placed in the MSU only when there is no other viable alternative for ensuring good order and security of the detention facility and the safety of those in it, including the detainee.

258. The Department said that when a detainee is placed in MSU, emphasis is placed on addressing the issues of concern which led to the placement in the first place, in order for the detainee to be reintegrated into stages 1, 2 or 3 as soon as possible.

Findings of fact concerning Mr El Masri's medical conditions

(a) Mr El Masri had a number of identified medical conditions, including schizoaffective disorder

259. At the time Mr El Masri was detained in MSU he was diagnosed with schizoaffective disorder. Schizoaffective disorder is a term that encompasses bipolar disorder and schizophrenia.

260. The Department was aware that Mr El Masri had a number of medical conditions, including schizoaffective disorder. Mr El Masri was also known to have a problem with illicit substance abuse; be an insulin dependant diabetic; and have been diagnosed with Hepatitis C.

261. Mr El Masri's Management plan (dated 30 July 2005) states:

> Mr El Masri has presented several instance of self-harm and has been on various levels of SASH [Suicide and Self Harm] since 28 October 2004. He has been on 2 minute observations since 8 April 2005. He continues to present challenging behaviours (attempted escapes, demonstrated verbal and physical aggression and threats). His behaviour can be unpredictable, he can become volatile [sic] and he appears to try and manipulate his environment and the people who live and work with him. He has a history of drug use. He requires very close management and ongoing monitoring.[121]

(b) Mr El Masri had a long history of mental health problems

262. Mr El Masri had a history of mental health illness prior to his detention in VIDC.

263. The Department states that Mr El Masri was diagnosed with chronic psychosis when he was in corrective services and continued to exhibit this condition when he was taken into immigration detention.

264. Incident reports indicate that Professional Support Services (PSS), a national organisation which provides psychological counselling services under subcontract to the Detention Services Provider (DSP) closely monitored and regularly assessed Mr El Masri, including arranging for a psychiatric assessment at Banks House on 4 July 2005.

265. Mr El Masri had a long history of self-harm while in immigration detention. In November 2003 Mr El Masri was admitted to Liverpool Hospital with a self-inflicted laceration to his neck. A report in 2005 by an independent psychiatrist (who I will refer to in this report at 'the second independent psychiatrist') observed 'this was a serious suicide attempt in that it could easily have been fatal'.

266. Mr El Masri's medical file records that on 3 May 2005, the first independent psychiatrist described Mr El Masri's depression as 'situational'.[122] On 17 May 2005, the first independent psychiatrist stated 'Mr El Masri has been on constant suicide and self-harm watch since early April 2005 … his affect is flat and he presents as hopeless. His current detention situation has been ongoing for a long time and he is unable to see an end to it'.[123]

267. On 25 May 2005, the Senior Psychologist at VIDC stated Mr El Masri had been on constant suicide and self-harm watch since early April 2005. She expressed concern Mr El Masri would repeat previous attempts to commit suicide and added '[h]e appears to have resigned himself to the fact he will die in detention and has said on a number of occasions that he will do it when he is not being watched'.[124]

268. On 6 June 2006, the Senior Psychologist at VIDC reported that Mr El Masri's suicidal ideations appeared to be a result of 'his ongoing detention situation, his hopelessness and familial stressors'. She observed 'those stressors that lead him to feel suicidal continue to remain and it appears that until these stressors are removed he remains at high risk'.[125]

269. On 24 June 2005, the first independent psychiatrist said that it would be helpful for Mr El Masri's depression and suicidal ideation if Mr El Masri was released back into the community, although the first independent psychiatrist noted 'there are legal and other issues and that is not an easy answer'.[126]

270. An undated letter from a third psychiatrist who examined Mr El Masri concluded 'it would appear that [Mr El Masri's] suicidal ideation is directly linked to his detention status and the only way he can continue to be managed in detention is to remain on 2 minute observations to avoid direct self-injury. I feel his management in detention is now compromised'.[127]

Justification by the Department for placing Mr El Masri in MSU

271. The Department has stated that the decision to transfer Mr El Masri to MSU was taken by VIDC management in order for the Department, GSL and medical staff to monitor Mr El Masri closely. The Department considered this monitoring was necessary, given concern that the actions of Mr El Masri may pose a risk to himself and others, as well as for the protection and good order and security of VIDC.

272. The Department states the accommodation of Mr El Masri in MSU was considered to be the most appropriate option based on:

    (a) the recommendations by the second independent psychiatrist;

    (b) Mr El Masri's non-compliance with established behavioural limits (ie self-harm attempts, hunger strike, refusing his medication, use of illicit drugs) and ongoing behavioural and psychological concerns; and

    (c) his refusal to be placed in another other location at VIDC except Stage 3.[128]

273. Management Plans indicate the purpose of placing Mr El Masri in MSU was to enable him to be closely supervised, to help prevent further incidents and to reduce the opportunities available for him to self-harm. There is evidence that Mr El Masri did not comply with established behavioural limits (ie self-harm attempts, hunger strikes, refusing his medication, use of illicit drugs).[129]

274. The Incident Reports document the Department's concern over Mr El Masri's possession of prohibited items (drugs, razors, knives, scissors and mobile phones) and his behaviour (threatening self-harm, barricading himself in his room, throwing items off a balcony and refusing to let his children leave the detention centre following a visit).

275. The only security risk assessment for Mr El Masri that has been provided to the Commission is dated 15 September 2005. It states that Mr El Masri's substance abuse and mental health problems are currently under supervision. The security assessment refers to numerous incidents that Mr El Masri had been involved in whilst in detention, including major disturbances in the centre, possession of prohibited articles and damage to the centre, aggressive behaviour and violence towards others, an attempt to escape, threats of self-harm and actual self-harm, and his history of substance abuse and mental health problems. It also states that that Mr El Masri has had 'numerous successful attempts at causing serious injury [to himself] and…a history of being aggressive, abusive and causing damage to property'.[130]

276. The Department also provided the Commission with a number of Behavioural Agreements and Reintegration Plans which were put in place with Mr El Masri's agreement. The stated purpose of the Reintegration Plans was to 'enable a structured reintegration of Mr El Masri into the general population of the Centre and to better support his return to the daily routine and activities at the Centre'.[131]

Consideration by the Department of alternatives to detaining Mr El Masri in MSU

277. The Department states that it considered the following alternatives to placing Mr El Masri in MSU:

> Two options considered but not trialled were increased escorts to his home and a reward system. These options were not implemented as they were considered as short term solutions and VIDC management were not confident that Mr El Masri would agree to the conditions attached to these options. During Mr El Masri's accommodation in the Management Support Unit between late July and mid October 2005, he had been participating in a reintegration process to return to Stage 3. Part of that process would involve him spending three hours a day in Stage 3 and having lunch in Stage 2.
>
> A placement in an alternative place of detention (Residence Determination) was also being considered, but Mr El Masri was discharged from immigration detention before the Minister could make a final decision on the granting of Residence Determination. Mr El Masri continued to have regular consultations with the psychiatrist, psychologist and mental health nurses from Professional Support Services (PSS) during his accommodation in the MSU. Mr El Masri also spent time at Banks House (a mental health facility attached to Bankstown Hospital) on several occasions for psychiatric assessment and treatment.[132]

278. The Department has provided a copy of teleconference minutes from 29 August 2005 and 5 September 2005 at which a multi-stage community reintegration plan for Mr El Masri was discussed. This plan involved:

- Continued placement at MSU in VIDC with psychiatric intervention to stabilise his presenting psychiatric symptomology and at-risk behaviour or admission to a psychiatric facility;

- Progression to a short-term placement option in VIDC Stage 3;
- Progression to a residential determination pending removal sponsored by a third party with structured community services to reduce the likelihood of pro-criminal behaviour;
- Residence bridging visa pending removal to be considered if Mr El Masri demonstrates ongoing compliance to behavioural objectives.[133]

279. Following reforms that came into force in June 2005, the Minister had a statutory power to make a residence determination specifying alternative residence arrangements for a person in immigration detention.[134] Under s 197AF this power to make a residence determination may only be exercised by the Minister personally. There is no duty to consider whether to exercise the powers.[135]

280. On 13 July 2005, before Mr El Masri was placed in MSU, the Minister accepted a submission from the Department to explore residence determination for Mr El Masri.[136] However, Mr El Masri was removed from detention before the Minister could make a decision about whether to grant a residence determination.[137]

Findings about Mr El Masri's access to medical care

281. I find that Mr El Masri's access to medical care within MSU was adequate. His diabetes appears to have been closely monitored and he received appropriate medication for this condition.

282. Mr El Masri was seen regularly by psychiatrists and had multiple admissions to Banks House, a mental health facility attached to Bankstown Hospital, for psychiatric assessment and treatment. His medical records show he was receiving regular medication for both physical and mental health conditions.

283. I find that Mr El Masri's requests to see the first independent psychiatrist were granted. I accept evidence provided by the Department that indicates Mr El Masri consulted with his treating psychiatrist on 3 May 2005, 9 June 2005 and 16 August 2005. I note, in particular, that email records from 16 August 2005 show Mr El Masri had requested to see the first independent psychiatrist and the Department had arranged for this to occur at 4:45 pm the same day.

Findings about Mr El Masri's mental health after being placed in MSU

284. While it appears that Mr El Masri received access to appropriate medical staff, there is a separate question about whether the Department and GSL took adequate action to implement the recommendations of medical staff, notably the two independent psychiatrists, that Mr El Masri should be moved from MSU to a different setting.[138]

(a) Evidence about Mr El Masri's mental health in MSU

285. Mr El Masri was transported to Banks House for psychiatric assessment on 29 July 2005, and 2, 5, 8 and 26 August 2005. These visits were made for a variety of reasons including incidents of attempted and actual self-harm, refusal to accept medication or medical treatment, and as a result of Mr El Masri's own request. Each time he was returned to VIDC without being sectioned under the Mental Health Act 1990 (NSW).

286. On 10 August 2005, the Psychiatry Registrar at Bankstown Hospital reported that:

> [Mr El Masri] has been seen by at least three other psychiatrists here. He had a history of anti-social personality disorder and psychosis (nos). We reviewed him yesterday, the reason he gave for this episode of self harm by stabbing himself with a pen is because he was put in isolation. There was no evidence of any injury. He complained that he doesn't have access to his wife and children. He has minor sleep disturbance. He didn't have any psychotic or clear depressive symptoms. The main stressor in his life is staying in the detention centre and spending time in isolation. His wife has said the only time some body listens to him in the detention centre is when he harms himself. It's obvious he has manipulative behaviour and he remains a chronic risk of self-harm unless the situation is changed.

287. On 16 August 2005, the first independent psychiatrist recommended that '[Mr El Masri] should be moved from the MSU to Stage III as he is settled and promising to behave'. He also recommended suicide watch continue.[139]

288. On 19 August 2005, the second independent psychiatrist reported that Mr El Masri had schizoaffective disorder. The second independent psychiatrist examined Mr El Masri for one hour on 19 August 2005 at VIDC in what the second independent psychiatrist described as an 'area (Stage 1) where he was being detained alone under the supervision of officers and under frequent observation'.[140]

289. The second independent psychiatrist stated:

> He wants to be released and so is likely to continue to engage in behaviour which he believes will facilitate his release and so is likely to remain a difficult management problem as long as he remains in detention. There will always be the uncertainty as to whether his difficult behaviour at any point in time is manipulative or the result of his psychoses or a mood swing and so the nature of each persistent behavioural deterioration will need to be determined by a psychiatrist either at Villawood or at a Public Hospital. As he is currently hypomanic his behaviour will be unpredictable and difficult to manage if he is not getting his way. Thus he should remain in his present situation in Stage 1 under close observation at least until his hypomania settles as whilst he is there he is likely to be brittle, will need to be humoured and his word could not be relied upon … When his hypomania has settled a decision will need to be made as to whether he can leave Stage 1 and its close observation. The problem will be if he is not going to be released from detention and his manipulative behaviour continues. In my opinion the management of manipulative behaviour is by limit setting and so being returned to Stage 3 would be conditional on him agreeing to abide by the behavioural limits set on him by the management team including the psychiatrist and the psychologist. If he does not agree to abide by them he should remain in Stage 1 or if he agrees and transgresses he should be returned to it. He is at threat of killing himself in relation to two possibilities: intentional as a result of a psychotic motivation from a deterioration in his psychoses be it schizophrenic, depressive or hypomanic; misadventure to affect his release.[141]

290. In the second independent psychiatrist's opinion,

> **the best clinical setting for Mr El Masri's management given would be for him to be released to the community under the care of a psychiatrist and if this is a realistic possibility in the circumstances of his case, as he believes it is, then I would recommend that it be expedited.** If it is not possible to release him then I would continue his current management at Villawood and if his psychosis does not settle and proves too difficult to manage in his current situation then he should be transferred to a psychiatric hospital (emphasis added).[142]

291. The second independent psychiatrist stated that if it was not possible for Mr El Masri to be released into the community under care or transferred to a prison hospital,

> then I see no alternative other than his management continuing as it has in recent times which will involve him being moved between Stage 1 and Stage 3 as his behaviour merits and between Villawood and the State's Public Health Psychiatric Services and United for assessment and/or temporary admission under the Mental Health Act.[143]

292. The second independent psychiatrist provided the following summary of his report:

> On the basis of his presentation and given that current drug abuse can be eliminated then Mr El Masri has Bipolar Disorder. If his history of hearing voices apart from periods of drug abuse is accepted then he also has Schizophrenia. This combination is diagnosed as Schzioaffective Disorder.
>
> ….
>
> If his psychoses can not be controlled at Villawood then he should be admitted to a Public Hospital Psychiatric Unit for as long as necessary to attain therapeutic control. However, when his psychosis is controlled then unless he is released from detention he is likely to continue his manipulative behaviour. He will then need frequent psychiatric assessment to ascertain if any difficult behaviour is manipulative or psychotic. As he is at danger of killing himself by psychotic intent or misadventure he will be difficult to manage in the facilities of Villawood. If limit setting fails for either reason then in my opinion he should be placed in a facility with the appropriate staff resources and physical facilities and where suitable ongoing behavioural management can occur such as the Prison Psychiatric Hospital.[144]

293. The second independent psychiatrist's report does not refer to Mr El Masri's placement in MSU. It does, however, refer to Stage 3 and Stage 1.

294. On 16 August 2005, the first independent psychiatrist recommended that Mr El Masri be moved from the MSU to Stage 3. Asked what steps the Department took to implement the recommendations of two independent psychiatrists, the Department stated:

> The management team at Villawood IDC implemented the following recommendation from [the first independent psychiatrist's] report; that Mr El Masri be moved from MSU and re-integrated into Stage 3. In conjunction with [the first independent psychiatrist's] recommendation, the management team also implemented the following recommendation from [the second independent psychiatrist's] report:
>
> That Mr El Masri's placement in MSU should continue until he agrees to the behavioural limits set by the management team at Villawood IDC (including the psychiatrist and psychologist), and his hypomanic condition settles.

> [The second independent psychiatrist] also noted that if Mr El Masri did not agree to abide by the behavioural limits set then he should remain in MSU or if he agreed and then transgressed; he should be returned to MSU.[145]

295. This statement by the Department appears to misquote the second independent psychiatrist's report of 18 August 2005, discussed above.

296. The Department states that detainees in MSU are reviewed every day by the placement review team to determine whether alternative accommodation is available or appropriate.[146]

297. Mr El Masri's reintegration plans stated his placement in MSU would be reviewed on a daily basis and if he continued to show good behaviour, consideration would be given to moving him to a less restricted accommodation area – namely, Stage 1.[147]

298. There is no direct evidence that Mr El Masri's detention in MSU was reviewed on a daily basis. On 30 August 2005 Mr El Masri was informed he must stay in MSU for a further 8 days.[148]

299. In response to a question about whether the Department conducted a daily review of Mr El Masri's placement in MSU as required in the Management plans, the Department stated that while the management team at VIDC regularly reviewed Mr El Masri's placement, 'formal records of Client Placement reviews were not maintained at VIDC in 2005'.[149]

300. The Department has provided a copy of Mr El Masri's Care Plan.[150] This plan outlines Mr El Masri's behavioural issues and medical management. There are no records of incidents of concern between late August and 4 October 2005.

301. In the period before his release from detention, Mr El Masri was released out of MSU for three hours a day to eat lunch and interact with other the detainees in the compound. He was also escorted to Stage 2 to eat lunch and interact with other detainees.

302. When Mr El Masri was released from detention on 14 October 2005 his discharge summary stated 'ongoing psychiatric care to be continued'.[151]

(b) Findings about the impact of MSU on Mr El Masri's mental health

303. I find that Mr El Masri's prolonged detention in MSU had a negative impact on his mental health. It was not suitable for Mr El Masri to be detained in restrictive and isolated conditions of MSU for extended periods of time and this form of detention had a negative impact on his mental health.

304. I find that Mr El Masri's prolonged detention in MSU was not properly reviewed. In particular, I accept that on 30 August 2005 Mr El Masri was informed he must stay in MSU for a further 8 days. I find that Mr El Masri's uncertainty about when he would be released from MSU caused him significant additional distress and anxiety.

Conclusion: Mr El Masri's treatment in MSU breached his right to be treated with humanity and dignity

(a) The conditions of Mr El Masri's prolonged detention in MSU breached art 10(1) of the ICCPR

305. I find that Mr El Masri's prolonged detention in MSU from the period of 29 July 2005 to 14 October 2005 breached his right to be treated with humanity and dignity in accordance with art 10(1). This finding is based upon on a matrix of factors including:

    (a) the impact of prolonged detention in the restricted and isolated conditions of MSU on Mr El Masri's known mental health conditions;

    (b) the failure to fully implement the recommendations of medical experts; and

    (c) the failure to conduct regular reviews of Mr El Masri's placement in MSU.

306. Although Mr El Masri's mental health problems reportedly predated being taken into immigration detention, the medical evidence leads me to conclude that his mental health problems were worsened by the conditions of MSU. The consensus of medical experts was that the best clinical setting for the treatment of Mr El Masri would have been achieved if he were released into the community.

307. The Department accepts that the MSU is not intended to accommodate detainees for long periods. However, the Department's claim that Mr El Masri's detention in MSU was reviewed daily does not appear to be supported by the material before me.

308. I find that that Mr El Masri's detention was not reviewed on a daily basis to determine whether more appropriate accommodation existed and on one occasion Mr El Masri was told he would continue to be detained in MSU for 8 days. I accept that Mr El Masri's uncertainty about when he would be released from MSU caused him additional distress and anxiety beyond that which he was already suffering by reason of his prolonged detention.

309. I note that the Department asserts that Mr El Masri was accommodated for approximately 71 days, not 78 days. The Department states that 'the 71 days takes into account the external escort of Mr El Masri from Villawood IDC on seven occasions between late July and mid October 2007'.[152]

310. The merits of the complaint that Mr El Masri's prolonged placement in MSU breached his right to be treated with humanity and dignity does not turn upon whether he was detained for 78 days or 71 days. However, I note the days the Department sought to exclude include the days when Mr El Masri was being transported from VIDC to Banks House after attempting to self-harm.

311. In all the circumstances, I conclude that the conditions in which Mr El Masri was detained in MSU breached his right to be treated with humanity and dignity art 10(1) of the ICCPR.

(b) Unnecessary to make separate determination about whether detention in MSU breached art 9(1)

312. For the reasons I have set out in Part E, I consider that Mr El Masri's detention after 16 July 2005 and until his release on 14 October 2005 breached art 9(1) on the basis that his detention was unlawful, or alternatively that the failure adequately to review his immigration status was inconsistent with his right not to be arbitrarily detained.

313. If a comprehensive and immediate review of the implications of the *Nystrom* decision had occurred, Mr El Masri would have been identified as a '*Nystrom* affected' person prior to being placed in MSU. During the entire period of Mr El Masri's detention in MSU he could have been released pursuant to the authority of the Full Federal Court in *Nystrom*.

314. The Commission has previously held that art 9(1) may be breached where a person's accommodation in detention changes in a way that involves a further and serious deprivation of their liberty that significantly alters the nature of their detention.[153] I agree with that approach.

315. Following this precedent, there may be an argument that Mr El Masri's detention in MSU constituted an additional deprivation of liberty resulting in a separate breach of art 9(1) of the ICCPR.

316. However, as I have found that Mr El Masri's ongoing detention after 16 July 2005 breached art 9(1), I consider that it is unnecessary to determine whether the additional deprivation of liberty imposed on Mr El Masri by his detention in MSU constituted an additional breach of art 9(1).

Part H:
Use of force on 8 August 2005

Complaint

317. The Complainant alleges that on the afternoon of 8 August 2005, Mr El Masri was knocked unconscious to the ground by guards. This incident occurred at approximately 4:40 pm in the afternoon of 8 August 2005.

Justification of the use of force by the Department

318. The Department claims that on the evening of 8 August 2005 Mr El Masri was threatening self-harm with a pen.[154] The Department states the GSL Operations Manager directed members of the Control and Restraint team to 'confront and secure Mr El Masri in order to prevent him causing injury to himself'.

319. The Department states this directive was carried out in a controlled manner. Three GSL officers were involved in the cell extraction. Once secured, Mr El Masri was examined by medical staff and mechanical restraints were removed. Mr El Masri was then taken to Bankstown Hospital for further examination.

Evidence about the use of force

(a) The video recording

320. A video recording was taken of the incident on 8 August 2005 which shows Mr El Masri being tackled to the ground by three officers and the subsequent events from 20.42 (as shown in the recording).

321. It would appear that from 20.49 Mr El Masri was talking and moving. Mr El Masri states on the video that he did want to self-harm. He says 'next time no more talking I'll just fucking kill myself'. While Mr El Masri was talking he took off his clothes.

322. It is unclear from the video footage whether Mr El Masri was knocked unconscious.

(b) Medical reports

323. The officer report dated 8 August 2005 reports that Mr El Masri did not sustain any physical injuries. It states:

> Wrists and ankles post cuff applications showed redness on the cuff line and nil skin breaks showed. Detainee was offered his regular night medications but refused and stated "Just send me to mental hospital". Detainee later took his medication and put his clothes on. In consultation with M.O on call [name deleted] detainee was sent to Bankstown Hospital for psychiatric assessment. Transferred to the hospital via VIDC transport at approximately 21:30hrs.

324. Mr El Masri was admitted to Bankstown Hospital about 11.30 pm on 9 August 2005. He was discharged from Banks House on the morning of 10 August 2005 and placed in MSU on constant two-minute SASH observations. As discussed above, the Psychiatry Registrar at Bankstown Hospital, reported that Mr El Masri claimed his reason for self-harm was in protest of being in isolation.

325. On 16 August 2005, Mr El Masri saw a Doctor at VIDC (the VIDC Doctor). He reported to her that he was crash tackled and hit his head and that he could feel the right side of his brain. He also reported that when he looked at things they felt warped and that he had headaches on his right side a few times per day for a couple of seconds. The VIDC Doctor's examination found a very mild tenderness over right temple and dizziness induced with repeated head flexion.

(c) Police records

326. On 17 August 2005 Mr El Masri contacted Bankstown Local Area Command to report the incident as an alleged assault. Two police officers attended VIDC and spoke to the VIDC centre Manager and the VIDC security officer. The police decided not to pursue the matter further. It is noted that the Complainant denies that the police spoke to Mr El Masri.

327. The 'COPS' event entry states:

> Upon speaking to the centre manager and security officer Tim it was established that they had conducted a cell extraction on the victim as he had in his possession a pen and was holding it to his chest threatening self harm… the victim had no visible injuries to indicate excessive force. The victim also did not complain of excessive force being used he was just unhappy that they did the cell extraction. It is this reason that police have created this event as doubtful.[155]

Conclusion: no breach of human rights

328. I find that the use of force against Mr El Masri did not amount to a breach of either art 7 or 10(1) of the ICCPR. Taking Mr El Masri's complaint at its highest, I am not satisfied that the alleged conduct was disproportionate in the circumstances or reached the requisite level of severity to constitute a breach of arts 7 or 10(1). This finding is based on my assessment of the video footage which I consider does not suggest excessive force was used in the course of the 'cell extraction'.

Part I:
Restrictions on Mr El Masri's telephone calls

Complaint

329. Mr El Masri alleges that whilst he was in MSU his incoming calls were restricted and his outgoing calls were screened. In particular, the Complainant alleges that phone calls made to Mr El Masri on 16 and 17 August 2005 by his wife and his previous legal representative were not allowed through.

Evidence of restrictions placed on phone calls

330. These complaints raise potential breaches of art 10(1), art 17(1) and art 23(1) of the ICCPR.

331. It is undisputed that, for a period of time, Mr El Masri's use of the telephone was monitored or limited.

332. The Department claims the reason for the restrictions was Mr El Masri's use of the phone to call detainees in Stage 3 to incite protests, including hunger strikes.

333. To establish a breach of Mr El Masri's human rights it would be necessary to show:

- The restrictions on Mr El Masri's ability to contact his family constituted an arbitrary interference with his family, rather than a reasonable and proportionate action to ensure the safety and good order of VIDC.
- The right of Mr El Masri to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel was restricted contrary to art 10(1).

334. The Department has stated that the Management Plans are the only records that describe the restrictions that were placed on Mr El Masri's telephone calls between late July and 14 October 2005.[156] According to the Department:

> Some restrictions were placed on outgoing calls following observations that Mr El Masri was making telephone calls to people in immigration detention in Stage 3, where he attempted to incite protests and hunger strikes. No restrictions were placed on telephone calls to or from Mr El-Masri's family, HREOC, the Commonwealth Ombudsman, the Department or Mr El-Masri's legal representative.[157]

335. A Management Plan dated 30 July 2005 for Mr El Masri states incoming calls 'will be permitted from Sunday 31 July 2005', but it does not indicate on what dates calls were not permitted. It also indicates that:

> outgoing social calls will be allowed but limited and dependant on the detainee's demeanour and compliance. Staff can determine the duration but 15-20 minutes should seem sufficient. Calls to and from DIMIA, HREOC and the Ombudsman's office will occur as per normal protocols. Staff will make the calls at all times. 2 staff will observe the call – as it will be made from the Officers station.

336. A Management Plan dated 10 August 2005 states incoming call phone calls were permitted. Outgoing calls were permitted but recorded as being 'dependent on him [Mr El Masri] meeting the agreed objectives'. The 'agreed objectives' are recorded as:

1. No assaults or threats to anyone
2. No threats of self-harm
3. No actual self-harm
4. No major outbursts
5. No disruptive behaviour
6. No deliberate damage to buildings, furnishings or fittings
7. Compliance with requests from staff and lawful instructions.

337. On 30 August 2005, the Management Plan states that Mr El Masri was not to make any phone calls to detainees within VIDC. Outgoing calls were permitted but dependent on him meeting agreed objectives including no threats, assaults or actual self-harm. Incoming calls were recorded as permitted.

338. There are no Management Plans that record what call restrictions, if any, were imposed on 16 or 17 August 2005.

339. The Management Plans that have been provided to the Commission would seem to support the Department's statement that no restrictions were placed on calls to the Commission, the Commonwealth Ombudsman, the Department or Mr El Masri's legal representative although they do not specifically state that no restrictions were placed on calls to or from Mr El Masri's family.

Conclusion: no breach of human rights

340. While I accept that there were restrictions placed on Mr El Masri's phone calls, I do not find that these were disproportionate or unreasonable such as to constitute an arbitrary interference with Mr El Masri's family life.

341. In particular, I do not consider there is sufficient evidence to support the allegation that phone calls made to Mr El Masri on 16 and 17 August 2005 by his wife and his legal representative were not allowed through.

342. I am not satisfied that there is sufficient evidence to find that the restrictions placed upon Mr El Masri's phone calls constituted an arbitrary interference with his privacy or his family life in breach of his human rights under art 10, art 17(1) and 23 of the ICCPR.

343. I am not satisfied that there is sufficient evidence to support a finding that the restrictions placed upon Mr El Masri's phone calls restricted his communications with his legal representative in breach of art 10(1) of the ICCPR.

Part J:
Visits by Mr El Masri's family

Complaint

344. The Complainant alleges that when her children visited Mr El Masri they had to visit him in a cage and they were concerned about his treatment. The Complainant states the 'cage' was an area of 6 x 6 metres surrounded by wire mesh.

345. This complaint raises potential breaches of art 10(1), art 17(1) and art 23 (1) of the ICCPR.

Evidence about family visits to Mr El Masri

346. The Department has provided evidence that between 26 August 2004 and 9 October 2005, Mrs El Masri and/or other family members visited Mr El Masri a total of 134 times. Nineteen visits occurred when Mr El Masri was detained in MSU.

347. In 2005, these visits occurred in the grassed area of the Stage 3 mess under the supervision of the assigned officers or the Interview Room in Stage 3. At times visits were conducted in the Stage 2 visiting area.

348. The Complainant submits there was no valid reason why the family could not have seen Mr El Masri in the normal visiting area in Stage 2, and that requiring Mr El Masri to visit his family in 'cage' like conditions was an unnecessary and disproportionate restriction on his liberty.

349. The Department and GSL also arranged two external family excursions: a family BBQ picnic at a local park on 18 July 2005; and an escorted visit by Mr El Masri to the family home on 28 July 2005.

Conclusion: no breach of human rights

350. I do not consider that the evidence provided by the Complainant supports a finding that Mr El Masri was denied the right to be visited by his family contrary to Principle 19 of the Body of Principles.

351. I find therefore that there was no violation of Mr El Masri's right under art 10(1). On the evidence currently before me I am satisfied that Mr El Masri had adequate access to visits from his family during his detention in VIDC.

352. There is no evidence before the Commission which supports the allegation that Mr El Masri's children were required to visit their father in a cage. There is also insufficient evidence before me to conclude that the conditions in which Mr El Masri's family visited Mr El Masri were unnecessarily or disproportionately restrictive.

353. While I accept that Mr El Masri's children found it distressing to visit their father in detention, I do not accept that the conditions in which these visits occurred amounted to an 'interference' with Mr El Masri's family life within the meaning of art 17(1) of the ICCPR. Instead, I find that these conditions were an ordinary incidence of his detention.

Part K:
Findings and recommendations

Power to make recommendations

354. 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.[158] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[159]

355. The Commission may also recommend:

> (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.[160]

Submissions from the Complainant and Department

356. The Complainant has not made submissions about any special damage suffered by Mr El Masri by reason of the alleged breaches of human rights.

357. The Department has submitted that since Mr El Masri commenced common law proceedings, the Commission should not attempt its own assessment of damages in tort, as such damages will be the subject of determination in the common law proceedings.

358. Asked to respond to these submissions, the Complainant stated:

> [The Commission] investigates breaches of human rights under the International Covenant of Civil and Political Rights which is different from common law breaches. Mr El Masri may be successful in one and not the other. We believe that in principle, Mr El Masri's matter should be assessed under international standards and there is no prejudice to the common law court proceedings…
>
> We further submit that the [Commission] should make a recommendation on compensation if it is found that there were breaches of Mr El Masri's human rights as the common law court proceedings would assess different heads of damages.[161]

359. The Complainant has not made submissions that seek to quantify the loss suffered by Mr El Masri or provided any estimate of the amount of compensation that is sought.

360. I acknowledge that common law proceedings commenced by Mr El Masri are still to be the subject of a judicial determination.

361. My statutory function is to inquire into the allegations that the Commonwealth has acted inconsistently with Mr El Masri's human rights.

362. I have conducted these inquiries and I have found that the Commonwealth has breached Mr El Masri's human rights. I therefore consider it is appropriate to recommend that the Commonwealth consider compensation be paid to Mr El Masri on this basis.

Consideration of compensation

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

364. However, in considering the assessment of a recommendation for compensation under s 35 of the HREOC Act (relating to discrimination matters under Part II, Division 4 of the HREOC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[162]

365. I am of the view that this is the appropriate approach to take to the present matter. As such, so far as is possible by a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[163]

366. Mr El Masri remained in detention for an unnecessarily long time after the Department failed to take opportunities to thoroughly review and assess the continuing validity of Mr El Masri's detention. These failures prevented Mr El Masri from being released at an earlier time.

367. The tort of false imprisonment is a more limited action than an action for breach of art 9(1). This is because an action for false imprisonment can not succeed where there is lawful justification for the detention, whereas a breach art 9(1) will be made out where it can established that the detention was arbitrary, irrespective of its legality.

368. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of art 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the Courts have compensated the loss of liberty.

369. The Complainant has not made submissions that seek to quantify the loss suffered by Mr El Masri, including submissions for pecuniary loss or damage, medical costs or costs of legal proceedings.

370. I note, however, that the tort of false imprisonment is actionable without proof of damage as the right to liberty is 'the most elementary and important of all common law rights'.[164]

371. The principal heads of damage for a tort of this nature are injury to liberty (the loss of time 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).[165] Damages may also be aggravated by the circumstances of a particular case, for example, where a lack of *bona fide* or improper or unjustifiable conduct on the part of a respondent is established.[166]

372. 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:

- In *Taylor v Ruddock*,[167] the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in NSW prisons.

  Although, as discussed above, the award of the District Court was ultimately set aside by the High Court, it provides useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.

  The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him $50 000 for the first period of 161 days and $60 000 for the second period of 155 days. For a total period of 316 days wrongful imprisonment, the Court awarded a total of $110 000 (ie $348.10 per day).

  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 and therefore his disgrace and humiliation was less.

  On appeal, the Court of Appeal of New South Wales considered that the award was low but within the acceptable range.[168] The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.[169]
- In *Goldie v Commonwealth of Australia & Ors (No 2)*,[170] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days (approximately $5500 per day).
- In *Spautz v Butterworth*,[171] 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. This is an award for approximately $1400 per day.

Recommendation that compensation be paid

(a) Compensation should be paid for Mr El Masri's arbitrary detention after 16 July 2005

373. I have found Mr El Masri should have been released by 16 July 2005, following the decision in *Nystrom* on 1 July 2005. The failure to release him from detention was inconsistent with his right not to be arbitrarily detained. In my view, his detention was unlawful.

374. The failures to act promptly were also inconsistent with Mr El Masri's right not to be arbitrarily detained. It is not appropriate for any compensation to be discounted because the effect upon Mr El Masri of his prolonged detention did not diminish with time. In his case, his ongoing detention was detrimental to his mental health.

375. After 16 July 2005, Mr El Masri spent 90 days in detention until his release on 14 October 2005.

376. I consider that the Commonwealth should pay to Mr El Masri an amount of compensation to reflect his loss of liberty, humiliation and the mental suffering caused by his ongoing detention. The Complainant has not made submissions on any specific loss that he has suffered or on an appropriate sum by way of compensation. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Taking into account the guidance provided by the decisions referred to above I consider that payment of compensation in the amount of $90 000 is appropriate for this aspect of the complaint.

(b) Compensation should be paid for Mr El Masri's arbitrary detention on 28 November 2006

377. I have found that Mr El Masri's detention on 28 November 2006 was also unlawful and caused by a failure to update Departmental records, an act that was contrary to Mr El Masri's right not to be arbitrarily detained.

378. I find that the circumstances of Mr El Masri's detention on 28 November 2006 were such as to cause him mental suffering, humiliation and significant indignity. I recommend that the Commonwealth pay Mr El Masri $5000 for this incident.

(c) Compensation should be paid in respect of the failure to treat Mr El Masri with humanity and dignity

379. I have also made a finding that the Department's actions in subjecting Mr El Masri to prolonged detention in the restrictive conditions of MSU exacerbated the negative impact that his ongoing detention was having on his mental health and, in particular, his schizoaffective disorder. In this context, there was a breach of art 10(1) of the ICCPR.

380. I consider that it is appropriate that compensation of $10 000 is awarded for this breach.

Apology

381. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr El Masri for the breaches of his human rights identified in this report. Apologies are important remedies for breaches of human rights. At least to some extent, they alleviate the suffering of those who have been wronged.[172]

Other recommendations

382. I recommend that the *Migration Series Instructions 411: Establishing immigration status – in the field and in detention* is amended to require officers promptly and fully to reassess the lawfulness of a person's detention where the basis for that person's detention may be affected by recent legal developments, including court decisions affecting a class of people.

The Department's response to the recommendations

383. By letter dated 25 June 2009, the Department was requested to advise the Commission within 14 days whether it has taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.

384. By letter dated 10 July 2009 the Department provided the following response to my notice of recommendations:

> The department has reviewed the findings and accepts that certain acts and/or practices were inconsistent with and contrary to human rights under the Human Rights and Equal Opportunity Commission Act 1986 (Cth).
>
> The department acknowledges the President's recommendation to:
>
> - pay compensation in the amount of $105,000.00 to Mr El Masri;
> - provide a formal written apology to Mr El Masri for the breaches of human rights identified in the report; and
> - amend the *Migrations Series Instructions 411: Establishing immigration status* – in the field and in detention to require officers to reassess the lawfulness of a person's detention where the basis for that person's detention may be affected by recent legal developments, including court decisions affecting a class of people.
>
> The issue of compensation is complicated by Mr El Masri's ongoing damages claim in the NSW Supreme Court involving the Commonwealth and the detention service providers. The Commonwealth is currently considering the President's recommendation in light of that litigation.
>
> The department accepts the President's recommendation to provide a formal written apology and we will forward you a copy once it is sent.
>
> Migration Series Instruction 411 has been updated to require compliance and detention staff to consider relevant case law when assessing whether or not a person may be unlawful and liable to be detained. In recognition of the significance of the issue, the department has also implemented a Chief Executive Instruction (CEI 33). The CEI 33 provides direction to all staff requiring certain processes to be followed where adverse litigation outcomes have potential implications for detention and/or removal. The CEI requires the involvement of departmental officials at the highest levels to ensure that the processes outlined in the CEI are followed. A copy of CEI 33 is enclosed for your information.
>
> CEIs are binding on departmental staff and staff can be sanctioned under the Australian Public Service Code of Conduct in the event of a breach.

385. I note the stated aim of the CEI is to ensure:

- Early identification of court decisions which have the potential to significantly impact on detention status and/or removal policy and procedures.
- Effective and prompt departmental response and protocols to manage such cases.
- Review of existing policy/procedures and effect any changes required.

386. The CEI provides that the litigation branch at the Department has responsibility for reviewing all court decisions within two days of receipt of written reasons for judgment to identify those court decisions which have the potential to significantly impact on detention status and/or removal policy procedures.

387. The CEI sets out what action must be taken upon the identification of such a case. Importantly, upon the identification of such a case, a copy of the judgement is to be provided to the department's Special Counsel with a request for his or her urgent advice on detention and/or removal implications.

388. The CEI also requires the Department to maintain a register of cases identified, and in respect of each such case, copies of the advice received, actions plans, and the report on the completion of the action plan.

389. At the date this report was finalised, the Department had not provided further advice about the outcome of their consideration of my recommendation that Mr El Masri be paid compensation. I have been provided with a copy of the letter of apology from the Department to Mr El Masri.

The Hon Catherine Branson QC
President
Australian Human Rights Commission

August 2009

Appendix 1

Initial submissions from the Department

390. On 13 January 2006, the Department provided a formal response to the complaint which denied the allegations made by Mr El Masri. The submissions from the Department included the following evidence:

- Incident reports relevant to Mr El Masri's time in MSU;
- A security risk assessment for Mr El Masri;
- Mr El Masri's Management Plans;
- Mr El Masri's behaviour agreement;
- An undated reintegration plan;
- A copy of the daily occurrence log for the period of 29 July 2005 to 8 August 2008;
- Video footage of the incident on 8 August 2005;
- Copies of officer report forms in relation to an earlier incident;
- Copy of teleconference minutes of a meeting on 5 September 2005 and a proposed community integration plan;
- Record of visits by Mrs El Masri and other family members to VIDC;
- Report of the second independent psychiatrist on 19 August 2005;
- Care plans for Mr El Masri; and
- A copy of an email of Mr El Masri's request to see the first independent psychiatrist and a copy of the second independent psychiatrist's subsequent report.

Submissions by the Complainant

391. On 31 May 2006, the Complainant's legal representative made submissions in response to the Department's submission of 13 January 2006.

392. On the 27 October 2006, the Complainant's legal representative sent two separate letters to the Commission.

Additional Complaint about Mr El Masri's detention on 28 November 2006

393. On 28 November 2006, the Complainant's legal representative emailed the Commission. The email stated in part that 'Mr El Masri was woken up by Immigration Officials who then arrested and detained him'. Mr El Masri's legal representative stated 'I will be adding this to the complaint'.

394. On 15 December 2006, the Complainant's legal representative made further submissions in relation to the allegations made by the Complainant. This included an allegation that Mr El Masri was unlawfully detained on 28 November 2006.

395. On 23 May 2007, the Commission wrote to the Department seeking the Department's response to the Complainant's allegations that Mr El Masri was unlawfully detained on 28 November 2006.

396. On 27 July 2007, the Department provided the Commission with a response to the allegation that Mr El Masri was wrongfully detained on 28 November 2006.

Additional submissions and evidence provided in 2008-2009

397. On 4 January 2008, the Commission wrote to the Department seeking additional information, including the Complainant's medical file.

398. The Department provided a formal response to this further request for information by letter dated 27 May 2008. This included a copy of Mr El Masri's medical file.

399. In 2008, the Commission sought and obtained the COPS entry record for 8 August 2005.

400. Further submissions were provided on behalf of the Complainant on 26 August 2008.

401. The Department provided a formal response to this further request for information by letter dated 27 May 2008.

402. On 26 August 2008, the Complainant provided further submissions in response to the further material provided by the Department.

403. On 24 September 2008, the Commission wrote to the Complainant seeking further submissions in response to a statement of issues in dispute.

404. On 24 October 2008, the Department provided further submissions.

405. On 3 November 2008, the Complainant provided further submissions in response.

406. On 26 February 2009, the Complainant provided submissions in response to the President's tentative view.

407. On 27 February 2009, the Department provided submissions in response to the President's tentative view.

408. On 17 April 2009, the Department provided further submissions in response to the President's tentative view.

Appendix 2

Functions of the Commission

The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights under the HREOC Act. Part II Divisions 2 and 3 of the HREOC Act confer functions on the Commission in relation to human rights. In particular, s 11(1)(f) of the HREOC Act empowers the Commission to inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to the rights set out in the human rights instruments scheduled to or declared under the HREOC Act.

Section 11(1)(f) of the HREOC Act states:

> (1) The functions of the Commission are:
>
> …
>
> (f) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
>
> (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
>
> (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.

Section 3 of the HREOC Act defines an 'act' or 'practice' as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

The Commission performs the functions referred to in s 11(1)(f) of the HREOC Act upon the Attorney-General's request, when a complaint is made in writing or when the Commission regards it desirable to do so (s 20(1) of the HREOC Act).

In addition, the Commission is obliged to perform all of its functions in accordance with the principles set out in s 10A of the HREOC Act, namely with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Commission attempts to resolve complaints under the provisions of the HREOC Act through the process of conciliation. Where conciliation is not successful or not appropriate and the Commission is of the opinion that an act or practice constitutes a breach of human rights, the Commission shall not furnish a report to the Attorney-General until it has given the respondent to the complaint an opportunity to make written and/or oral submissions in relation to the complaint (s 27 of the HREOC Act).

If, after the inquiry, the Commission finds a breach of human rights, it must serve a notice on the person doing the act or engaging in the practice setting out the findings and the reasons for those findings (s 29(2)(a) of the HREOC Act). The Commission may make recommendations for preventing a repetition of the act or practice, the payment of compensation or any other action or remedy to reduce the loss or damage suffered as a result of the breach of a person's human rights (ss 29(2)(b) and (c) of the HREOC Act).

If the Commission finds a breach of human rights and it furnishes a report on the matter to the Attorney-General, the Commission is to include in the report particulars of any recommendations made in the notice and details of any actions that the person is taking as a result of the findings and recommendations of the Commission (ss 29(2)(d) and (e) of the HREOC Act). The Attorney-General must table the report in both Houses of Federal Parliament within 15 sitting days in accordance with s 46 of the HREOC Act.

It should be noted that the Commission has a discretion to cease inquiry into an act or practice in certain circumstances (s 20(2) of the HREOC Act), including where the subject matter of the complaint has already been adequately dealt with by the Commission (s 20(2)(c)(v) of the HREOC Act).

1 The relevant Department has since been renamed twice and is currently called the Department of Immigration and Citizenship (DIAC).

2 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 3 January 1976).

3 [2005] FCAFC 121 (Moore and Gyles JJ; Emmett J dissenting).

4 Submissions by the Department, dated 27 February 2009, [4].

5 [2005] FCAFC 121.

6 Submission by the Department, dated 17 April 2009, Attachment 1.

7 Submission by the Department, dated 17 April 2009, Attachment 2.

8 Email from Ms Byers to the Director of Detention Case Co-ordination at the Department of Immigration and Citizenship, dated 28 September 2005.

9 Submissions by the Department, dated 17 April 2009, Attachment 3.

10 *El Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1685.

11 Ibid [2].

12 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (*'Nystrom'*).

13 *Report of complaints by immigration detainees against the Commonwealth of Australia* (2009) AusHRC 40 [76]; *Report of a complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* (2007) AusHRC 39, [51]-[55].

14 (1997) 78 FCR 208.

15 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.

16 This conclusion has been reach in previous reports. See for example, *Report of complaints by immigration detainees against the Commonwealth of Australia* (2009) AusHRC 40 [73]-[75]; *Report of a complaint by Mr Huong Nguyen and Mr Austin Okoye Against the Commonwealth of Australia and GSL (Australia) Pty Limited* (2007) AusHRC 39 [48]-[49]; *Report of an inquiry into a complaint by Mr AV of a breach of his human rights whilst in immigration detention* (2006) AusHRC 35, 8.2.1; also see *Report of an inquiry into a complaint by six asylum seekers concerning their transfer from immigration detention centres to State prisons and their detention in those prisons* (2002) Aus HRC 21, 4.2.

17 United Nations Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 130, [1]. See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.

18 Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988.

19 Ibid [5.8].

20 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.

21 Ibid [9.2].

22 (2003) 126 FCR 54.

23 Ibid [152].

24 [2000] 2 NZLR 65.

25 Ibid [40], [42], references listed at [41], [42].

26 [2001] 3 NZLR 433.

27 Ibid [34].

28 *Saadi v United Kingdom* [2008] ECHR 80, [67].

29 Ibid [69].

30 See for example, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), [9.2].

31 United Nations Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]. See also *Handyside v United Kingdom* [1976] ECHR 5, [48]-[49]; *The Sunday Times v the United Kingdom* [1979] ECHR 1, [62].

32 Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995, [6.3].

33 Comments of Ms Cecilia Medina in an individual opinion concurring with the majority decision given in *Tatiana Zheludkova v Ukraine*, Communication No 726/1996 UN Doc CCPR/C/76/D/726/1996.

34 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153; United Nations Human Rights Committee, General Comment 9, Article 10 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 131.

35 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153.

36 See United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153. The UNHRC also considered this relevant in *Jensen v Australia*, where it found a complaint of both art 7 and art 10 inadmissible because it failed to demonstrate that the treatment departed from that of an ordinary prisoner.

37 *Taunoa v Attorney-General* [2008] 1 NZLR 429.

38 *Miguel Angel Estrella v Uruguay*, Communication No 74/1980, UN Doc CCPR/C/18/D/74/1980.

39 *Tatiana Zheludkova v Ukraine*, Communication No 726/1996, UN Doc CCPR/C/76/D/726/1996.

40 *Michael and Brian Hill v Spain*, Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993 (1997).

41 See *Daley v Jamaica*, Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), [7.6]; *Teesdale v Trinidad and Tobago*, Communication No 677/1996, UN Doc CCPR/C/74/D/677/1996 (2002), [9.1].

42 *McTaggart v Jamaica*, Communication 748/1997, UN Doc CCPR/C/67/D/748/1997 (1999), [8.5].

43 *Report of Complaints by immigration detainees against the Commonwealth of Australia* (2009) AusHRC 40.

44 Ibid [106].

45 The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957. They were subsequently adopted by the United Nations General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1.

46 The Body of Principles were adopted by the United Nations General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).

47 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153. See also *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/458/1991, [9.3]. The Body of Principles apply to all persons under any form of detention or imprisonment. The Standard Minimum Rules are directed at the treatment of prisoners and the management of penal institutions. Although immigration detention facilities are not penal institutions in the sense that they do not house convicted criminals or people charged with a criminal offence, the Standard Minimum Rules are expressed to set out minimum conditions which are accepted as suitable by the United Nations for the general management of institutions housing all categories of prisoner.

48 United Nations Principles for the protection of persons with mental illness and the improvement of mental healthcare, Adopted by General Assembly Resolution 46/119 of 17 December 1991, principle 7.1; see also principle 20.

49 M Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd ed, 2005) 247-8.

50 *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 Jospeh, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004) [9.51].

51 Principle 15: 'Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.'

52 M Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary* (2nd ed, 2005) 518.

53 *Report of a complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* (2007) AusHRC 39, [80]-[88].

54 United Nations Human Rights Committee, 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].

55 S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2nd ed, 2004) 482-3.

56 Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992.

57 Ibid [8.3]. Whilst this case concerned a breach of art 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.

58 Communication No 74/1980, UN Doc CCPR/C/OP/2 (1990), 93.

59 Ibid [9.2].

60 (1938) 60 CLR 336, 362 (Dixon J).

61 (1992) 110 ALR 449, 449-50 (Mason CJ, Brennan, Deane and Gaudron JJ).

62 [2005] FCAFC 121.

63 *El Masri v Minister for Immigration* [2003] FMCA 344 (19 August 2003) (*'El Masri (No 2)'*).

64 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.

65 [2008] FCAFC.

66 This notice must set out the reasons for the decision. A failure to comply with these notice requirements does not affect the validity of a decision to cancel a visa under s 501(2). See s 501G.

67 *El Masri (No 2)* [2003] FMCA 344. An appeal against this decision was not allowed as it was out of time: *El-Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 742 (11 June 2004).

68 An officer is defined by s 5 of the Migration Act to include an officer of the Department and a member of the Australian Federal Police or the Police Force of a State. Sections 13 and 14 of the Migration Act define lawful and non-lawful citizens. Section 13 provides that a lawful non-citizen is a non-citizen in the migration zone who holds a visa that is in effect. Under s 14 an unlawful non-citizen is a citizen in the migration zone who is not a lawful non-citizen.

69 (2002) 117 FCR 566; [2002] FCA 433 (2002).

70 Ibid, 569, [6] (Gray and Lee JJ).

71 Ibid.

72 Ibid, 570, [9].

73 Ibid, 570-571.

74 Ibid, 572-573, [19].

75 Ibid, 573, [20].

76 In *Goldie v Commonwealth of Australia & Ors* [2004] FCA 156 (*'Goldie (No 2)'*), Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act.

77 (2005) 222 CLR 612.

78 (2005) 222 CLR 612, 626, [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, McHugh and Kirby JJ dissenting).

79 Ibid, 622 [28] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

80 Ibid.

81 Ibid, 628, [51].

82 [2007] FCA 1500.

83 (2001) 207 CLR 391.

84 (2003) 218 CLR 28.

85 [2007] FCA 1500, [8].

86 Ibid.

87 Ibid [11].

88 [MSI 411.1].

89 [MSI 411.1].

90 [MSI 411.1].

91 [MSI 411.10].

92 (2008) FCAFC 132.

93 Submissions by Michaela Byers, dated 3 November 2008.

94 Submissions by Michaela Byers, dated 27 October 2006 and 15 December 2006; see also submissions dated 3 November 2008 where Ms Byers submitted that 'no review of Mr El Masri's case was undertaken after his initial processing of his detention'.

95 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121.

96 Email from the Department to the Commission, dated 27 July 2007.

97 Submissions of the Department, dated 17 April 2009; see also submissions of the Department, 27 February 2009, [12].

98 Submissions by the Department, dated 17 April 2009, [4].

99 Submissions by the Department, dated 17 April 2009, [9]-[12].

100 Submissions by the Department, dated 17 April 2009, [12].

101 Submissions by the Department, dated 27 February 2009, [8].

102 Submissions by the Department, dated 27 February 2009, [16].

103 Submissions by the Department, dated 17 April 2009, [12]-[13].

104 Submissions by the Department, dated 17 April 2009, Attachment 1.

105 Submissions by the Department, dated 17 April 2009, Attachment 1.

106 Submissions by the Department, dated 17 April 2009, Attachment 2.

107 Submissions by the Department, dated 17 April 2009, [11].

108 Submissions by the Department, dated 17 April 2009, Attachment 3.

109 Submissions by the Department, dated 27 February 2009, [8].

110 Submissions by the Department, dated 17 April 2009, [23]-[25].

111 Submissions by the Department, dated 17 April 2009, [24].

112 See further email from Michaela Byers to the Commission, dated 4 May 2007.

113 *El Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1685.

114 Ibid [2].

115 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.

116 Email from the Department to the Commission, dated 27 July 2007; see also undated letter from the Department to Michaela Byers, December 2006.

117 Email from the Department to the Commission, dated 27 July 2007.

118 Ibid.

119 'Villawood Immigration Detention Centre (VIDC) – Sydney NSW', Department of Immigration and Citizenship <http://ww.immi.gov.au/detention/facilities_villawood.htm> at 7 November 2005.

120 Ibid.

121 Management Plan for Detainees in Management Unit, Ahmed Salah El Masri, dated 30 July 2005.

122 Referral by the second independent psychiatrist to the VIDC doctor, dated 3 May 2005.

123 Letter from the first independent psychiatrist to the VIDC Doctor, dated 17 May 2005. The first independent psychiatrist also stated that Mr El Masri told him 'there is hope that he will not be deported and likely to be released from Villawood Detention Centre into the community although he is not sure when this will happen'.

124 Report by the Senior Psychologist at VIDC, dated 25 May 2005.

125 Report by the Senior Psychologist at VIDC, dated 6 June 2006.

126 Letter from the first independent psychiatrist, dated 24 June 2005.

127 Letter from the VIDC Doctor (undated).

128 These four reasons are identified in the Department's response to the Commission's questions, dated 27 May 2008.

129 Some of these incidents, however, occurred at a time prior to Mr El Masri's placement in MSU, some incidents dating back as early as April 2005; others concern incidents that occurred shortly before his placement in MSU (July 2005); and others during his time in MSU.

130 Security Risk Assessment for VW2261: El Masri, Ahmad Salah.

131 See also the Department's response to the Commission's questions, dated 27 May 2008, Attachment 0 (5 September 2005) and P (29 August 2005).

132 The Department's response to the Commission's questions, dated 27 May 2008, Attachment 0 (5 September 2005).

133 The Department's response to the Commission's questions, dated 27 May 2008, Attachment 0 (5 September 2005) and P (29 August 2005).

134 *Migration Act 1958* (Cth), s 197AB.

135 *Migration Act 1958* (Cth), s 197AE.

136 The Department's response to the Commission's questions, dated 27 May 2008.

137 It is noted that the *Migration Amendment (Detention Arrangements) Act 2005* (Cth) gave the Minister new powers to grant a visa to a person in immigration detention where the Minister is satisfied that it is in the public interest to do so. See *Migration Act 1958* (Cth), s 195A. The explanatory memorandum states that the new provision is intended to 'be used to release a person from detention where it is not in the public interest to continue to detain them'.

138 See further the Department response to the Commission dated 27 May 2008, question 4.

139 Letter from the first independent psychiatrist dated 16 August 2005.

140 Report by the second independent psychiatrist, and psychologist, p 1, dated 18 August 2005. It is noted that although this report is dated 18 August 2005, the report states the second independent psychiatrist's examination of Mr El Masri took place on 19 August 2005. See also the Department's response to the Commission's questions, dated 27 May 2008, Attachment 0 (5 September 2005) and P (29 August 2005).

141 Report by the second independent psychiatrist and psychologist, pp 11-12, dated 18 August 2005.

142 Report by the second independent psychiatrist and psychologist, p 13, dated 18 August 2005.

143 Ibid.

144 Ibid.

145 The Department's response to the Commission's questions, dated 27 May 2008.

146 Letter from the Department to the Commission, dated 13 January 2006.

147 See also the Department's response to the Commission's questions, dated 27 May 2008, Attachment 0 (5 September 2005) and P (29 August 2005).

148 Management Plan for Detainees in Management Unit, Ahmed Salah El Masri, 10 August 2005, updated 30 August 2005. Page 3 of the Plan states 'Detainee El Masri was visited by the Centre Management Team and advised there would be no changes to his current status at the MSU for a period of at least 8 days'.

149 The Department's response to the Commission's questions, dated 27 May 2008.

150 Letter from the Department to the Commission, dated 13 January 2006, Attachment L.

151 Discharge summary for Mr Ahmed El Masri, dated 14 October 2005.

152 The Department's response to the Commission's questions, dated 27 May 2008.

153 *Report of an Inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Hedland Immigration Reception and Processing Centre,* (2002) AusHRC 24, [4.4.1.1]. See also *Report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention* (2001) AusHRC 18, [15.1].

154 Officer report forms also record that earlier on 8 August 2005, Mr El Masri produced a sharpened toothbrush from his underwear. He then reportedly told a psychologist he was not going to use the toothbrush to harm himself. Mr El Masri handed the tooth brush to the General Deputy Manager. He is also recorded as having said 'I want to give to her so I can show that I'm over it now and want to get out the Management Unit': see further letter from the Department to the Commission, dated 13 January 2006.

155 NSW Police Service, Event Ref E 24901705, created 17/8/2005.

156 The Department's response to the Commission's questions, dated 27 May 2008.

157 Ibid.

158 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) s 29(2)(a).

159 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) s 29(2)(b).

160 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) s 29(2)(c).

161 Email from the Complainant's solicitor to the Commission, dated 18 May 2009.

162 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 [55] (Wilcox J).

163 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 239 (Lockhart J).

164 *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J); see also *Murray v Ministry of Defence* [1988] 1 WLR 692, 701-703; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); and *Sadler & State of Victoria v Madigan* [1998] VSCA 53 (1 October 1998), [51].

165 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1, 14-15 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].

166 *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1, 15-17 (Clarke JA); *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239-240 (Lockhart J).

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

168 *Ruddock v Taylor* (2003) 58 NSWLR 269.

169 *Ruddock v Taylor* (2003) 58 NSWLR 269, [48]-[49].

170 [2004] FCA 156.

171 *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA).

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

Glossary

Commission – Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission)

Complainant – Mrs Cheryle El Masri on behalf of Mr Ahmad El Masri

Department – the Department of Immigration and Citizenship (formerly the Department of Immigration and Multicultural and Indigenous Affairs)

GSL – GSL (Australia) Pty Ltd

HREOC Act – *Human Rights and Equal Opportunity Act 1986* (Cth)

ICCPR – *International Covenant on Civil and Political Rights*

UNHRC – United Nations Human Rights Committee

MSI – Migration Series Instructions

MSU – Management Support Unit

Nystrom – *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121

SASH – Suicide and Self Harm (Observations)

The first independent psychiatrist – Mr El Masri's treating psychiatrist

The second independent psychiatrist – The independent psychiatrist and psychologist who examined Mr El Masri and made recommendations in the report dated 18 August 2005.

VIDC – Villawood Immigration Detention Centre

Further Information

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