Australian Human Rights Commission

Tuifangaloka v Commonwealth of Australia

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Miss Judy Tuifangaloka v Commonwealth of Australia (Department of Immigration & Citizenship)

Report into the right to be protected from arbitrary interference with family, the right to liberty and the right to have the best interests of the child considered as a primary consideration in all actions concerning children.

[2012] AusHRC 53

Australian
Human Rights
Commission

Australian Human Rights Commission

June 2012

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

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Ms Kalolaine Taufa on behalf of her daughter Miss Judy Tuifangaloka.

I have found that the acts and practices of the Commonwealth breached Ms Tuifangaloka's right to be protected from arbitrary interference with family, the right to liberty and the right to have the best interests of the child considered as a primary consideration in all actions concerning children.

By letter dated 26 April 2012, the Department of Immigration and Citizenship provided its response to my findings and recommendations. I have set out the response of the Department in its entirety in part 6 of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint against the Commonwealth of Australia by Ms Kalolaine Taufa on behalf of her daughter Miss Judy Tuifangaloka alleging a breach of her daughter's human rights.
2. The Commission has been conducting an inquiry since January 2007 in relation to a complaint against the Commonwealth filed by Ms Taufa on behalf of her six children. Ms Taufa alleged that the Commonwealth engaged in acts or practices inconsistent with the human rights of her children.
3. The Commonwealth has reached a settlement in relation to the acts alleged in relation to Ms Taufa's five youngest children. This report deals with the outstanding issues that relate to Ms Taufa's eldest child, Miss Tuifangaloka.
4. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
5. As a result of the inquiry, the Commission has found that acts of the Commonwealth identified below were inconsistent with the following rights of Miss Tuifangaloka:
    (a) the right to be protected from arbitrary interference with family recognised in articles 17(1) and 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR);
    (b) the right to liberty recognised in article 9(1) of the ICCPR and in article 37(b) of the *Convention on the Rights of the Child* (CRC); and
    (c) the right to have the best interests of the child considered as a primary consideration in all actions concerning children recognised in article 3(1) of the CRC.

2 Background

6. Miss Tuifangaloka was born in Australia on 17 April 1995.
7. Between 28 April 2003 and 19 October 2004 Miss Tuifangaloka held a number of different temporary visas. The last of these visas was a Bridging Visa E (BVE) granted on 12 February 2004 that allowed Miss Tuifangaloka to remain in Australia while her mother applied to the Federal Court for declaratory relief that her children acquired Australian citizenship by birth. This visa was due to expire on 5 November 2004.
8. On 19 February 2004 Miss Tuifangaloka's father, Mr Siaosi Taufa, was unlawfully removed from Australia.
9. On 7 October 2004, Ms Taufa withdrew her application to the Court in relation to her children's citizenship.
10. At 7.40pm on 19 October 2004 a number of immigration officers entered the home of Ms Taufa and her six children and executed a search warrant. Ms Taufa was asked a number of questions about their visas. At 8.30pm, following this questioning, Ms Taufa and her children were detained under s 192(1) of the *Migration Act 1958* (Cth) (Migration Act), ostensibly for the purpose of questioning about their visas. Ms Taufa filled out passport applications for each of the children and was instructed to pack bags for them. The family was then taken to Villawood Immigration Detention Centre (VIDC).
11. At VIDC, Ms Taufa's BVE was cancelled under s 116(1)(a) . By the operation of s 140 of the Migration Act, Miss Tuifangaloka's visa was cancelled at the same time. Ms Taufa and her children were then detained in VIDC.
12. On 15 April 2005, Ms Taufa signed an undertaking that Miss Tuifangaloka would remain in VIDC as a temporary visitor and would not be in immigration detention for the purposes of the Migration Act.
13. On 17 April 2005 Miss Tuifangaloka turned 10 years old and obtained Australian citizenship. It would have been unlawful for her to remain in immigration detention thereafter.
14. On 11 May 2005 the Bridging (Removal Pending) Visa became available for issue.
15. On 26 May 2005 officers of the Department discussed issuing a Bridging (Removal Pending) Visa to Ms Taufa. However, this possibility was not discussed with Ms Taufa.
16. On 30 May 2005, a departmental officer asked Ms Taufa if she would consider relocating her family to the Port Augusta Immigration Residential Housing (IRH) in South Australia. On 8 June 2005 Ms Taufa was advised that there was a house available at the Port Augusta IRH, but she said that she did not want to relocate.
17. On 13 July 2005 the Department made a submission to the Minister to consider granting a Bridging (Removal Pending) Visa to the family. On 28 July 2005 the Minister chose not to consider the submission and granted a residence determination under s 197AB of the Migration Act. As a result, on 28 July 2005 Miss Tuifangaloka was released from VIDC.
18. On 29 May 2008 Mr Taufa returned to Australia.

3 Legislative framework

3.1 Functions of the Commission

19. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, s 11(1)(f) gives the Commission the following functions:

> 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.

20. Section 20(1)(a) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.

21. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

3.2 What is a 'human right'?

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

3.3 What is an 'act'?

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

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

4 Was there an act or practice of the Commonwealth?

25. The alleged acts of the Commonwealth as set out in the initial written complaint or raised in subsequent submissions of the complainant are:

Act 1: The removal of Mr Taufa from Australia and the resulting separation of Miss Tuifangaloka from her father.

Act 2: The decision to detain Ms Taufa and her children, including Miss Tuifangaloka, under s 192 of the Migration Act for questioning about their visas.

Act 3: The decision to cancel Ms Taufa's BVE under s 116(1)(a) which led automatically to the cancellation of Miss Tuifangaloka's BVE.

Act 4: The failure to place Miss Tuifangaloka in a less restrictive form of detention than VIDC.

Act 5: The decision to invite Ms Taufa to sign an undertaking that Miss Tuifangaloka remain with her in VIDC as a visitor after she became an Australian citizen.

26. For the reasons set out below, I find that each of these acts was inconsistent with or contrary to the rights of Miss Tuifangaloka under the ICCPR and the CRC.

Act 1: The removal of Mr Taufa from Australia and the resulting separation of Miss Tuifangaloka from her father

27. Mr Taufa was removed from Australia on 19 February 2004. The Department has conceded that Mr Taufa's removal from Australia on 19 February 2004 was unlawful as he held a valid bridging visa at that time.[2] He was granted a Spouse (Provisional) visa on 22 May 2008 and returned to Australia on 29 May 2008.

28. The unlawful removal of Mr Taufa from Australia is an 'act' for the purposes of s 3 of the AHRC Act. It was something done by the Commonwealth which was not required by law. Indeed, it was something done by the Commonwealth which was inconsistent with the rights held by Mr Taufa under his visa.

29. The complainant alleges that the removal of Mr Taufa from Australia resulted in an arbitrary interference with Miss Tuifangaloka's right to family. This allegation calls for consideration of articles 17 and 23 of the ICCPR.

30. Article 17(1) of the ICCPR provides:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

31. Article 23(1) of the ICCPR provides:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

32. Professor Manfred Nowak has noted that:[3]

> [T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.

33. In Australian Human Rights Commission Report 39 at [80]-[88], the Commission took the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person's family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

34. It is uncontested that Mr Taufa's removal from Australia was unlawful. As a result of his removal Mr Taufa was separated from his children, including Miss Tuifangaloka, for over four years. I find that this separation involved an interference with Miss Tuifangaloka's family[4] and amounted to a breach of article 17(1) and article 23(1) of the ICCPR.

35. Following its recognition that the removal of Mr Tuafa was unlawful, the Department acknowledged that it would *"need to take into account the impact of separation from his family"*.[5]

36. The psychologist's report provided to the Commission suggests that the removal of Mr Taufa from Australia had a negative impact on Miss Tuifangaloka's wellbeing and development. As at May 2008, the date of the report, Miss Tuifangaloka continued to grieve her father's absence. Relevantly, the report states that Miss Tuifangaloka had to assume quasi-parent responsibilities in the absence of her father and as a result:[6]

> on occasion, she "wishes she was dead", entertains thoughts of self-harm and absconding from the family home.

37. Although it is not necessary for Miss Tuifangaloka to demonstrate damage sustained by her as a result of her separation from her father in order to succeed in a claim under article 17(1) and article 23(1), this evidence provides further support for such a finding.

38. The Department has acknowledged that no specific consideration was given to the interests of Mr Taufa's children at the time of his removal.[7] As a result, his removal may also have resulted in a breach of article 3 of the CRC. Article 3 of the CRC provides that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

39. In *Minister for Immigration and Ethnic Affairs v Teoh*, the Court considered that the refusal of resident status to a parent of dependent children living in Australia, with the direct consequence of deportation for the parent, and the breaking up of the family, is an 'action concerning children'.[8] I conclude that the present conduct, involving the removal of Mr Taufa from Australia with the consequent separation from his six young children and the breaking up his family, is also an action concerning children.

40. The ratification by Australia of the CRC gave rise to a legitimate expectation in such circumstances that the best interests of the child would be taken into account as a primary consideration. If the decision maker proposes to make a decision inconsistent with a legitimate expectation, then procedural fairness requires that the person affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course.[9]

41. The UNICEF Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on the application of article 3:[10]

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

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

42. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the CRC in areas falling within the scope of their respective mandates.

43. In the present circumstances, where the Department has acknowledged that no specific consideration was given to the interests of Mr Taufa's children at the time of his removal, I find that there has also been a breach of article 3 of the CRC.

Act 2: The decision to detain Ms Taufa and her children under s 192 of the Migration Act for questioning about their visas

44. At 7.40pm on 19 October 2004 several officers of the Department attended the Taufa family home, apparently without prior notice. They executed a search warrant. The executing officer asked Ms Taufa a number of questions about her visa and those of the children. At that time, Ms Taufa held a BVE that had been granted on 12 February 2004. Each of her children held visas that were dependant on her visa. Ms Taufa answered the questions asked of her and cooperated with the requests made of her. Following this questioning, the officers made a decision to cancel the visas held by Ms Taufa and her children. At 8.30pm, Ms Taufa and her children were detained under s 192(1) of the Migration Act ostensibly for questioning about their visas.

45. The complainant alleges that the decision to detain her and her children under s 192 amounted to a breach of article 9(1) of the ICCPR and article 37(b) of the CRC.

46. Article 9(1) of the ICCPR provides that:

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

47. Article 37(b) of the CRC provides that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

48. The complainant alleges first, that the detaining officer did not comply with the requirements of s 192; and secondly, that the detention of Miss Tuifangaloka was in any event arbitrary in the sense of being unreasonable and inappropriate in the circumstances.

49. Section 192 of the Migration Act 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.

50. As s 192(1) 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 Miss Tuifangaloka in purported compliance with the section was an 'act' of the Commonwealth.

'Evade or otherwise not cooperate with officers'

51. By the operation of s 172(1)(ba) of the Migration Act, at the time of her detention Miss Tuifangaloka was an 'immigration cleared non-citizen'. Accordingly, she could not lawfully be detained under s 192(1) unless the detaining officer reasonably suspected that she would attempt to evade the officer and other officers, or otherwise not co-operate with officers in their enquiries about her visa and other related matters.

52. The complainant submits that at no time had Ms Taufa attempted to evade the Department or failed to co-operate with the officers in their inquiries.[11] At the time of her detention, Miss Tuifangaloka was a child of 9 years of age. It is unlikely, therefore, that she would have attempted to evade departmental officers of her own volition.

53. The Department has provided the Commission with a copy of pages of the notebook of the warrant holder at the time the search warrant was issued and an extract from the Department's computer system describing the execution of the warrant. The description of the execution of the warrant suggests that Ms Taufa was cooperative throughout. For example, the officer noted that:

> POI was asked if she had a valid travel document for her and the children, she advised that she had a valid passport but the children did not have any travel documents. POI was requested to present birth certificates for all her children, to which she did. …
>
> POI completed passport applications for all the children at her residence.

54. Ms Taufa is recorded as providing a response to each of the questions asked by the officer executing the warrant. There is no suggestion in any of the notes that she attempted to evade any of the officers present. The notes suggest that she packed bags for herself and her six children in a period of 40 minutes before the family was taken into immigration detention.

55. The Department has not submitted that one or more of its officers held one of the suspicions identified in s 192(2) at the time of the family's initial detention. Nor has it provided any material which would support such a suspicion. On 28 February 2012, I wrote to the Department highlighting the fact that no submission of this nature had been made and that, in the absence of any further submission from the Department touching on this issue, it would be open to me to find that such a suspicion was not held and that the detention under s 192(1) was unlawful. The Department confirmed on 26 March 2012 that it had no further submissions to make on this issue.

56. I find that the officer who detained Ms Taufa and her children in purported reliance on s 192(1) of the Migration Act did not hold one of the suspicions identified in s 192(2). I therefore conclude that the detention of Ms Taufa and her children was unlawful. As a result, I find that such detention was in breach of article 9(1) of the ICCPR and article 37(b) of the CRC.

Act 3: The decision to cancel Ms Taufa's BVE under s 116(1)(a) of the Migration Act

57. According to records produced by the Department, Ms Taufa's BVE was cancelled pursuant to s 116(1)(a) of the Migration Act at 10.00pm on 19 October 2004. By the operation of s 140 of the Migration Act, Miss Tuifangaloka's BVE was cancelled at the same time.

58. Section 116 relevantly provides:

> **116 Power to cancel**
>
> (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
>
> (a) any circumstances which permitted the grant of the visa no longer exist.

59. The decision to cancel Ms Taufa's BVE under s 116(1)(a) was discretionary and is therefore an 'act' for the purposes of this inquiry.

60. As noted above, Ms Taufa and her children had been issued bridging visas on 12 February 2004. These visas were issued to allow them to remain in Australia while they sought judicial review of a decision made in relation to the children's citizenship. Those visas were due to expire on 5 November 2004.

61. On 7 October 2004, Ms Taufa withdrew her application in the Federal Court of Australia. Accordingly, it appears that from 7 October 2004 the circumstances which permitted the grant of the visas no longer existed. This change in circumstances enlivened the discretion in s 116(1)(a) to cancel the visas.

62. The act of cancelling Ms Taufa's BVE made her, Miss Tuifangaloka and the other Taufa children, vulnerable to being deprived of their liberty. This is because the detention of unlawful non-citizens is mandatory under s 189(1) of the Migration Act.

63. The complainant alleges that the decision to cancel Ms Taufa's BVE amounted to a breach of article 9(1) of the ICCPR and articles 3 and 37(b) of the CRC. These provisions are set out above.

64. The first relevant issue is whether the decision to cancel Ms Taufa's visa was lawful. The complainant has suggested in general terms that the process surrounding the cancellation of the visas was flawed. She has not provided details of the suggested flaws.

65. On 20 January 2012, I wrote to the Department setting out my preliminary views in relation to this matter. I noted that the Commission had not been provided with any contemporaneous records which might throw light on what took place on 19 October 2004 after departmental officers attended the Taufa family home and, in particular, whether the procedures set out in s 119 – s 121 of the Migration Act were followed by those officers when exercising the discretion to cancel Ms Taufa's visa. I invited the Commonwealth to make further submissions on these issues and to provide copies of relevant documents. On 23 February 2012, the Department indicated that it did not wish to make any further submissions in relation to this matter.

66. On 28 February 2012, I again wrote to the Department highlighting the fact that no documents had been provided to the Commission which identified:

- when Ms Taufa was put on notice of the proposed cancellation of her visa;
- the time allowed to her to show cause including the nature of any opportunity given to her to seek independent advice;
- what if anything was said by Ms Taufa in opposition to the cancellation of her visa; and
- the time of the decision to cancel her visa.

I noted that this request for supporting documents was important as the Commission was required to assess whether Ms Taufa's visa was lawfully cancelled. On 26 March 2012, the Department provided copies of the documents described in paragraph 53 above. No submission was provided in relation to whether the procedures set out in s 119 – s 121 of the Migration Act had been followed.

67. The records of the officer executing the search warrant at Ms Taufa's residence indicate that he asked Ms Taufa a number of questions about her visa. In particular:

> POI was asked what her intentions were now that the Tania Singh matter has been finalised. POI advised that she intended to lodge a further application to stay here. POI was asked what type of application she was intending to lodge as she had already lodged a PV and this had been refused. POI then stated again that she will fight for the rights of her children and will lodge something else so that they can stay here.

68. It appears that the reference to the Tania Singh matter is a reference to the legal proceeding in relation to which Ms Taufa's bridging visa had been granted. The officer's notes record that:

> Frank Donatiello was contacted and briefed of the situation. A decision was made to cancel the families current Bridging Visa E's as the circumstances for which they were granted no longer existed.

69. There is no reference in the officer's notes to this decision being communicated to Ms Taufa, to her being provided with the proposed grounds for cancellation of the visa, or to her being invited to show that those grounds do not exist or that there is a reason why the visa should not be cancelled. These steps are required by s 119 – s 121 of the Migration Act. There is no record of anything said by her which could constitute a response to any such communication or invitation. It does not appear that Ms Taufa was provided with an opportunity to contact a legal or migration advisor prior to her visa being cancelled.

70. On the basis of the contemporaneous records from 19 October 2004, I find that Ms Taufa's visa was unlawfully cancelled. The cancellation of Ms Taufa's visa resulted in the cancellation of Miss Tuifangaloka's visa by operation of s 140 of the Migration Act. Because the first cancellation was unlawful, the second cancellation which flowed as a necessary consequence of the first was also unlawful. I find that the cancellation of Miss Tuifangaloka's visa was unlawful and therefore in breach of the requirements of article 9(1) of the ICCPR.

71. In the circumstances it is strictly unnecessary to determine whether the decision to cancel Ms Taufa's visa was in any event arbitrary in the sense that it was unreasonable and inappropriate in the circumstances. I note, however, that there was on 19 October 2004 an apparent alternative to cancellation of the visas of the Taufa family; the visas were due to expire in 17 days' time. An alternative to taking steps to cancel their visas was to notify the family that their visas would not be renewed when they expired on 5 November 2004. Instead, officers of the Department arrived at the Taufa family home in the evening of 19 October 2004, apparently without notice, and executed search warrants before commencing a period of questioning detention. Ms Taufa and her six young children were transported to VIDC where the family's visas were cancelled that night.

72. Article 37(b) of the CRC provides that the detention of a child shall be used only as a measure of last resort.

73. Given the availability of alternatives to the cancellation of the visas prior to their expiry, and the discretionary nature of the cancelation power, it would appear that:

(a) the decision to cancel the family's visas was arbitrary in the sense that it was unreasonable and inappropriate in the circumstances in breach of article 9(1) of the ICCPR; and

(b) the decision to cancel the family's visas, with the necessary consequence that Miss Tuifangaloka would be placed in immigration detention, failed to accord sufficient weight to the requirement in article 37(b) of the CRC that detention of children be a measure of last resort.

74. Whether the detention of Ms Taufa and her children in VIDC was reasonable and appropriate is considered in more detail in relation to Act 4 below.

Act 4: The failure to place Miss Tuifangaloka in a less restrictive form of detention than Villawood Immigration Detention Centre

75. After Miss Tuifangaloka's BVE was cancelled on 19 October 2004 she was detained with her mother and five siblings in VIDC. She remained in VIDC until 28 July 2005, although the Department alleges that, after she turned 10 years old on 17 April 2005, she stayed in VIDC as a visitor of her mother and was not in 'immigration detention'. Miss Tuifangaloka's status as a 'visitor' at VIDC is considered in relation to Act 5 below. In total, Miss Tuifangaloka spent over nine months at VIDC.

76. In Miss Tuifangaloka's handwritten complaint to the Commission she states that she remembers immigration officers arriving at her house at about 7.00pm and the family leaving their home for VIDC at about midnight. Her mother similarly recalls approximately three immigration officers arriving at the house at about 7.00pm and thereafter cancelling the family's visas and taking them to VIDC. Miss Tuifangaloka writes:[12]

> It was 2:00am and we only entered the Lima Dorm. It was dark, cold and a place of unknown. We walked in and I looked around and I saw this lady talking on one of the payphone's and she looked at me and said "Welcome to Hollywood".

77. Miss Tuifangaloka describes witnessing acts of self-harm by other detainees while in detention including 7 to 10 men *"who had cut their hands and layed down on the ground when news helicopters flew on top of us"* and another man who drank *"a liquid which was not for drinking"* and which her mother later told her was bleach. The Department concedes that there was a problem with rats in the complex during the time that Ms Taufa and her family were in VIDC.[13]

78. An unlawful non-citizen who is detained under s 189 must be kept in 'immigration detention' until he or she is removed, deported or granted a visa. However, 'immigration detention' is not limited to detention in a detention centre such as VIDC. Section 5 of the Migration Act defines 'immigration detention' to include another place approved by the Minister in writing.

79. After the cancellation of her visa, there were therefore three alternatives to the detention of Miss Tuifangaloka at VIDC:

(a) she could have been removed from Australia;

(b) she could have been detained at a less restrictive, alternative place of detention;

(c) she could have been granted a visa.

80. Each of these alternatives is considered below.

Removal from Australia

81. The first alternative to detention of Ms Taufa and her children in VIDC was to arrange for their removal to Tonga. The consideration of this option below leaves to one side the question of whether the children were lawfully detained and whether they could therefore be lawfully removed.

82. The Department submits that Ms Taufa was uncooperative with requests to have the births of her children registered in Tonga and efforts to secure travel documentation for her children.[14] However, it acknowledges that there were complications obtaining travel documents for the children born in Australia.[15]

83. The complainant submits that she was cooperative with the Department in this process.[16] In particular, she says that she completed passport forms when asked to. This is consistent with contemporaneous notes taken by the officer who attended her house in the evening of 19 October 2004. She contacted the Consulate General of the Kingdom of Tonga and requested the issue of travel documents for her children. The Consulate General wrote to her on 8 December 2004 stating that it was unable to issue travel documents to children who have not held a passport previously. It said that passports must be applied for directly to the Department of Foreign Affairs in Tonga.

84. Given the difficulties in arranging removal from Australia, it was incumbent on the Commonwealth to consider less restrictive forms of detention (at least until removal could be arranged) or the grant of a visa.

Alternative places of detention

85. The second alternative to the detention of Ms Taufa and her children in VIDC was for the Minister to exercise her discretion to detain Miss Tuifangaloka in an alternative place of detention. It was open to the Minister to exercise her discretion in this way at any time between when Miss Tuifangaloka's visa was cancelled on 19 October 2004 and when Miss Tuifangaloka became an Australian citizen on 17 April 2005.

86. The decision to detain Miss Tuifangaloka in VIDC on 19 October 2004 and the failure to place her in a less restrictive form of detention before 17 April 2005 are 'acts' for the purposes of s 3 of the AHRC Act.

87. The complainant alleges that the failure to place Miss Tuifangaloka in a less restrictive form of detention than VIDC amounted to a breach of article 9(1) of the ICCPR and article 37(b) of the CRC. These provisions are set out above.

88. Detention includes immigration detention.[17] Lawful immigration detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system.[18] Accordingly, where alternative places of detention that impose a lesser restriction on a person's liberty are reasonably available, and where detention in an immigration detention centre is not demonstrably necessary, prolonged detention in an immigration detention centre may be disproportionate.

89. When considering the Commonwealth's aim of ensuring the effective operation of Australia's migration system, it is useful to consider the instructions given to officers of the Department about the performance of their functions. The complainant alleges that these instructions were not complied with. In particular, the complainant alleges that:

(a) the Department did not comply with the policy set out in the Migration Series Instruction 371 (MSI 371)[19] in respect of Ms Taufa and her children in that the Department did not consider less restrictive forms of immigration detention for Miss Tuifangaloka before May 2005; and

(b) the Department did not comply with the policy set out in the Migration Series Instruction 234 (MSI 234)[20] by failing to review regularly the ongoing need for and form of detention of Miss Tuifangaloka.

90. The Commonwealth Ombudsman reviewed and reported on the case of Miss Tuifangaloka and nine other children in detention. The report concluded that there was a failure by the Department to apply its own policies, especially in relation to children, and in all cases a failure to consider the relevant children's best interests. The Ombudsman noted:[21]

> The general conclusion of this report is that in all 10 cases there was unsatisfactory administration by DIMA that in many instances breached the existing DIMA policy and Australian standards. These shortcomings stemmed from inadequate and ambiguous policy in DIMA relating to children, and in some cases, from a lack of understanding on the part of DIMA officers concerning the applicable policy and legislation. Generally, there was a failure in all cases to consider the best interests of a child or to give adequate individual consideration to a child's circumstances or needs.

Consideration of 'alternative places of detention'

91. MSI 371 confirms that certain unlawful non-citizens, in particular unlawful non-citizen women and children, may be accommodated in a place other than an immigration detention facility.[22] Alternative places of detention include residential housing projects, foster carer homes, hotels, motels and community care facilities. In particular, the Instruction required the Department to make every effort to enable the placement of women and children in a residential housing project as soon as possible.

92. The Department has acknowledged that no consideration was given to accommodating Ms Taufa and her six children in an alternative place of detention when they were first detained on 19 October 2004.[23] Further, the Department has acknowledged that it has not been able to locate any documentation to indicate that Ms Taufa and her children were offered placement in residential housing prior to the end of May 2005; that is, more than seven months after they were detained.[24]

93. The Department indicated that: *"It was considered to be in the best interests of the children that they remain with their mother who was detained in a detention centre"*.[25] However, this submission does not appear to deal with the possibility that Ms Taufa could be accommodated in an alternative place of detention along with her children.

Review of detention circumstances

94. MSI 234 provided that where a person is detained for a prolonged period, officers should regularly review the need for continued detention, and for maintaining the form of detention.[26]

95. On 18 April 2005, the day after Miss Tuifangaloka turned 10 years old, an internal email between departmental officers noted that the *"arrangements for the family should be kept under very regular review in relation to the place of detention, whether a BV is appropriate etc"*.[27]

96. Despite this, the Department has acknowledged that it has not been able to locate any documentation on departmental files that clearly indicates that there was a formalised and regular review process in place.[28] It appears that the first record of a review is dated 26 May 2005 when the Department considered whether to grant a Bridging (Removal Pending) Visa to the family.[29] This option was not discussed with the family, and was not pursued by the Department.

97. On 30 May 2005, Ms Taufa was asked if she would consider relocating her family to the Port Augusta Immigration Residential Housing in South Australia. At that time Port Augusta was a community of approximately 13,000 people at the northern point of the Spencer Gulf in South Australia, approximately 1,500 km from where Ms Taufa and her family lived in Sydney. The Department has indicated that in 2005 this was the only residential housing that was available,[30] although it appears that there was nothing preventing the Minister from approving other alternative places of detention.

98. On 8 June 2005, the Department offered Ms Taufa a placement at Port Augusta. According to the Department, Ms Taufa stated that she did not want to move to Port Augusta.[31] Ms Taufa and her family had, at that time, been in VIDC for over seven months, her children were attending school in the area and it was part way through the school year. In 2006, there was a Tongan community in Sydney of over 10,000 people and it could be expected that Ms Taufa and her family would have friends and supporters within this community.[32] Data from the 2006 census does not reveal any persons born in Tonga or whose parents were born in Tonga living in Port Augusta at that time.[33] These circumstances may give some indication as to why Ms Taufa did not agree to move to Port Augusta in June 2005.

99. On 28 July 2005, the Minister made a residence determination under s 197AB of the Migration Act and the family was transferred to community detention.

Ministerial intervention

100. The third alternative to detention of Ms Taufa and her children in VIDC was to grant them a further visa.

101. If the Minister thought that it was in the public interest to do so, the Minister could have exercised her power under s 351 of the Migration Act to substitute a more favourable decision for a decision of the Migration Review Tribunal (MRT).

102. It appears that the family's case was referred to the Minister on 6 February 2004 for consideration of the exercise of her public interest powers pursuant to s 351 of the Migration Act.[34] The Commission has not been provided with a copy of the submission from the Department to the Minister. It is clear from the circumstances that the power under s 351 was not exercised.

103. On 18 January 2005, while in VIDC, Ms Taufa applied for a BVE. This application was refused on 20 January 2005 on the grounds that the delegate of the Minister was not satisfied that she had a genuine intention to depart Australia voluntarily. Ms Taufa sought review of this decision in the MRT, and on 2 February 2005, the MRT affirmed the decision of the delegate.

104. On 13 April 2005, a Detention Case Coordinator in the Department sent an email to several other departmental officers headed "Possible MI – Taufa/Tufangalok family". The email read in part:[35]

> I am reviewing the cases of children in detention and have identified that the Taufa/Tufangalok family (consisting of a mother and six children) currently in Villawood and are in the removal process. It appears that the family circumstances may be required to be assessed in relation to the Ministerial Intervention guidelines – one of the children who was born in Australia is about to turn 10.

105. At that time, departmental Guidelines relevant to the exercise of the Ministerial powers under s 351 indicated that 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.[36] 'Unique or exceptional circumstances' were defined to include:[37]

> (a) circumstances that may bring Australia's obligations under the CRC or ICCPR into consideration;
>
> (b) circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case;
>
> (c) strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident); and
>
> (d) compassionate circumstances regarding the age and/or health and/or psychological state of the person.

106. The Commission has not been provided with any information as to whether the recommendation of the Detention Case Coordinator of 13 April 2005 was followed and a further submission was made to the Minister in relation to the possible exercise of her public interest powers. It could be expected that such a submission would deal with the new circumstances of the detention of Ms Taufa and her six children in an immigration detention facility, and the fact that Miss Tuifangaloka was about to become an Australian citizen. It is clear from the circumstances that the power under s 351 was not exercised.

Conclusion in relation to detention at VIDC

107. I find that the acts of the Commonwealth in detaining Miss Tuifangaloka in VIDC on 19 October 2004 and failing to place her in a less restrictive form of detention before 17 April 2005 were inconsistent with article 9(1) of the ICCPR and article 37(b) of the CRC in that she was not deprived of her liberty as a last resort, in the least restrictive way possible and for the shortest possible period of time.

108. Alternatives to detention in an immigration detention facility were to:

> (a) offer Ms Taufa and her family a place in residential housing when they were first placed in detention;
>
> (b) offer Ms Taufa and her family a less restrictive form of detention at any time during their detention;
>
> (c) grant Ms Taufa and her children a substantive visa.

109. The continued presence of Miss Tuifangaloka in VIDC after her tenth birthday is discussed in relation to Act 5 below.

Act 5: The decision to invite Ms Taufa to sign an undertaking that Miss Tuifangaloka remain with her in Villawood Immigration Detention Centre

110. Miss Tuifangaloka was born in Australia on 17 April 1995. On 17 April 2005, she turned ten years old while detained at VIDC. At that time, she acquired Australian citizenship pursuant to s 10(2)(b) of the *Australian Citizenship Act 1948* (Cth). At that time, section 10(2) provided:

> Subject to subsection (3), a person born in Australia after the commencement of the Australian Citizenship Amendment Act 1986 shall be an Australian citizen by virtue of that birth if and only if:
>
> (a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or
>
> (b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.

111. From 17 April 2005 it would have been unlawful for Miss Tuifangaloka to remain in immigration detention.

112. On 15 April 2005 Ms Taufa was invited to sign a written undertaking to the effect that Miss Tuifangaloka was to remain at VIDC after her tenth birthday as a temporary visitor in the care of her mother. She signed this undertaking in the circumstances described below. The apparent purpose of obtaining Ms Taufa's signature on this undertaking was to justify the continued residence of Miss Tuifangaloka in VIDC with her mother.

113. The invitation by the Department for Ms Taufa to sign this undertaking with the intention of relying on the undertaking to, in effect, continue to detain Miss Tuifangaloka in VIDC is an act for the purpose of s 3 of the AHRC Act.

114. The complainant alleges that despite the undertaking being given, no alternative less restrictive arrangements were offered to her. As a result, in practical terms, Miss Tuifangaloka continued to be detained at VIDC until a residence determination was granted on 28 July 2005.

115. The complainant raises concerns about:

> (a) the process by which the undertaking was obtained;
>
> (b) the conflict between the act and the Department's policy in relation to visitors; and
>
> (c) the lack of consideration given to alternative arrangements.

116. There is some evidence from the Department's file about the way in which the undertaking came to be signed. In an internal email on the file a departmental officer wrote:[38]

> She initially wasn't too sure about signing anything and confirmed that the only family here is her uncle and his wife, however stated that she didn't trust them. She then thought about ringing her husband or uncle but didn't have the number. She also thought she was being released with Judy.
>
> After all was explained again, she signed the document and was assured that if she changed her mind at any time, from Monday onwards, after speaking with DIMIA, Judy could be immediately allowed to leave the centre.
>
> Judy, herself stated that she wanted to stay with her mother in VIDC.

117. The context of the email suggests that Ms Tuafa, at least initially, did not fully understand the nature of what she was being invited to sign. It does not appear that she was given the opportunity to obtain legal advice about the consequences of signing the document or what alternatives may be available.

118. The Department's policy in relation to visitors at the time was set out in MSI 234. This instruction advised officers to "normally refuse" requests made by detainees to have citizen or lawful non-citizen dependent relatives stay with them at a place of detention because places of detention are generally not an appropriate environment for those who do not need to be detained.[39]

119. The Commonwealth Ombudsman reviewed Miss Tuifangaloka's circumstances, including the circumstances in which Ms Tuafa came to sign the undertaking. The Ombudsman noted that in some other cases there had been a failure to recognise that a child in detention became an Australian citizen upon reaching the age of 10, and at that stage could no longer lawfully be held in detention. Then, in what is apparently a reference to the circumstances of Miss Tuifangaloka, the Ombudsman noted that:[40]

> In some other cases, where this point was recognised, the child nevertheless remained in detention as a visitor of its parents without any proper, documented examination of whether an alternative arrangement should be made for the child.

120. The Department claims that it gave consideration to placing Miss Tuifangaloka with her aunt and uncle in the community. This appears to be limited to the interview with Ms Taufa described in the email set out in paragraph 116 above. This was determined not to be a suitable arrangement because Ms Taufa informed the Department that she did not trust her relatives to care for the children and expressed a preference for Miss Tuifangaloka to remain at VIDC. It appears that the Department did not discuss other options with Ms Taufa at that time, including accommodation of the whole family in a less restrictive form of detention.

121. I find that the invitation by the Department for Ms Taufa to sign the undertaking requesting that Miss Tuifangaloka remain at VIDC under her care with the intention of relying on the undertaking to, in effect, continue to detain Miss Tuifangaloka in VIDC amounted to a continued arbitrary detention of Miss Tuifangaloka. Such an act ran counter to the Department's guidelines about visitors, it was apparently done without consideration of less restrictive forms of detention that could accommodate the whole family, and no such alternatives were discussed with Ms Taufa.

122. The Department has indicated that there is no documentation that explicitly states whether it considered Miss Tuifangaloka's continued placement at VIDC as appropriate after her tenth birthday.[41] In the absence of any evidence that consideration was given to this issue, I conclude that the acts described above were also in breach of article 3 of the CRC in that they did not take into account the best interests of Miss Tuifangaloka as a primary consideration.

123. Further, this complaint is linked to the complaint in relation to Act 1 described above. As the Department has acknowledged *"it may have been unnecessary for Ms Tuifangaloka to remain at VIDC as a visitor had her father not been detained and subsequently removed from Australia by DIAC, on 19 February 2004"*.[42]

124. I find that there has been a breach of article 9(1) of the ICCPR and articles 3 and 37(b) of the CRC in relation to the continued detention of Miss Tuifangaloka in VIDC from 17 April 2005 until at least 8 June 2005 when Ms Taufa was offered accommodation at Port Augusta Immigration Residential Housing.

5 Conclusion and recommendations

5.1 Findings

125. As noted above, I find that:

(a) The removal of Mr Taufa from Australia and the resulting separation of Miss Tuifangaloka from her father was inconsistent with or contrary to articles 17(1) and 23(1) of the ICCPR and article 3 of the CRC.

(b) The decision to detain Ms Taufa and her children, including Miss Tuifangaloka, under s 192 of the Migration Act for questioning about their visas was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.

(c) The decision to cancel Ms Taufa's BVE under s 116(1)(a) which led automatically to the cancellation of Miss Tuifangaloka's BVE was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.

(d) The failure to place Miss Tuifangaloka in less restrictive form of detention than VIDC was inconsistent with or contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.

(e) The decision to invite Ms Taufa to sign an undertaking that Miss Tuifangaloka remain with her in VIDC as a visitor after she became an Australian citizen was inconsistent with or contrary to article 9(1) of the ICCPR and articles 3 and 37(b) of the CRC.

126. 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.[43] The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.[44]

127. The Commission may also recommend:[45]

(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.

5.2 Consideration of compensation

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

129. 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.[46]

130. 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.[47]

131. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR or article 37(b) of the CRC. This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) of the ICCPR or article 37(b) of the CRC will be made out where it can be established that the detention was arbitrary, irrespective of legality.

132. Notwithstanding this important distinction, the damages awarded in false imprisonment provide an appropriate guide for the award of compensation for a breach of article 9(1) of the ICCPR or article 37(b) of the CRC. 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.

133. 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).[48]

134. 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.

135. In *Taylor v Ruddock*,[49] the District Court at first instance considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, during which the plaintiff was in 'immigration detention' under the Migration Act but held in New South Wales prisons.

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

137. 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.

138. 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.[50]

139. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.[51] The Court noted that "as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish".[52]

140. In *Goldie v Commonwealth of Australia & Ors (No 2)*,[53] Mr Goldie was awarded damages of $22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.

141. In *Spautz v Butterworth*,[54] 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.

142. In Australian Human Rights Commission Report 41[55] I recommended that the Commonwealth should pay the complainant $90 000 as compensation for the 90 days he was arbitrarily detained in immigration detention. In Australian Human Rights Commission Report 45[56] I recommended that the Commonwealth should pay the complainant $450 000 as compensation for the 16 months he was arbitrarily detained in immigration detention.

5.3 Recommendation that compensation be paid

143. I have found that as a result of acts of the Commonwealth Miss Tuifangaloka was arbitrarily detained contrary to article 9(1) of the ICCPR and article 37(b) of the CRC.

144. Neither the complainant nor the Commonwealth have made any submissions on an appropriate sum of compensation.

145. I consider that the Commonwealth should pay to Miss Tuifangaloka an amount of compensation to reflect the loss of liberty caused by her detention at VIDC and the consequent interference with her family. Had Miss Tuifangaloka been transferred to community detention she would still have experienced some curtailment of her liberty, and I have taken this into account when assessing her compensation. I have not assessed the quantum of that compensation by utilising a strict 'daily rate'.

146. 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 $250,000 is appropriate.

5.4 Apology

147. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Miss Tuifangaloka for the breaches of her human rights 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.[57]

6 Department's response to recommendations

148. On 11 April 2012, 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 Ms Kalolaine Taufa on behalf of her daughter Miss Judy Tuifangaloka against the Commonwealth.

149. By letter dated 26 April 2012 the Department provided the following response to my findings and recommendations:

> **Department of Immigration and Citizenship response to the Australian Human Rights Commission Notice of findings in relation to Miss Judy Tuifangaloka**
>
> On 11 April 2012 you wrote to me regarding your Notice of findings in relation to the human rights complaint on behalf of Miss Judy Tuifangaloka.
>
> You advised that you had found that certain acts complained of were inconsistent with and contrary to the human rights of Miss Tuifangaloka and that you had made recommendations for consideration by the department.
>
> The department regrets any harm caused to Miss Tuifangaloka as a consequence of the removal of her father, Mr Taufa. The department's responses to the recommendations outlined in the Notice of findings follow:
>
> **Recommendation 1:**
>
> Payment of compensation in the amount of $250,000
>
> **Department's response:**
>
> The department is continuing to pursue options under the discretionary compensation mechanisms for Miss Judy Tuifangaloka.
>
> **Recommendation 2:**
>
> The Commonwealth provide a formal written apology to Miss Tuifangaloka.
>
> **Department's response:**
>
> The department will provide Miss Tuifangaloka with an apology. We will provide you with a copy of that letter.

150. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission
June 2012

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

2 Letter from Ms Deborah Jacka, Assistant Secretary, Review Coordination Branch, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 June 2007 p 10; email from Ms Sally Lavers, Assistant Director, Ombudsman and HREOC Section, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 22 June 2007.

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

4 *Winata v Australia* [2001] UNHRC 24, UN Doc CCPR/C/72/D/930/2000 at [7.2].

5 Email from Ms Cheryl Trussler, Ombudsman and HREOC Section, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 March 2008.

6 Report of Paul Farrugia dated 18 May 2008, p 12 at [7.1.2].

7 Letter from Ms Deborah Jacka, Assistant Secretary, Review Coordination Branch, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 June 2007, p 10.

8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289 per Mason CJ and Deane J, at 302 per Toohey J.

9 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291-292 per Mason CJ and Deane J, at 301-302 per Toohey J, at 304 per Gaudron J.

10 United Nations Children's Fund (UNICEF), *Implementation Handbook for the Convention on the Rights of the Child* (2008) 38-39.

11 Letter from Ms Michaela Byers to the Australian Human Rights Commission dated 25 July 2011.

12 Handwritten account of detention by Miss Judy Tuifangaloka, enclosed with letter from Ms Michaela Byers to the Australian Human Rights Commission dated 6 March 2007.

13 Letter from Ms Deborah Jacka, Assistant Secretary, Review Coordination Branch, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 June 2007, p 14.

14 Letter from Chris Dorrian, Acting Director, Ombudsman and Human Rights Coordination Section, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 12 November 2008, pp 5-6.

15 Letter from Ms Deborah Jacka, Assistant Secretary, Review Coordination Branch, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 June 2007, p 7. See also complainant's detention file OPF 2005/3729 p 37.

16 Letter from Ms Michaela Byers to the Australian Human Rights Commission dated 18 February 2009, p 1.

17 UN Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons),* 30 June 1982, No. 8. 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 UN Human Rights Committee, *CCPR General Comment 31 The nature of the general legal obligation imposed on States Parties to the Covenant,* 26 May 2004, CCPR/C/21/Rev.1/Add [6]. See also Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004), 308, [11.10].

19 MSI 371 was issued on 2 December 2002 and applied at the time that Miss Judy Tuifangaloka was placed in immigration detention at VIDC.

20 MSI 234 was issued on 12 May 1999 and applied at the time that Miss Judy Tuifangaloka was placed in immigration detention at VIDC.

21 Commonwealth Ombudsman, *Report into Referred Immigration Cases: Children in Detention,* Report No. 8 of 2006 at [3.2]. The Ombudsman did not examine whether there was a period of unlawful detention in any of these cases.

22 MSI 371 at [1.1.2].

23 Letter from Chris Dorrian, Acting Director, Ombudsman and Human Rights Coordination Section, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 12 November 2008, p 4.

24 Letter from the Australian Government Solicitor to the Australian Human Rights Commission dated 11 March 2009, p 3.

25 Letter from Chris Dorrian, Acting Director, Ombudsman and Human Rights Coordination Section, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 12 November 2008, p 4.

26 MSI 234 at [7.5].

27 Complainant's detention file OPF 2005/3729 p 33.

28 Letter from the Australian Government Solicitor to the Australian Human Rights Commission dated 11 March 2009, p 3.

29 Letter from the Australian Government Solicitor to the Australian Human Rights Commission dated 11 March 2009, p 3.

30 Letter from the Australian Government Solicitor to the Australian Human Rights Commission dated 11 March 2009, p 3.

31 Letter from the Australian Government Solicitor to the Australian Human Rights Commission dated 11 March 2009, p 3.

32 2006 Census Tables: Sydney (Statistical Division) – NSW: Country of Birth of Person (Full Classification List), Ancestry (Full Classification List).

33 2006 Census of Population and Housing: Port Augusta (Urban Centre/Locality) – SA: Country of Birth of Person (Full Classification List), Ancestry (Full Classification List).

34 Complainant's detention file OPF 2005/3729 p 37.

35 Email from Ms Effi Petridis Alvanos, Detention Case Coordinator to Ms Robyn Legg dated 13 April 2004, complainant's detention file OPF 2005/3729 p 2.

36 *Migration Series Instructions 386: Guidelines on Ministerial Powers under sections 345, 351, 391, 417, 454 and 501J of the Migration Act 1958* (MSI 386), issued on 14 August 2003, at [4.1.1].

37 MSI 386 at [4.2.1].

38 Email from Ms Michelle Campbell, DIMIA Deputy Manager, VIDC to Ms Effi Petridis Alvanos, Detention Case Coordination, DIMIA dated 15 April 2005. Complainant's detention file OPF 2005/3729 p 30.

39 MSI 234 at [19.1].

40 Commonwealth Ombudsman, *Report into Referred Immigration Cases: Children in Detention,* Report No. 8 of 2006 at [4.5].

41 Letter from Ms Deborah Jacka, Assistant Secretary, Review Coordination Branch, Department of Immigration and Citizenship to the Australian Human Rights Commission dated 18 June 2007, p 8.

42 Letter from the Department to the complainant dated 31 October 2011, suggesting that Miss Tuifangaloka consider lodging a claim under the Compensation for Detriment caused by Defective Administration scheme.

43 AHRC Act s 29(2)(a).

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

45 AHRC Act s 29(2)(c).

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

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

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

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

50 Ibid at [140].

51 [2003] NSWCA 262 at [49]-[50].

52 Ibid at [49].

53 [2004] FCA 156.

54 (1996) 41 NSWLR 1 (Clarke JA).

55 [2009] AusHRC 41 at [376].

56 [2011] AusHRC 45 at [101].

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

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