Australian Human Rights Commission

Cherkupalli v Commonwealth of Australia

[2012] AusHRC 49

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Cherkupalli v Commonwealth of Australia (Department of Immigration & Citizenship)

Report into arbitrary detention

[2012] AusHRC 49

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Human Rights
Commission

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March 2012

The Hon Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report of an inquiry into the complaint made pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) by Mr Prashant Cherkupalli.

I have found that the acts of the Commonwealth breached Mr Prashant Cherkupalli's fundamental human right not to be subject to arbitrary detention protected by article 9(1) of the *International Covenant on Civil and Political Rights.*

By letter dated 31 October 2011, the Department of Immigration and Citizenship provided its response to my findings and recommendations. I have set out this response in its entirety in part 15 of my report.

Please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

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Contents

1 Introduction

1. This is a report setting out the Commission's findings and the reasons for those findings following an inquiry by the Australian Human Rights Commission into a complaint lodged by Mr Prashant Cherkupalli.
2. Mr Cherkupalli complains that his detention by the Department of Immigration and Citizenship (the Department) involved acts inconsistent with or contrary to human rights, namely the right to liberty in article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

2 Summary

2.1 Summary of findings

3. I have found that the following acts of the Department were inconsistent with the human rights of Mr Cherkupalli for the reasons indicated:

    a) The act of the Commonwealth in deciding to detain, and thereafter detaining, Mr Cherkupalli in reliance on s 192 of the *Migration Act 1958* (Cth) (the Migration Act) was inconsistent with article 9(1) of the ICCPR as I am not satisfied that the detaining officer turned his or her mind to the requirements of s 192(2) of the Migration Act.

    b) The act of the Commonwealth cancelling Mr Cherkupalli's bridging visa was inconsistent with article 9 of the ICCPR as it led to his detention and the procedures established by s 119 to s 121 of the Migration Act were not complied with.

    c) The act of the Commonwealth in deciding to detain Mr Cherkupalli in reliance on s 189 of the Migration Act was inconsistent with article 9(1) of the ICCPR because the detaining officer did not hold a reasonable suspicion that Mr Cherkupalli was an unlawful non-citizen and therefore the procedures established by law were not complied with.

    d) The failure of the Commonwealth to review the relevant aspects of Mr Cherkupalli's file, or alternatively to review it with reasonable care, was inconsistent with article 9(1) of the ICCPR because it rendered his detention in reliance on s 189 of the Migration Act thereafter not 'in accordance with such procedures as are established by law'.

    e) The failure of the Commonwealth to consider and place Mr Cherkupalli in a less restrictive form of detention than an immigration detention centre from the outset of and throughout Mr Cherkupalli's detention was inconsistent with article 9 of the ICCPR.

    f) The refusal by the Commonwealth to grant Mr Cherkupalli a bridging visa was inconsistent with article 9 of the ICCPR.

4. I have therefore concluded Mr Cherkupalli was arbitrarily deprived of his liberty from 26 November 2004 to 19 April 2006, a period of 509 days.

2.2 Summary of recommendations

5. In light of my findings regarding the acts of the Commonwealth I make the following recommendations:

    a) That the Commonwealth pay financial compensation to Mr Cherkupalli in the sum of $697 000.[1]

    b) That the Department ensure that its staff receive training in the importance of protecting the right to liberty and, in that context, the importance of maintaining accurate and detailed records of decisions made and the reasons for those decisions.

    c) That to the extent possible, the Department provide training to all 'officers' within the meaning of the Migration Act on the proper exercise of the discretion to detain under s 192(1) of the Migration Act.

d) That the detaining officers considering whether to detain a non-citizen whose visa has recently been cancelled be required to check carefully the record of the decision cancelling the visa for errors, including possible procedural errors on the face of the document, before making the detention decision.

e) That officers reviewing the legality of a person's detention be required to pay particular attention to the record of the visa cancellation decision for any potential errors on the face of the document.

f) That regular reviews of a non-citizen's detention under s 189 and s 190 of the Migration Act include consideration of whether the non-citizen is in the least restrictive form of detention.

g) That the Minister reconsider Mr Cherkupalli's application under s 351 of the Migration Act in light of the findings in this report and in particular, my finding that Mr Cherkupalli's bridging visa was not authorised by s 119 to s 121 of the Migration Act.

h) That the Commonwealth provide a formal written apology to Mr Cherkupalli for the breaches of his human rights identified in this report.

3 Complaint

6. Mr Cherkupalli is an Indian national who came to Australia on 30 July 2003 to undertake a Master of Computer Studies degree. At this time, successful completion of this course of study would have qualified him for a permanent Australian visa.
7. Mr Cherkupalli's initial student visa gave him a limited right to work. However, after this visa expired on 13 August 2004 and pending the processing of his application for a further student visa, he was granted a bridging visa which was subject to the condition that he not work.
8. On 26 November 2004, Mr Cherkupalli was found working at Michel's Patisserie in Chester Hill in breach of the no work condition of his bridging visa. He was detained and taken to Villawood Immigration Detention Centre where his bridging visa was cancelled.
9. Mr Cherkupalli was not released from Villawood Immigration Detention Centre (VIDC) until 19 April 2006 (i.e. 17 months or 509 days later) when he was granted another bridging visa and ultimately a further student visa.
10. Mr Cherkupalli's application for a further student visa was, as mentioned above, pending when he was detained. On 22 December 2004 this application was refused because of his failure to comply with the 'no work' condition on his bridging visa. He challenged this decision in the Federal Magistrates Court and on 18 November 2005, that Court made a consent order remitting the decision to the Department for reconsideration. That reconsideration ultimately resulted in Mr Cherkupalli being granted a further student visa but that visa was not granted for nearly two years.
11. In the meantime, Mr Cherkupalli made at least ten applications for a bridging visa. Three of these applications were refused and the refusals upheld by the Migration Review Tribunal. In the case of seven of the applications, the Department sought the provision of surety in the amounts of either $10 000 or $8 000. As Mr Cherkupalli could not raise these amounts he withdrew the applications.
12. As a consequence, Mr Cherkupalli remained in detention at VIDC until April 2006 when, following community representations to the Minister, he made a further application for a bridging visa which was granted the same day. No surety was sought on this occasion.
13. Mr Cherkupalli was granted a further student visa on 29 October 2007 and he completed his Master of Engineering Studies in April 2009. By that time the successful completion of his course of studies did not qualify him for a permanent Australian visa.
14. A chronology of key events is set out in Appendix 1.

4 Legislative framework

4.1 The Commission can inquire into 'acts' or 'practices' of the Commonwealth

15. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right. Section 8(6) of the AHRC Act requires that this function be performed by the President.

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

4.2 What is a 'human right'?

17. Section 3(1) of the AHRC Act defines 'human rights' to include the rights and freedoms recognised by the ICCPR.

18. Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

4.3 What is an 'act'?

19. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) of the AHRC Act provides that a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

20. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken.[2]

21. Mr Cherkupalli has identified ten separate acts of the Commonwealth which he alleges are inconsistent with his right to liberty as recognised by article 9 of the ICCPR. Each of these acts is separately considered below.

5 Mr Cherkupalli's detention under s 192 of the Migration Act

22. On 26 November 2004, Mr Cherkupalli was found by departmental officers working in breach of the 'no work' condition on his bridging visa. He was detained at the place where he was working and held in detention, in purported reliance on s 192 of the Migration Act. He was taken to VIDC for questioning and shortly after his interview, a departmental officer cancelled his bridging visa.

23. He alleges that his detention during this period of approximately two hours was inconsistent with article 9(1) of the ICCPR for two reasons. First, he alleges that the detaining officer did not comply with the requirements of s 192 of the Migration Act; and secondly, he alleges that his detention was in any event arbitrary in the sense of being unreasonable and inappropriate in the circumstances.

5.1 Is there an 'act'?

24. I accept that this initial period of detention was purportedly authorised under s 192 of the Migration Act. That section relevantly provides:

> **Detention of visa holders whose visas liable to cancellation**
>
> (1) Subject to subsection (2), if an officer knows or reasonably suspects that a non-citizen holds a visa that may be cancelled under Subdivision C, D or G of Division 3 or section 501 or 501A, the officer may detain the non-citizen.
>
> (2) An officer must not detain an immigration cleared non-citizen under subsection (1) unless the officer reasonably suspects that if the non-citizen is not detained, the non-citizen would:
>
> a. Attempt to evade the officer and other officers; or
>
> b. Otherwise not cooperate with officers in their inquiries about the non-citizen's visa and matters relating to the visa.
>
> …

25. As s 192 of the Migration Act is a provision that, in the circumstances specified by the section, allows but does not require the detention of a non-citizen, the detention of Mr Cherkupalli in purported compliance with the section was an 'act' of the Commonwealth within the meaning of the AHRC Act.

5.2 Detention under s 192 of the Migration Act inconsistent with article 9(1) of the ICCPR

26. Mr Cherkupalli claims that this initial period of detention was inconsistent with article 9(1) of the ICCPR because the Department did not follow the procedures established under s 192 of the Migration Act.

27. Subject to the requirements of s 192(2) of the Migration Act, I am satisfied that the circumstances of Mr Cherkupalli's case enlivened the discretion vested in an officer of the Department by s 192(1) of the Migration Act. The critical issue is whether the detaining officer reasonably suspected that, were Mr Cherkupalli not detained, he would attempt to evade the officer or other officers or otherwise not cooperate with them in their enquiries.

28. The Department has acknowledged that nothing in the material before the Commission suggests that the requirement of s 192(2) was considered at the time of Mr Cherkupalli's initial detention. I am satisfied that this material tends positively to suggest that the requirement was not considered. Not only is there no record of the detaining officer forming the relevant suspicion, I accept the truth of Mr Cherkupalli's statement that the situation at the relevant time was 'chaotic' and he was not asked any questions that might cast light on whether, were he not detained, he would co-operate or be likely to evade the detaining officer or other officers. I conclude that the detaining officer did not give consideration to the requirement of s 192(2) and did not hold the relevant suspicion.

29. Even were I satisfied that the detaining officer held the relevant suspicion, I would not be satisfied that the suspicion was reasonable. While the Department's records show that 'on entry three persons were seen attempting to decamp the premises', nothing in the records, or in any other material before me, suggests that Mr Cherkupalli was one of these three. I am not satisfied that he was. Nor am I satisfied that there existed at the time any other basis on which the detaining officer could hold a reasonable suspicion that, if not detained, Mr Cherkupalli would attempt to evade him or her or other officers.

30. I conclude that the act of the Commonwealth in deciding to detain, and thereafter detaining, Mr Cherkupalli in reliance on s 192 of the Migration Act was inconsistent with the right to liberty recognised by article 9(1) of the ICCPR in that he was deprived of his liberty without the procedures established by law being complied with.

5.3 No finding on arbitrariness in the wider sense

31. Having found that Mr Cherkupalli's detention during this period was inconsistent with the right to liberty recognised by article 9(1) of the ICCPR, I do not consider it necessary to make any further finding on whether the detention was arbitrary in the sense of being unreasonable and inappropriate in the circumstances.

6 The decision to cancel Mr Cherkupalli's bridging visa

32. Mr Cherkupalli alleges that the decision to cancel his bridging visa on 26 November 2006 was unlawful because the Department did not comply with the procedural fairness processes prescribed by s 119 to s 121 of the Migration Act. In particular, he claims that he was not given written notice of the intention to cancel his visa before his visa was cancelled as required by s 119(1) of the Migration Act. He further alleges that, in any event, the visa cancellation was arbitrary.

6.1 Is there an 'act'?

33. Mr Cherkupalli's bridging visa was cancelled under s 116(1) of the Migration Act. Section 116(1) allows, but does not require, a visa to be cancelled if the Minister, or his or her delegate, is satisfied of one of a number of specified circumstances. The decision to cancel a visa under s 116(1) is therefore an 'act' of the Commonwealth within the meaning of the AHRC Act.

6.2 Cancellation of bridging visa inconsistent with article 9(1) of the ICCPR

34. It is unfortunate that this inquiry is taking place almost seven years after the cancellation of Mr Cherkupalli's bridging visa. The time delay exacerbates the difficulty of determining precisely what happened on 26 November 2004. The officer who cancelled Mr Cherkupalli's bridging visa concedes she does not have a clear memory of the events of that night and does not recall Mr Cherkupalli in particular.

35. Mr Cherkupalli's statutory declaration sheds little light on what occurred during the cancellation interview. He states:

> We were then called in for an interview one by one. The officers prepared the forms. I tried to explain about the fact that I had only been working a few hours. They asked me to sign the forms and I did.

36. The written record of what happened at the relevant time is contained in two forms that were completed by the departmental officers at or about the time of the decision to cancel Mr Cherkupalli's bridging visa. The first form is a Notice of Intention to Consider Cancellation and the other is a Record of Decision Whether to Cancel Visa. Both of these forms record that Mr Cherkupalli received notice of the intention to cancel his visa at 21:50 hours on 26 November 2004. The second form records that he was notified of the visa cancellation at 21:30 hours on the same day; that is, 20 minutes before the time recorded as the time when he received notice of the intention to cancel his visa.

37. The act of cancelling Mr Cherkupalli's bridging visa made him vulnerable to being deprived of his liberty because the detention of unlawful non-citizens is mandatory under s 189 of the Migration Act. Strict compliance with the requirements of the Act in respect of visa cancellation is thus of utmost importance. I am not satisfied that the requirements of s 119 to s 121 of the Migration Act were complied with, and in particular the requirement of s 119(1) that the visa holder be given particulars of the grounds on which cancellation is being considered and invited to show within a specified time that those grounds do not exist or that there are reasons why the visa should not be cancelled.

38. I am not satisfied that the forms completed by the departmental officers on 26 November 2004 accurately record what happened that evening. However, I am satisfied that:

    a) Mr Cherkupalli was given no meaningful opportunity to show why his visa should not be cancelled; and

    b) it is likely that he was not invited to show within a specified time or at all that the grounds on which cancellation was being considered did not exist or that there was a reason why his visa should not be cancelled.

39. I think it likely that, as Mr Cherkupalli's statutory declaration indicates, both forms were completed more or less contemporaneously and without Mr Cherkupalli being afforded the opportunity to speak against the cancellation.

40. I note that the Department has conceded that, if a court were to review its decision to cancel Mr Cherkupalli's bridging visa, there is a reasonable prospect that it may be set aside for jurisdictional error for apparent failure to comply with the relevant statutory cancellation procedural provisions.[3]

41. I am therefore satisfied that s 119 of the Migration Act had not been satisfied at the time that Mr Cherkupalli's bridging visa was cancelled.

42. I conclude that the act of the Commonwealth cancelling Mr Cherkupalli's bridging visa was inconsistent with his right to liberty recognised by article 9(1) of the ICCPR in that his visa was cancelled, with the consequence that he became liable to mandatory detention, without the procedures established by law being complied with.

6.3 No finding on arbitrariness in the wider sense

43. I do not consider it necessary in the circumstances to make a further finding on whether the cancellation of Mr Cherkupalli's bridging visa was arbitrary in the wider sense.

7 The decision to detain under s 189 of the Migration Act

44. Mr Cherkupalli alleges that the Department did not follow the procedures established by s 189 of the Migration Act when detaining him indefinitely at VIDC on 26 November 2004. In particular, he claims that there could not have been a reasonable basis for the suspicion that he was an 'unlawful non-citizen' because the Department's decision to cancel his visa was invalid. Further, this error was on the face of the decision record.

45. As a consequence, Mr Cherkupalli submits that the entire period of his detention from 26 November 2004 – 19 April 2006 was inconsistent with his right to liberty under article 9(1) of the ICCPR.

7.1 Is there an 'act'?

46. Under Australian law, the lawfulness of the decision to cancel Mr Cherkupalli's bridging visa is a separate issue to that of the lawfulness of Mr Cherkupalli's detention. The power to detain an individual until a visa is granted or he or she is removed from Australia under the Migration Act is contained in s 189 and s 196 of the Migration Act.[4] Section 189(1) of the Migration Act provided at the time that:

> If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

47. Accordingly, in order to detain a person under s 189 of the Migration Act, a departmental officer must either know or 'reasonably suspect' that the person is an unlawful non-citizen. Once an officer of the Department has the requisite knowledge or reasonable suspicion, detention under s 189(1) is mandatory.[5]

48. In *Ruddock v Taylor,*[6] the High Court discussed the meaning of 'reasonably suspects' under s 189 of the Migration Act. The majority found that 'what constitutes reasonable grounds for suspicion should be judged against what was known or reasonably capable of being known at the relevant time'.[7] Consequently, a 'suspicion' under s 189 of the Migration Act can still be 'reasonable' where it is based on an opinion that is later found to be legally flawed.

49. The majority observed in *Ruddock v Taylor,* that each officer had been provided with what, on its face, appeared to be a regular and effective decision of the Minister to cancel the respondent's visa. Each officer checked whether the respondent held any other visa and only detained the respondent upon finding that he did not hold another visa.[8] It had not been suggested that the officers had acted in bad faith. The majority concluded that the suspicion held by each officer was reasonable in the circumstances.[9]

50. In *Goldie v Commonwealth of Australia and Others,*[10] Gray and Lee JJ found that the word 'reasonably' required that a suspicion that a person is an unlawful non-citizen be justifiable upon objective examination of relevant material. In *Goldie,* the Department made a decision to cancel the appellant's visa based on a search of computer records without having also searched the appellant's file. The officer formed the view that the appellant was an unlawful non-citizen and detained the appellant under s 189(1) of the Migration Act. The appellant in fact held a valid visa at the time he was detained. The Court found that there was an 'absence of sufficient search or inquiry to make the formation of the suspicion justifiable on objective examination'.[11]

51. The majority in *Goldie* considered that where an officer is aware of conflicting facts, the reasonableness of any suspicion formed by the officer must be judged in the light of the facts available to him or her at the particular time.[12] The majority stated:

> [T]he appropriate construction of s 189 is that 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.[13]

52. Accordingly, I proceed on the basis that before a detaining officer can be found to have a 'reasonable suspicion' that a person is an unlawful non-citizen he or she is required to make sufficient inquiries to satisfy him or herself that facts exist to support this state of mind. In my view, the steps a detaining officer either takes or fails to take to inform him or herself of facts sufficient to form the 'reasonable suspicion' required by s 189 of the Migration Act are 'acts' of the Commonwealth for the purposes of the AHRC Act.

7.2 Decision to detain under s 189 of the Migration Act inconsistent with article 9(1) of the ICCPR

53. Mr Cherkupalli claims that the detaining officer could not have reasonably suspected that he was an unlawful non-citizen because the document recording the decision to cancel his bridging visa indicates that the decision to cancel his bridging visa was made 20 minutes before he was given written notice of the Department's intention to cancel his bridging visa.

54. Mr Cherkupalli contends that it should have been plain to the detaining officer handling his case that the cancellation of his bridging visa was tainted with procedural error and therefore invalid.

55. I accept the Department's submission that a reasonable suspicion may be legally flawed. However, in light of the majority's ruling in *Ruddock v Taylor,* it is necessary for me to assess whether the facts the detaining officer was 'reasonably capable of knowing at the relevant time' were compatible with a 'reasonable suspicion' that Mr Cherkupalli was an unlawful non-citizen.

56. The departmental officer responsible for cancelling Mr Cherkupalli's bridging visa states that while the form called 'Notice of Intention to Cancel' bears her signature, the handwriting in the form is not hers. She has concluded from a reading of the records that another officer of the Department commenced the interview and that she completed it and made the decision to cancel Mr Cherkupalli's bridging visa. Ms Stephens, the departmental officer responsible for cancelling Mr Cherkupalli's bridging visa, states:

> (W)hilst it is clear that I did make the decision to cancel the visa, it is not clear on the documents provided who actually made the decision to detain Mr Cherkupalli (I would suggest that the decision to detain this client was not mine).

57. I accept that the detaining officer was probably not Ms Stephens but rather another departmental officer. The material before me does not disclose what documentation was before the detaining officer or what steps or checks he or she undertook. It seems likely that the record of the decision to cancel Mr Cherkupalli's bridging visa was before the detaining officer and I so conclude. As noted above, a significant anomaly is apparent on the face of this document. It records that the decision to cancel the bridging visa was made at 21:30 hours while also recording that the visa holder received notice of intention to consider cancelling his bridging visa at 21:50 hours on the same day.

58. I conclude that the detaining officer ought to have examined the record of the decision to cancel Mr Cherkupalli's bridging visa and identified this anomaly. Had he or she done so they would have been alerted to the possibility that the requirements of the Migration Act had not been complied with and the need to make due inquiry to satisfy themselves that it was reasonable to suspect that Mr Cherkupalli was an unlawful non-citizen.

59. As indicated above, I am satisfied that if the detaining officer had made proper inquiries they would have discovered that the requirements of s 119 to s 121 of the Migration Act had not been complied with. That is, in contrast to the situation in *Ruddock v Taylor* discussed above, the error in this case was 'reasonably capable' of being known at the time the decision to detain Mr Cherkupalli was made.

60. For the above reasons, I conclude that at the time the decision to detain Mr Cherkupalli was made the delegate did not hold a reasonable suspicion that he was an unlawful non-citizen. Accordingly, I conclude that the act of the Commonwealth in deciding to detain Mr Cherkupalli in reliance on s 189 of the Migration Act was inconsistent with his right to liberty recognised by article 9(1) of the ICCPR in that he was deprived of his liberty without the procedures established by law being complied with.

61. I note that the Department submits that the apparent error in the decision document does not lead to arbitrary detention because the same decision (to cancel the visa) would have been made had the error been discovered earlier and the decision revisited.

62. I respectfully note that this submission appears to accord limited respect to an assumption inherent in the legislative requirement that the holder of a visa be given the chance to show cause why his or her visa should not be cancelled. That assumption is that the Minister or the delegate will consider with an open mind whatever the visa holder puts forward and, as appropriate, reconsider the initial tentative decision accordingly.

63. I do not consider it appropriate to speculate on whether, given the appropriate opportunity, Mr Cherkupalli could have satisfied the delegate that his visa should not be cancelled at all, or should not have been cancelled immediately. In any event, the critical issue is whether the detaining officer followed the procedures established by law when detaining Mr Cherkupalli. I have concluded that the detaining officer did not.

64. Further, I note that Mr Cherkupalli has submitted that:

> the lack of satisfactory documentation disclosing any decision by the Department to detain pursuant to either s 192 or s 189, yet alone disclosing any proper consideration of the jurisdictional preconditions to detention of Mr Cherkupalli under either of those sections is further evidence of the arbitrariness of his detention.[14]

65. I accept that the absence of satisfactory documentation is in the circumstances of this case a factor tending to suggest that the requirements of the Migration Act were not followed. I once again stress that the keeping of accurate records concerning decisions to detain individuals is an important element of ensuring the protection of the right to liberty. The lack of appropriate records in this case is a cause for concern.

8 No review of the legality of Mr Cherkupalli's detention

66. Mr Cherkupalli alleges that the Department failed to review the legality of his detention and that this was inconsistent with article 9(1) of the ICCPR.

8.1 Is there an 'act'?

67. I accept that Mr Cherkupalli's detention from shortly after his bridging visa was cancelled on 26 November 2004 until 19 April 2006 was purportedly authorised under s 189 of the Migration Act.

68. Any decision to detain a person on the grounds of 'reasonable suspicion' under s 189 of the Migration Act carries with it a responsibility to continue to assess the validity of the decision in the light of further inquiries and information, to determine whether the suspicion continues to exist and that it is still reasonably held.[15]

69. The failure to make sufficient inquiries to properly sustain the reasonableness of the suspicion required by s 189 of the Migration Act is an 'act' of the Commonwealth for the purposes of the AHRC Act.[16]

8.2 Failure to review the legality of detention inconsistent with article 9(1) of the ICCPR

70. Given that the right to liberty is at stake, a high degree of care is required from departmental officers charged with the responsibility of ensuring the requisite 'reasonable suspicion' continues throughout a person's detention under s 189 of the Migration Act.

71. The Department submits that 'it did not become apparent that there were possible problems with the bridging visa cancellation decision until early February 2010'. This was well after Mr Cherkupalli was released from immigration detention. The Department further submits that the relevant officers held an ongoing reasonable suspicion that Mr Cherkupalli was an unlawful non-citizen under s 189 of the Migration Act throughout the entire period of his detention.[17]

72. As outlined in the chronology in Appendix 1, during the period of Mr Cherkupalli's detention, he made at least ten applications for a bridging visa.

73. It has not been suggested that any of these applications were regarded as invalid. I therefore conclude that one or more departmental officers considered each of them. Proper consideration of each application would require a review of Mr Cherkupalli's file. A review of Mr Cherkupalli's file should have revealed the discrepancies on the face of the record of the cancellation of Mr Cherkupalli's bridging visa. For this reason, the fact that Mr Cherkupalli may not have been an unlawful non-citizen was 'reasonably capable' of being known shortly after Mr Cherkupalli made his first application for a bridging visa.

74. Mr Cherkupalli made his first application for a bridging visa on 29 November 2004. A departmental officer presumably considered this application within a reasonable time thereafter. In the circumstances I consider that a reasonable time for this purpose was in the order of two weeks. I therefore conclude that the error was reasonably capable of being known on or about 13 December 2004.

75. The failure of the Commonwealth to review this aspect of Mr Cherkupalli's file, or alternatively to review it with reasonable care was inconsistent with article 9(1) of the ICCPR because it rendered his detention in reliance on s 189 of the Migration Act thereafter not 'in accordance with such procedures as are established by law'.

9 Failure to review appropriateness of detention in an immigration detention centre

76. Mr Cherkupalli alleges that the Department's failure to review the appropriateness of his detention and the Department's repeated decisions to impose unreasonable bond requirements were both inconsistent with his right to liberty under article 9(1) of the ICCPR.

77. In my letter setting out the acts or practices raised by the complaint that appear to be inconsistent with or contrary to human rights (s 27 letter), I dealt with these two allegations together as 'the Department's failure or refusal to detain Mr Cherkupalli in a less restrictive detention option other than detention in an immigration detention centre'.

78. In the Department's response to the s 27 letter, it submitted that by considering the possible grant of a bridging visa to Mr Cherkupalli, the Department did consider the possibility of releasing Mr Cherkupalli from immigration detention on a number of occasions prior to the eventual bridging visa grant in April 2006. I accept this submission.

79. I will therefore deal separately with these two aspects of Mr Cherkupalli's complaint.

9.1 Is there an 'act'?

80. As discussed above, s 189(1) of the Migration Act requires the detention of persons reasonably suspected to be unlawful non-citizens. However, the Migration Act did not require that Mr Cherkupalli be detained in an immigration detention centre.

81. The definition of 'immigration detention' includes 'being held by, or on behalf of an officer in another place approved by the Minister in writing'.[18]

82. Further, s 197AB of the Migration Act, which was inserted into the Migration Act during Mr Cherkupalli's detention on 29 June 2005, states:

> If the Minister thinks that it is in the public interest to do so, the Minister may make a determination (a residence determination) to the effect that one or more specified persons to whom this subdivision applies are to reside at a specified place, instead of being detained at a place covered by the definition of immigration detention in subsection 5(1).[19]

83. In my view, it was within the power of the Minister to have approved Mr Cherkupalli's residing in a place other than the VIDC throughout his detention. It was also within the Minister's power to make a residence determination in relation to Mr Cherkupalli under s 197AB of the Migration Act from 29 June 2005 onwards.

84. I therefore consider that the failure by the Minister to consider or approve detention in a place other than the VIDC or later to make a residence determination to both be 'acts' of the Commonwealth under the AHRC Act.

9.2 Failure to detain in less restrictive form of detention inconsistent with article 9(1) of the ICCPR

85. To avoid being arbitrary, detention must be necessary and proportionate. The State must demonstrate that there is no less invasive means of achieving the outcome that it seeks.

86. Mr Cherkupalli was detained in VIDC for 17 months after failing to comply with the no work condition of his bridging visa. Mr Cherkupalli's detention in VIDC for 17 months would not be arbitrary if the Department could show that it was necessary. However, the Department's submissions do not address this point and it has offered no justification for Mr Cherkupalli's ongoing detention in VIDC rather than in the community.

87. In the Department's response to the s 27 letter, it submits that the power in s 197AB of the Migration Act was initially used primarily for moving family groups into community detention. It appears that it was also used mainly where bridging visas were not available to effect release from detention.

88. The Department does not allege that the individual circumstances of Mr Cherkupalli's case justified continued detention in an immigration detention centre because he posed a risk to the community or was a high risk case for absconding or any other matter that might reasonably justify the extent of the restriction on his liberty. Indeed, Mr Cherkupalli submits that he had 'repeatedly made it clear to departmental officers that his desire and intention was to obtain a student visa as quickly as possible so that he might continue his studies'.[20]

89. I therefore conclude that the Commonwealth's failure to consider and place Mr Cherkupalli in a less restrictive form of detention than an immigration detention centre from the outset of and throughout Mr Cherkupalli's detention was inconsistent with article 9(1) of the ICCPR.

10 Refusal to grant a bridging visa

90. Mr Cherkupalli alleges that the Department's repeated decisions to impose unreasonable bond requirements when considering his applications for bridging visas were inconsistent with his right to liberty under article 9(1) of the ICCPR.

91. Mr Cherkupalli submits that the Department continued to require, as a condition to the grant of a bridging visa, a security bond of an amount that it was informed he was unable to pay.[21] I accept that the Department's decision to impose security bonds resulted in it failing to grant Mr Cherkupalli a bridging visa.

10.1 Is there an 'act'?

92. By virtue of s 73 of the Migration Act, it was within the Minister's power to issue Mr Cherkupalli with a bridging visa,[22] provided the Minister could be satisfied that Mr Cherkupalli would abide by any conditions if imposed or security had been lodged where this had been requested.[23]

93. The grant of a bridging visa is thus a discretionary act. Further, the imposition of a security bond is a discretionary act.

94. I therefore consider the Department's refusal to grant Mr Cherkupalli a bridging visa until 19 April 2006 an 'act' of the Commonwealth for the purposes of the AHRC Act.

10.2 Refusal to grant a bridging visa inconsistent with article 9(1) of the ICCPR

95. Mr Cherkupalli sought a bridging visa on at least ten occasions before he was finally granted a bridging visa on 19 April 2006.

96. The Department has submitted that:

> due to the individual circumstances of his case, including the risk that he would not abide by further immigration requirements, these visa (Bridging Visas) were not granted and Mr Cherkupalli remained in detention.
>
> …
>
> When Mr Cherkupalli's individual circumstances changed, the Minister withdrew from the Federal Court case and the Department's approach to reviewing the cases of clients in detention changed, a Bridging Visa was in fact granted and he was released from detention. This indicates that the period of detention was based on Mr Cherkupalli's individual circumstances, and on reasonable and proportionate criteria, and therefore not arbitrary.[24]

97. In its response to the s 27 letter, the Department notes that the Migration Review Tribunal affirmed three of these decisions.

98. In seven of the ten applications, the Department imposed a condition that Mr Cherkupalli provide a security deposit. The deposit sought was:

    a) $10 000 on the applications dated 20 June, 8 July and 14 July 2005; and

    b) $8 000 on the applications dated 19 August, 19 September, 29 September and 5 October 2005.

99. It appears that the purpose of the Department's insistence on a bond was to 'encourage compliance with visa conditions'. Mr Cherkupalli's submissions refer to a policy document concerning the security bond identified as 'Migration Series Instruction 388'. This document purportedly stated at the time that 'a decision maker must ask for a security bond which is sufficiently high to act as a strong incentive to encourage compliance with visa conditions'.[25]

100. The Department has submitted that 'at the time, Migration Series Instruction 388 provided policy guidance to departmental officers that if a bond was requested, $10 000 was a reasonable amount'. The Department further submits that the fact that it reduced the bond requested to $8 000 and then ultimately did not insist on a bond is evidence that it considered Mr Cherkupalli's circumstances when setting the bond.

101. In the Department's response to the s 27 letter, it submits that the Department 'continues to believe that its decisions, including those in relation to the imposition of the bond, were appropriate in the circumstances and within the policy framework at the time'.

102. The refusal to grant Mr Cherkupalli a bridging visa resulted in his detention in an immigration detention centre for a period of 17 months because he worked, apparently for a few hours, in contravention of his visa conditions. In my view, the legitimate aim of encouraging compliance with visa conditions does not justify Mr Cherkupalli's prolonged detention and the extreme interference with his right to liberty under article 9(1) of the ICCPR.

103. The legitimate aim of ensuring compliance with visa conditions could have been achieved in this case through less invasive and more proportionate means such as imposing reporting conditions on the bridging visa.[26] I therefore conclude that the Commonwealth's refusal to grant Mr Cherkupalli a bridging visa was inconsistent with article 9(1) of the ICCPR.

11 The failure to afford Mr Cherkupalli an opportunity to comment and the refusal to grant student visa

104. Mr Cherkupalli alleges that the Department failed to provide him with an opportunity to comment on whether he 'substantially complied with the no work condition of his bridging visa' when determining whether to grant him a student visa.

105. He says that this act prolonged his detention in VIDC because, had the delegate asked Mr Cherkupalli for his comments, the delegate would have learned that the day he was found working at Michel's Patisserie was the first and only day he worked in non-compliance with the no work condition and that he had only worked for a few hours to fill in for a friend.

106. Mr Cherkupalli claims that had the delegate known this information, the delegate would have concluded that he had 'substantially' complied with the no work condition and a student visa would have been granted.

107. In support of this argument, he points to the fact that the Department ultimately granted him a student visa on 29 October 2007 after it provided him with an opportunity to provide information on 6 February 2006. Mr Cherkupalli claims that had an opportunity to comment been provided initially, he would have been granted a student visa and released from detention in or around December 2004.

11.1 Is there an 'act'?

108. I accept that a decision to grant Mr Cherkupalli a Student (Temporary) (Class TU) Visa under Regulation 572.212 and in particular, the decision to not provide Mr Cherkupalli with an opportunity to comment on the case against him, are exercises of discretion and therefore 'acts' of the Commonwealth for the purposes of the AHRC Act.

11.2 No finding on failure to provide an opportunity to comment and refusal to grant student visa

109. I note that the Department refused Mr Cherkupalli's application for a student visa on 22 December 2004 and that the Minister consented to the remittal of Mr Cherkupalli's application for a student visa on 18 November 2005. I also note that on 6 February 2006 the Department wrote to Mr Cherkupalli inviting him to comment on information which was relied upon to refuse the student visa application.

110. I acknowledge that the Department granted Mr Cherkupalli a student visa after receiving his comments. The inference is therefore open that the student visa was granted because of his comments. However, this is not the only possible explanation. Other factors could have been influential on the Department. I note, for example, that in mid-April 2006 members of the Wollongong community wrote to senior departmental officers on his behalf. Other factors may also have been influential including the irregularities attending the earlier cancellation of his bridging visa, the period that he had spent in detention and possible changes in Departmental policy.

111. While I accept that both the failure to afford Mr Cherkupalli an opportunity to comment and the refusal to grant him a student visa on 22 December 2004 were inconsistent with the requirements of the Migration Act, I am not persuaded that if he had been granted that opportunity he would have been immediately granted a visa or that he would have been granted a visa earlier than in fact proved to be the case.

12 Inexplicable administrative delay

112. Mr Cherkupalli also alleges that the Department's inexplicable delay in granting him a student visa following the remittal of his application prolonged his detention in VIDC and was inconsistent with article 9(1) of the ICCPR.

12.1 Is there an 'act'?

113. I accept that the alleged 'inexplicable delay' by departmental officers can constitute an 'act' of the Commonwealth for the purposes of the AHRC Act.[27]

12.2 No finding on inexplicable administrative delay

114. The Department took approximately 23 months – or almost two years – to make a decision on Mr Cherkupalli's remitted student visa application. I note that prior to the Department granting Mr Cherkupalli a student visa, he was released from detention on a grant of a bridging visa on 19 April 2006.

115. The period taken to process Mr Cherkupalli's student visa seems, on its face, to be unreasonably long.

116. The Department submits that Mr Cherkupalli's student visa application contained outstanding processing requirements which delayed the processing of his application. In particular, it appears that Mr Cherkupalli took some time in providing the required financial and medical documents and that the financial documents needed to be verified in New Delhi twice. The Department submits that at least part of the delay was therefore reasonable and within the control of Mr Cherkupalli.

117. I accept that the delay was in part caused by Mr Cherkupalli's failure to provide adequate documentation. However, the Department has not provided any justification for the 80 day period between the remittal order made on 18 November 2005 and its first letter to Mr Cherkupalli inviting his comments which is dated 6 February 2006. I assume that no reasonable justification can be provided.

118. Accordingly, I am satisfied that the administrative delay in writing to Mr Cherkupalli to invite his comments was unreasonable. I am also of the view that delay in the processing of applications that could result in a person being released from detention in an immigration detention centre can be inconsistent with the right to liberty.

119. However, in the circumstances of this case, I am not satisfied that the delay of 80 days following the issue of the consent remittal orders on 18 November 2005 prolonged Mr Cherkupalli's detention in an immigration detention centre. Mr Cherkupalli was released from the VIDC on 19 April 2006 after members of the Wollongong community made representations to senior departmental officers and after lodging a further application for a bridging visa. I am not persuaded that, had the 80 days' delay not occurred, a student visa would have been granted to Mr Cherkupalli earlier than this date. In these circumstances, I make no finding in relation to the departmental officers' inexplicable administrative delay in processing Mr Cherkupalli's student visa application.

13 Failure to provide judicial review

120. Mr Cherkupalli also alleges that 'the conduct of the Department violated article 9(4) of the ICCPR in that no substantive judicial review of the continued necessity of his detention was available to him'.

121. Article 9(4) of the ICCPR provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

122. Mr Cherkupalli's submissions do not specify how the provision of judicial review is within the discretion of the Commonwealth, its officers or its agents. I conclude that the failure to provide judicial review of the continued necessity of Mr Cherkupalli's detention is a consequence of the law and not an 'act' of the Commonwealth within the meaning of the AHRC Act.

14 Recommendations

14.1 Power to make recommendations

123. 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.[28] The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.[29]

124. 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.[30]

125. In making my recommendations, I have considered the detailed submissions of Mr Cherkupalli. The Department has not made any submissions in reply to these submissions.

14.2 Compensation

(a) Consideration of compensation

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

127. However, in considering the assessment of a recommendation for compensation under s 35 of the AHRC Act (relating to discrimination matters under Part II, Division 4 of the AHRC Act), the Federal Court has indicated that tort principles for the assessment of damages should be applied.[31]

128. I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.[32]

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

130. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for a breach of article 9(1). This is because the damages that are available in false imprisonment matters provide an indication of how the courts have considered it appropriate to compensate for loss of liberty.

131. The principal heads of damage for a tort of this nature are injury to liberty (the loss of freedom considered primarily from a non-pecuniary standpoint) and injury to feelings (the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status).[33]

132. 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.

133. In *Taylor v Ruddock,*[34] the Court found that the plaintiff was unlawfully imprisoned and awarded him $50 000 for the first period of 161 days and $60 000 for the second period of 155 days. In awarding Mr Taylor $110 000, the District Court took into account the fact that Mr Taylor had a long criminal record and that this was not his first experience of a loss of liberty. He was also considered to be a person of low repute who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances.[35]

134. In *Goldie v Commonwealth of Australia & Ors (No 2),*[36] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.

135. In *Spautz v Butterworth,*[37] 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.

136. In *El Masri v Commonwealth (DIAC),*[38] I recommended that the Commonwealth pay the complainant $90 000 as compensation for the 90 days he was arbitrarily detained in an immigration detention centre.

(b) Recommendation that compensation be paid for loss of liberty

137. I have found that the decisions to detain Mr Cherkupalli under s 192 of the Migration Act and under s 189 of the Migration Act were inconsistent with article 9(1) of the ICCPR. I have also found the Department's refusal to grant Mr Cherkupalli a bridging visa was inconsistent with article 9(1) of the ICCPR.

138. I have therefore found that Mr Cherkupalli was arbitrarily deprived of his liberty from 26 November 2004 to 19 April 2006; a period of 509 days.

139. Mr Cherkupalli seeks financial compensation for his arbitrary detention in the amount of $1 000 per day of detention. He submits that this is consistent with the Commission's decision in *El Masri* and assumes a lower daily rate than the decisions in *Taylor v Ruddock, Goldie v Commonwealth and Spautz v Butterworth*.

140. I consider that the Commonwealth should pay to Mr Cherkupalli an amount of compensation to reflect the loss of liberty caused by his detention at VIDC but I have not assessed the quantum of that compensation by utilising a strict 'daily rate'.

141. 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 $450 000 is appropriate. Mr Cherkupalli did not have a criminal record nor did he commit a crime by working in breach of his visa conditions. I am therefore of the view that Mr Cherkupalli would have felt the disgrace and humiliation experienced by a person of good character. I note his comments that:

> I am no longer credible, who would believe that I was sent to a detention centre for going to work for four hours. That is what I have done wrong, who is going to believe the government kept me detained for 17 months for working for four hours. They will think I have done something very bad. I have never been in trouble before. I was ashamed and embarrassed at finding myself in detention. How do I explain this to my mother and sister?[39]

(c) Recommendation that compensation be paid for loss of earnings and costs

142. Mr Cherkupalli has also submitted that his detention has had lasting impacts on his visa and employment prospects. He has therefore requested a recommendation for additional compensation in the amount of $250 000 in respect of his loss of earnings and further visa application costs. He submits that this amount is an estimate based on the following assumptions and calculations.

a) That Mr Cherkupalli would have been earning a starting salary of $75 000 per annum indexed by $5 000 from June 2006 for four years;

b) Offset by Mr Cherkupalli's salary earned working as a part time technician for 20 hours per week estimated at $25 000 per annum over four years;

c) $20 000 for additional educational and visa costs for amount lost due to additional expenses of applying for a further student visa.

143. I note that this estimate is imprecise. For example, the University of Sydney website states that:

> The starting salary for engineering and IT graduates is approximately $50 000 per annum or higher, and will continue to increase with the skills shortage.[40]

144. Further, the amount of $20 000 claimed for visa and educational costs has not been particularised. However, I note that in Ms Jelen's Social Work report of 22 April 2010, she writes that Mr Cherkupalli's detention resulted in his inability to attend his University course and that he was forced to forfeit prepaid student fees in the amount of $57 000.

145. In my view, the loss of earnings Mr Cherkupalli claims would have commenced in mid-2007, not 2006, as he would have needed to complete his studies and obtain a permanent residence visa before realising these earnings. This loss will presumably continue until he is granted a visa which allows him to work for longer than 20 hours per week. There is no certainty that this will happen soon or at all.

146. In the absence of better particulars and opposing submissions from the Department, I am prepared to recommend an amount of $232 000 to represent Mr Cherkupalli's loss of earnings. This amount is based on the following calculations:

a. $250 000 ($50 000 x 5 years);

b. Offset by $125 000 ($25 000 x 5 years);

c. Additional $50 000 for likely pay rises during 5 year period;

d. $57 000 for forfeited prepaid educational costs.

(d) Recommendation that compensation be paid for future treatment costs

147. Finally Mr Cherkupalli submits that I should recommend compensation for future treatment costs to address the psychological impacts of his detention.

148. I note that Ms Jelen, a Social Worker in the Client Assessment & Referral Unit of Legal Aid NSW, reports that Mr Cherkupalli's detention has had a lasting psychological impact on him. She writes that 'Mr Cherkupalli readily identified his detention as a psychologically catastrophic life event that continues to have a harmful influence on his life'. She considered it was reasonable to conclude that Mr Cherkupalli suffers from post-traumatic stress disorder and possibly also depression.[41]

149. I note that Ms Jensen refers to research undertaken by Dr Louise Newman, Psychiatrist, and Dr Christine Phillips, General Practitioner and Senior Lecturer, that concludes that 'in the community, the incidence of PTSD and depression has been identified in 60-85% of individuals who have been detained in immigration detention centres'.[42]

150. Prior to being detained, Mr Cherkupalli described his life as being 'happy, I had my family, friends, I was normal. I had dreams of having a good job, getting married, having kids. There was satisfaction and joy in living.' Mr Cherkupalli states that after being released from detention: 'Inside is killing me. I have nothing, no family, no friends, no hope or dreams. I don't feel'.

151. Ms Jensen concludes that she has no doubt 'Mr Cherkupalli's experience of being detained for 17 months and then being abruptly released at 7pm at night would have left him frightened, disoriented and highly anxious'. She suggests that his incarceration at VIDC resulted in an extreme and intense negative emotional response and loss of physical integrity. Ms Jensen states that 'Mr Cherkupalli remains in a state of hopelessness and believes he has no real control over his life'.

152. Mr Cherkupalli complains that he is now socially isolated owing to his inability to re-establish contact with his family in India due to his shame of being detained. Mr Cherkupalli has physiological symptoms, including headaches and sleeplessness. Mr Cherkupalli submits that he has no access to Medicare in his present visa situation and lacks the financial resources necessary to pay for medical or therapeutic intervention.

153. Mr Cherkupalli has claimed an amount of $11 685 to $20 685 for appointments with a psychiatrist and a psychologist plus a reasonable amount for medication costs. I note that this amount is based on an estimate of treatment costs provided to the Commission on 4 February 2011.

154. In my view, it is appropriate to recommend an additional amount of $15 000 compensation be paid to Mr Cherkupalli representing his reasonable future treatment costs.

14.3 Change to policy or operations

155. As mentioned in the body of this report, the keeping of accurate records concerning decisions to detain individuals is an important element of ensuring the protection of the right to liberty. The lack of appropriate records in this case is a cause for concern.

156. I note that in the Department's response to the s 27 letter, it states that:

> Many of the Department's processes have been improved since the events under examination occurred. This is particularly true of the records which are made when detaining suspected unlawful non-citizens.

157. Nonetheless, I recommend that the Department ensure that its staff receive training in the importance of protecting the right to liberty and, in that context, the importance of maintaining accurate and detailed records of decisions made and the reasons for those decisions.

158. I recommend that, to the extent possible, the Department provide training to all 'officers' within the meaning of the Migration Act on the proper exercise of the discretion to detain under s 192(1) of the Migration Act.

159. I recommend that:

a) detaining officers considering whether to detain a non-citizen whose visa has recently been cancelled be required to check carefully the record of the decision cancelling the visa for errors, including possible procedural errors on the face of the document, before making the detention decision; and

b) officers reviewing the legality of a person's detention be required to pay particular attention to the record of the visa cancellation decision for any potential errors on the face of the document.

160. I recommend that regular reviews of non-citizen's detention under s 189 of the Migration Act include consideration of whether the non-citizen is in the least restrictive form of detention.

14.4 Ministerial intervention under s 351 of the Migration Act

161. In the circumstances of this particular case, it appears that Mr Cherkupalli's detention has led to his inability to apply for a permanent residence visa.

162. Mr Cherkupalli submits that his aspiration, when he came to Australia, was to complete his studies in engineering and obtain a permanent visa to reside in Australia. He submits that had he not been detained, he would have completed his engineering qualifications by mid 2007 and would have had sufficient points to qualify for permanent residency 'Skilled Independent Visa – subclass 136 visa' at that time.[43]

163. However, Mr Cherkupalli submits that he was unable to complete his studies prior to his 30th birthday due to not being released from detention until 19 April 2006.

164. Further, the law changed on 1 September 2007 and Mr Cherkupalli does not now meet the criteria for a skilled independent visa under the current Migration Regulations.[44]

165. On 31 May 2011, Mr Cherkupalli applied for the second time for a ministerial intervention under s 351 of the Migration Act. On 26 September 2010, the solicitor acting for Mr Cherkupalli informed the Commission that the Minister has declined to exercise his powers under s 351 of the Migration Act.

166. Section 351 of the Migration Act provides the Minister with a discretion to substitute for a decision of the Tribunal another more favourable decision regardless of whether the Tribunal had the power to make that other decision. In exercising this power, the Minister is not bound by certain provisions of the Migration Act.

167. The current guidelines on the exercise of ministerial powers under s 351 are found in the Procedures Advice Manual 3 which states:

> The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances.

168. The ministerial guidelines include the following relevant factors for assessing whether a case involves 'unique or exceptional circumstances':

a) circumstances that may bring Australia's obligations under the ICCPR into consideration;

b) compassionate circumstances regarding the psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person.

169. In my view, Mr Cherkupalli's situation involves 'unique or exceptional circumstances' in light of my findings that the Department has acted inconsistently with Mr Cherkupalli's human rights.

170. I am also satisfied that Mr Cherkupalli's detention resulted in his failing to generate sufficient points to apply for a permanent visa in mid-2007.

171. I therefore recommend that the Minister reconsider Mr Cherkupalli's application under s 351 of the Migration Act in light of my above findings and in particular, my finding that the cancellation of his bridging visa was not authorised by s 119 to s 121 of the Migration Act.

172. The intent of this recommendation is to place Mr Cherkupalli into the position he would have been in had he not been detained by the Department but rather had completed his studies and applied for a permanent residence visa in mid-2007 under the law as it was prior to the changes effected on 1 September 2007.

14.5 Apology

173. In addition to the above recommendations, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Cherkupalli for the breaches of his right to liberty identified in this report. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.[45]

15 Department's response to the recommendations

174. On 6 October 2011, I provided a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr Cherkupalli.

175. By letter dated 31 October 2011 the Department provided the following response to my findings and recommendations:

> ***AHRC recommendation: The Commonwealth pay financial compensation to Mr Cherkupalli in the sum of $597,000.***
>
> DIAC's response: Not agreed at this stage. The Department notes the President's recommendation with regards to compensation payable to Mr Cherkupalli. Mr Cherkupalli has a separate ongoing compensation claim in the Supreme Court of New South Wales concerning the substance of the complaint. The recommendation will be considered in light of that litigation.
>
> ***AHRC recommendation: The Department ensure that its staff receive training in the importance of protecting the right to liberty and, in that context, the importance of maintaining accurate and detailed records of decisions made and the reasons for those decisions.***
>
> DIAC's response: Agreed. The Global Learning and Change Branch in DIAC provides core and foundation training which Is available to all staff. Some of the learning products which are relevant are:
>
> Australia's Legal System
> Making a Decision
> Legend.
>
> Role-specific training is also delivered for DIAC officers who carry out roles in the following areas:
>
> Visa and Migration
> Border Management
> Visa Compliance and Status Resolution (CSR)
> Onshore Detention Network and Offshore asylum seeker management roles.
>
> The CSR Basics program and the Entry Officer Training course include a module, Module 10 Cancellations Process, which is designed to provide participants with an introduction to the legislation, policy and procedures that govern the cancellation of temporary and substantive visas. Staff in all CSR roles must attend this training.
>
> This module covers the topic of 'Responding to a NOICC' (see p. 49 heading 3.2.4 of 'Mod 10 — PG Cancellation Processes) which is attached. In addition, staff in most DIAC roles who have visa cancellations as a part of their duties, continue on to undertake further Cancellations training delivered by staff from the Compliance Policy Section. This training consists of a further 1-2 days face-to-face training.

AHRC recommendation: To the extent possible, the Department provide training to all 'officers' within the meaning of the Migration Act on the proper exercise of the discretion to detain under s 192(1) of the Migration Act.

DIAC's response: Agreed. The Compliance Field Visits (CFV) training course is a Certificate IV in Government (Statutory Compliance), with Australian Forensic Services (AFS) providing accreditation.

DIAC's CFV training course is designed to introduce a range of standard practices and equipment for DIAC Compliance officers to learn to use and adopt in support of Compliance related activities. Module 18 of the CFV training course covers the various powers of detention under the Migration Act 1958 (the Migration Act) as well as the differences between those powers.

The training directly related to s.192 of the Migration Act (delivered and facilitated by Compliance Policy) is Module 18D – Questioning and Suspected UNC and detaining a UNC – Immigration Detention s.192 – which is also attached.

Participants are assessed by Compliance Policy on their ability to demonstrate a knowledge of s.192 of the Migration Act. The assessment method is that participants must satisfactorily complete the specified individual and group activities in Module 18D – Questioning and-Suspected UNC and detaining a UNC – Immigration Detention s.192 – as well as demonstrate their ability to apply the legislation to practical scenarios. This is assessed by Compliance Policy and AFS. The workbook is attached.

AHRC recommendation: Detaining officers considering whether to detain a non-citizen whose visa has recently been cancelled be required to check carefully the record of the decision cancelling the visa for errors, including possible procedural errors on the face of the document, before making the detention decision.

Officers reviewing the legality of a person's detention be required to pay particular attention to the record of the visa cancellation decision for any potential errors on the face of the document.

DIAC's response: Agreed. The 'Mod 10 — PG Cancellation Procedures' states that:

'Throughout all of the steps in the visa cancelling process, attention to detail is essential. It is critical to pay attention to factors such as identifying the correct person and the correct address and specifying the exact visa which is to be cancelled. Accurate record keeping is also essential to ensure data integrity and maintain an evidence based and transparent decision process.'

Sections 3.1 and 3.2 specifically address what must be considered prior to any visa cancellation as well as the necessary steps to complete.

AHRC recommendation: Regular reviews of a non-citizen's detention under s.189 and s.190 of the Migration Act include consideration of whether the non-citizen is in the least restrictive form of detention.

DIAC's response: The Control Framework for Detention Related Decision Making specifies how DIAC uses its business processes, people and systems to mitigate the risk of a person:

- being detained unlawfully;
- being kept in an inappropriate place of detention;
- being detained for longer than necessary; or
- not being managed to a timely immigration outcome.

The Control Framework was initially implemented at the end of 2006. It consisted of 17 identified decision points in the compliance pathway — referred to as Mandatory Control Points (MCPs) —which represent a significant level of risk to decision makers, clients, the department and other stakeholders.

Of the 17 identified MCPs, 10 were implemented and were embedded within the Compliance, Case Management, Detention and Settlement (CCMDS) Portal to achieve consistency of decision making, managerial oversight, and a durable, reviewable and accessible record.

The 'Control Framework for Detention Related Decision Making' has the full details of DIAC's processes in this area and is attached.

AHRC recommendation: The Minister re-consider Mr Cherkupalli's application under s.351 of the Migration Act in light of my above findings and in particular, my finding that the cancellation of Mr Cherkupalli's BVC was not authorised by ss119-121 of the Migration Act.

DIAC's response: Not agreed at this stage. When the Minister considered Mr Cherkupalli's request for Ministerial Intervention on 12 September 2011, he was aware of the preliminary views of the AHRC. The Minister decided not to intervene in this case.

The Minister has specified in his guidelines that he does not wish to consider repeat requests unless the Department is satisfied that there has been a significant change in circumstances, or new and substantive claims involving unique or exceptional circumstances.

On the information available, the Department is not satisfied that Mr Cherkupalli's circumstances have changed or that there is any new information that would bring his case within the ambit of the Minister's guidelines, or otherwise warranting a repeat referral to the Minister. As such, the Department does not have grounds to initiate a repeat request to the Minister on behalf of the client.

Nevertheless, if there is new information or a change in circumstances, Mr Cherkupalli or his authorised representative could lodge a further request for Ministerial Intervention. Any such request would be processed in accordance to the Minister's guidelines.

AHRC recommendation: The Commonwealth provide a formal written apology to Mr Cherkupalli for the breaches of his human rights identified in this report.

DIAC's response: Not agreed at this stage. The Department notes the President's recommendation to provide a formal written apology to Mr Cherkupalli. The Department will consider this recommendation in light of ongoing litigation involving Mr Cherkupalli.

176. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission

March 2012

Appendix 1: Chronology

Date	Action
30 July 2003	Arrived on offshore subclass 574 (Postgraduate Research Sector) visa ('no work' condition)
6 August 2003	Granted subclass 574 visa onshore (work limitation condition)
13 August 2004	Subclass 574 visa expired
9 September 2004	Applied for student visa onshore and was granted Bridging Visa C with condition 8101 (no work)
26 November 2004	Bridging Visa C cancelled under s 116(1)(b) of the Migration Act for breach of 'no work' condition and detained under s 189 of the Migration Act at Villawood Immigration Detention Centre (VIDC)
29 November 2004	Applied for bridging visa
1 December 2004	DIAC refuses application for bridging visa
2 December 2004	Application lodged with Migration Review Tribunal (MRT) to review refusal to grant bridging visa
13 December 2004	MRT affirms DIAC's decision to refuse bridging visa
22 December 2004	Student visa application refused by DIAC due to non-compliance with 'no work' condition of Bridging Visa C
4 January 2005	Lodged application for review of student visa refusal with MRT but the fee waiver was refused and the application for review was deemed ineligible
13 January 2005	Application for bridging visa lodged

17 January 2005	DIAC refuses bridging visa (DIAC claimed no amount of security would provide assurance of compliance with visa conditions)
19 January 2005	Application to review decision to refuse bridging visa lodged with MRT
31 January 2005	MRT affirms DIAC's decision to refuse bridging visa
31 March 2005	MRT decision – refusal of application to review student visa refusal on the basis that application ineligible – complainant did not pay application fee and application for fee waiver refused
25 May 2005	Letter to Minister Vanstone seeking Ministerial Intervention under s 351 of the Migration Act
20 June 2005	Applied for bridging visa – DIAC asked for $10 000 security – application withdrawn because complainant could not afford
8 July 2005	Applied for bridging visa – DIAC asked for $10 000 security – application withdrawn because complainant could not afford
14 July 2005	Applied for bridging visa – DIAC asked for $10 000 security – application withdrawn because complainant could not afford
19 August 2005	Applied for bridging visa – DIAC asked for $8 000 security – application withdrawn because complainant could not afford
30 August 2005	DIAC informs Minister will not exercise power under s 351 of the Migration Act

2 September 2005	Application for judicial review in Federal Magistrates Court (FMC) of MRT decision dated 31 March 2005
19 September 2005	Applied for bridging visa – DIAC asked for $8 000 bond – application withdrawn because complainant could not afford
29 September 2005	Applied for bridging visa – DIAC asked for $8 000 bond – application withdrawn because complainant could not afford
5 October 2005	Applied for bridging visa – DIAC asked for $8 000 bond – application withdrawn because complainant could not afford
18 November 2005	Minister withdrew from FMC proceedings regarding the student visa refusal (failure to provide opportunity to respond to the refusal) – decision remitted by consent to DIAC for reconsideration
6 February 2006	DIAC sent letter seeking comments regarding substantial non-compliance with conditions of Bridging Visa C
20 February 2006	Letter to DIAC responding to letter seeking comments
19 April 2006	Applied for bridging visa – granted and released from VIDC
29 October 2007	Student visa subclass TU 573 granted
April 2009	Completed Master of Engineering Studies

1 Note the sum of $597 000 was reported in the summary of the Notice under s 29 of the AHRC Act. The correct total of the calculations set out in part 14 of the Notice and this Report is $697 000.

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

3 Email from Kenneth Truelsen of the Department to Rebecca Gieng of the Commission, dated 17 February 2010.

4 *Al Kateb v Godwin* (2004) 219 CLR 562.

5 *Ruddock v Taylor* (2005) 222 CLR 612, 622.

6 Ibid.

7 Ibid, 622.

8 Ibid, 628.

9 Ibid, McHugh and Kirby JJ dissented at 651. McHugh J found that a mistaken belief that a visa had been lawfully cancelled is a mistake of law, and therefore cannot be a reasonable suspicion within the meaning of s 189. Kirby J agreed. Further, he stated that basic principles of statutory construction are protective of fundamental rights and freedoms and dictate that a section which purports to deprive a person of his or her liberty must be strictly construed. See also *Re Bolten; Ex parte Beane* (1987) 162 CLR 514, 523.

10 [2002] FCA 433.

11 Ibid, [17] (Gray and Lee JJ).

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

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

14 Mr Cherkupalli's submissions, 21 December 2010, 10 [46].

15 See Legal Opinion prepared by the Australian Government Solicitor for Department of Immigration, Multiculturalism and Indigenous Affairs, reported in the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau,* 6 July 2005, 23; Procedure Advice Manual, National Compliance Operational Instructions – Powers to detain, [PA 135.3], Overview s 189, *Maintaining Reasonable Suspicion.*

16 This is consistent with my view in *El Masri v Commonwealth* (DIAC) [2009] AusHRC 41.

17 Email from Kenneth Truelsen of the Department to Prabha Nandagopal of the Commission, 4 February 2011.

18 *Migration Act 1958* (Cth), s 5.

19 *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

20 Mr Cherkupalli's submissions, 21 December 2010, [14].

21 Mr Cherkupalli's submissions, 21 December 2010, [59] and letters referred to therein.

22 The Department concedes that bridging visas were available to Mr Cherkupalli throughout his detention. I also note that at various points throughout Mr Cherkupalli's detention, he was 'awaiting a visa determination' and therefore met the relevant precondition for the grant of a bridging visa under s 73 of the Migration Act.

23 See Migration Regulations 1994, sub regulations 050.223 and 050.224, as they then were.

24 Email from Kenneth Truelsen of the Department to Prabha Nandagopal of the Commission, 4 February 2011.

25 Mr Cherkupalli's submissions, 21 December 2010, 15 [59].

26 For example, condition 8402 provides that the holder must report (a) within 5 working days of grant to an office of immigration; and (b) to that office on the first working day of every week after reporting under paragraph (a).

27 See *El Masri v Commonwealth* (DIAC) [2009] AusHRC 41.

28 AHRC Act, s 29(2)(a).

29 AHRC Act, s 29(2)(b).

30 AHRC Act, s 29(2)(c).

31 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).

32 See *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

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

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

35 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140]. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range. The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish': *Ruddock v Taylor* [2003] NSWCA 262 [49]-[50].

36 [2004] FCA 156.

37 (1996) 41 NSWLR 1 (Clarke JA).

38 Above note 27, [376].

39 Ms Mary Jelen, Social Work Consultant, Client Assessment & Referral Unit, Legal Aid NSW, Social Work Report, 22 April 2010, 5.

40 Engineering & Information Technology course information, University of Sydney, at http://www.eng.usdy.edu.au/apply/courses.html, viewed 14 September 2011.

41 Ms Mary Jelen, Social Work Consultant, Client Assessment & Referral Unit, Legal Aid NSW, Social Work Report, 22 April 2010, 6-7.

42 Ibid, 7.

43 Mr Cherkupalli's submissions, 21 December 2010, 19 [17].

44 Ibid.

45 S Shelton, *Remedies in International Human Rights Law* (2000), 151.

Further Information

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