



Australian  
Human Rights  
Commission

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# Ogawa v Commonwealth (DIAC)

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[2014] AusHRC 69

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**Ogawa v Commonwealth  
(Department of Immigration  
and Citizenship)**

Report into arbitrary detention

[2014] AusHRC 69

**Australian Human Rights Commission 2014**



**Australian  
Human Rights  
Commission**

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**Australian  
Human Rights  
Commission**

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27 February 2014

Senator the Hon. George Brandis QC  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Dr Megumi Ogawa.

I find that the Commonwealth acted inconsistently with or contrary to the human rights of the complainant. I find that the Commonwealth's failure to place Dr Ogawa in a less restrictive form of detention was arbitrary under article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

By letter dated 4 December 2013, Mr Martin Bowles, Secretary of the Department of Immigration and Citizenship, provided a response to my findings and recommendations. I set out his response below.

The Department notes Professor Triggs' findings that:

*The Commonwealth acted inconsistently with or contrary to the human rights of the complainant. Professor Triggs has also found that the Commonwealth's failure to place Dr Ogawa in a less restrictive form of detention was arbitrary under article 9 of the ICCPR.*

Response by the Secretary of the Department of Immigration and Border Protection to Recommendations 1 and 2 of the Notice of Findings by the President of the Australian Human Rights Commission under section 29(2)(a) of the *Australian Human Rights Commission Act 1986* (Cth) into human rights complaints by Dr Megumi Ogawa.

While we note your findings, it is the Department's view, as stated in the responses of 19 March 2012 and 14 May 2013, that Dr Ogawa was detained lawfully in accordance with the *Migration Act 1958* (Cth) (Migration Act), and her immigration detention has not been and is not arbitrary.

**Recommendation 1**

*I consider that the Commonwealth should pay to Dr Ogawa an amount of compensation to reflect the loss of liberty caused by her detention at VIDC.*

*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 \$50 000 is appropriate.*

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## **DIAC Response**

Not accepted.

Compensation is only paid on the basis of potential legal liability where there is a meaningful prospect of liability in relation to the matter. The Department does not consider that there is any legal liability in relation to Dr Ogawa's detention.

Further, compensation is only paid under the Compensation for Detriment caused by Defective Administration (CDDA) scheme where the department was defective in its administration and this resulted in a financial detriment, as outlined in Finance Circular 2009/09 (the guidelines). The department is of the view that no compensation is payable under the guidelines in relation to Dr Ogawa's detention.

## **Recommendation 2**

*In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Dr Ogawa 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.*

## **DIAC Response**

Not accepted.

With respect to the view that the Commonwealth acted inconsistently with or contrary to the procedures established by law within the meaning of Article 9(1) of the ICCPR, the Department continues to rely on its previous submissions that Dr Ogawa's immigration detention was lawful, being in accordance with the relevant provisions of the Migration Act, and was not arbitrary. Dr Ogawa refused to cooperate with departmental attempts to assist her to regularise her status.

As per standard practice of facilitating the removal of any detainee who has a history of non-compliance, she was held in immigration detention whilst arrangements were made for her travel to Japan. Her removal did not eventuate because she applied for... [another] visa (which was refused). Dr Ogawa's immigration detention was a proportionate measure, taken only following departmental attempts to resolve Dr Ogawa's situation using other methods. The measure was aimed at the legitimate goal of maintaining the integrity of the migration system and was proportionate to that goal.

Accordingly, given the Department maintains that Dr Ogawa's immigration detention was lawful and not arbitrary, there is no basis for the payment of compensation or provision of a formal apology and therefore, there will be no action taken with regard to these recommendations.

Please find enclosed a copy of my report.

Yours sincerely



Gillian Triggs  
**President**  
Australian Human Rights Commission

# 1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings.
2. The Commission held an inquiry into a complaint lodged by Dr Megumi Ogawa against the Commonwealth of Australia (Department of Immigration and Citizenship). Dr Ogawa alleges that her immigration detention from May to July 2006 was arbitrary and therefore inconsistent with the human rights recognised in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).
3. This inquiry was undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA Act).
4. I find that the Commonwealth acted inconsistently with or contrary to the human rights of the complainant. I find that the Commonwealth's failure to place Dr Ogawa in a less restrictive form of detention was arbitrary under article 9 of the ICCPR.

## 2 Background

5. Dr Ogawa's case is well known to the Department. Dr Ogawa has a long and complex history of litigation against the University of Melbourne<sup>1</sup> and the Department.<sup>2</sup> The relevant background to this complaint is set out in the decision of Cowdroy J in *Ogawa v Minister for Immigration* [2006] FCA 1694:

5 Ms Ogawa arrived in Australia, having been issued with a Student Visa. On 29 September 2003 such visa was cancelled pursuant to s 116(1)(b) of the *Migration Act 1958* (Cth) ('the Act') [following a dispute with Melbourne University about the appointment of an appropriate supervisor for her doctoral thesis]. In fact, but for the cancellation, the Student Visa would have expired on 15 March 2004.

6 Ms Ogawa appealed the decision to cancel her Student Visa and on 9 June 2004 the Tribunal determined to set aside the decision of the delegate. However, as the Tribunal's decision was delivered after the expiration of the visa, the decision had no effect.

7 On 30 June 2004 Ms Ogawa lodged an application for judicial review to this Court. Apparently she considered there was some merit in doing so, even though the decision of the Tribunal was in her favour.

8 On 6 July 2004, Ms Ogawa was granted a Bridging E visa, subclass 050, on the basis that she had applied for judicial review of a decision relating to a substantive visa. Pursuant to the *Migration Regulations 1994* ('the Regulations') clause 050.512, such visa was valid for a period of 28 days after the judicial review proceedings are completed.

9 On 23 July 2004 this court dismissed her application for judicial review. Ms Ogawa then sought leave to appeal to the Full Federal Court against such decision, but on 26 November 2004 the Full Court refused her application for leave to appeal.

10 Ms Ogawa then filed an application on 22 December 2004 in the High Court of Australia against the decision of the Full Federal Court to refuse leave to appeal. However, such application was deemed by Rule 41.10.4 of the *High Court Rules 2004* to be abandoned. Such rule provides:

‘Where an unrepresented applicant does not file a written case and a draft notice of appeal within 28 days of the filing of the application, the application shall be deemed to be abandoned, unless, either before or after the expiration of that period, the Court or a Justice has otherwise ordered or directed.’<sup>1</sup>

11 As a result of the dismissal of the High Court proceedings, Ms Ogawa’s Bridging Visa expired 28 days thereafter, namely on 17 February 2005. On 19 May 2006 Ms Ogawa was detained in immigration detention pursuant to s 189 of the Act. On that day she made an application for the Bridging Visa which is the subject of this notice of motion. Such visa was refused on that day.

6. On 30 June 2004, Dr Ogawa made an application to the Minister to intervene in her case and grant her a student visa under s 351 of the *Migration Act 1958* (Cth) (Migration Act). However, in accordance with Ministerial Guidelines, her request was not considered at this stage as she had commenced judicial review proceedings.
7. On 22 September 2005, the Department:

Advised Ms Ogawa that it was appropriate for her to resume her request to the Minister as she no longer had any court proceedings against the Department, and that if she did so she would be entitled to another bridging visa on the basis of her s 351 application.<sup>3</sup>
8. In response, on 22 September 2005 Dr Ogawa stated in an email to the Department:

...I wish to prepare the documents to the Minister for consideration of the Ministerial Intervention after my judicial review in relation to the cancellation of my student visa is concluded.<sup>4</sup>
9. On 30 September 2005, the Ministerial Intervention Unit withdrew her request for Ministerial Intervention. This withdrawal of her request for Ministerial Intervention had consequences for Dr Ogawa. It meant that Dr Ogawa did not meet the requirements for a Bridging E visa, as she had no current application for Ministerial Intervention that was being assessed by an officer against the Ministerial guidelines.<sup>5</sup>
10. The decision of the Ministerial Intervention Unit to regard Dr Ogawa’s application for Ministerial Intervention as having been abandoned (rather than deferred) has been the subject of some judicial criticism. In *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), Scarlett FM noted:

That was not what the Applicant sought. She sought a deferment, or a postponement, or an adjournment. She did not seek to withdraw it. She did not seek to regard it as having been abandoned. In my view the Ministerial Intervention Unit... or the Department... cannot escape criticism.<sup>6</sup>
11. Dr Ogawa was detained in Villawood Immigration Detention Centre (VIDC) from 20 May 2006 until she was released on a Bridging Visa on 26 July 2006. She was held in immigration detention for 68 days.
12. It is worth noting that in December 2004, the migration legislation was amended to correct the anomaly that led to Dr Ogawa not being able to obtain a further student visa. That is, people who have had a visa decision set aside by the Migration Review Tribunal, where the visa period has already ceased, may now make a further visa application onshore. Previously, it was not permitted to make a further visa application onshore once the original visa period had expired. The Minister requested that all cases of people affected by this anomaly be referred to him for consideration under s 351. Although Dr Ogawa was affected by this anomaly, it appears that her case was not referred to the Minister for consideration.



# 3 Legislative framework

## 3.1 Functions of the Commission

13. 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.
14. Section 20(1)(b) 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.
15. 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’?

16. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.<sup>7</sup> Article 9(1) of the ICCPR is relevant to the present inquiry and provides:
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. ...

## 3.3 What is an ‘act’ or ‘practice’

17. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.
18. 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.
19. 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;<sup>8</sup> that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

## 4 The complaint and the ‘act or practice’

20. On 13 June 2011, Dr Ogawa lodged a written complaint with the Commission. She alleged that she was detained unreasonably at VIDC and that her detention violated her human rights as housing detention was denied for no reason. Dr Ogawa was detained at VIDC for 68 days, from 20 May 2006 to 26 July 2006.
21. On 29 June 2011, Dr Ogawa submitted:
- I could not make a complaint to the Commission earlier because: i) I did not know that the Commission can help me in this case; and ii) in any event, I was in and out of jail frequently which made it virtually impossible to deal with this complaint. I should also add that my mental disorder makes me avoid anything which causes bad memories.
22. On 8 August 2011, Dr Ogawa submitted that her detention was arbitrary, in breach of the ICCPR, and referred to the decision of Cowdroy J of the Federal Court in *Ogawa v Minister for Immigration* [2006] FCA 1694 (15 December 2006).
23. On 14 September 2011 Dr Ogawa sought to add a further allegation to her complaint, that the Department’s refusal to pay her compensation for arbitrary detention is a breach of her human rights. On 27 September 2011 the Commission confirmed that this will now be considered as part of her complaint. I have now made a finding of arbitrary detention. Accordingly, I will consider any recommendations as to compensation in part 7 below.
24. I understand that Dr Ogawa has sought compensation from the Commonwealth under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme), which has been refused.<sup>9</sup> The Commonwealth’s decision in this regard is reviewable by the Commonwealth Ombudsman.
25. On 9 November 2011, the Commission wrote to the Department seeking its response to Dr Ogawa’s complaint. On 19 March 2012 the Department provided its response.
26. On 10 February 2012, Dr Ogawa advised the Commission that she was of the view that her detention was arbitrary because it was the result of the Department unilaterally withdrawing her request to the Minister for Ministerial Intervention; and that both the Federal Magistrate’s Court and the Federal Court had been critical of the Department in this respect. The Commission advised Dr Ogawa that this was not adding a further allegation, rather it was clarifying Dr Ogawa’s current complaint and formed part of the factual matrix of her complaint.
27. On 5 February 2013, Dr Ogawa submitted:
- I believe that at the very least, the following acts of the Commonwealth should be considered by the Commission:
1. The decision to withdraw my request for Ministerial intervention resulting in the loss of my Bridging Visa;
  2. The failure to review and/or reverse the Department’s decision to withdraw my request for Ministerial intervention prior to or at the time of taking me into detention;
  3. The failure to review my application for review of the cancellation of my student visa before my student visa expired (Dr Ogawa further submitted that the MRT breached s 353(1) of the Migration Act because it took too long to make a decision, resulting in the loss of her student visa);

4. The failure to refer my case to the Minister for his intervention when the Minister intervened in all cases affected by the anomaly of the legislation concerning an application for a visa after the Tribunal setting aside the Department's decision to cancel a visa;

5. The failure to grant me a student visa after the Tribunal set aside the Department's decision to cancel my student visa;

6. The decision under s 189 of the Migration Act 1958 to detain.

28. I have given careful consideration to these submissions of Dr Ogawa. Dr Ogawa submits that these points should be considered as separate acts of the Commonwealth.

29. In relation to point 3 above, this is an act of the Migration Review Tribunal (MRT) and not of the Commonwealth (Department of Immigration and Citizenship). Accordingly, I have not considered this allegation as part of my inquiry into this complaint.

30. In relation to point 6, as set out above, I cannot inquire into acts which are required by law. The Commission's functions under s 11(1)(f) are only engaged where the act is within the discretion of the Commonwealth. In relation to point 6, once Dr Ogawa became an unlawful non-citizen, she was subject to mandatory detention under s 189 of the Migration Act. Section 189(1) of the Migration Act provides for the detention of unlawful non-citizens in the following terms:

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.

31. Accordingly, I cannot inquire into the decision under s 189 of the Migration Act to detain. In relation to points 1, 2, 4 and 5 above, I accept that these are all discretionary acts of the Commonwealth. However, my inquiry function is limited to acts of the Commonwealth that 'may be inconsistent with or contrary to any human right'. I have formed the view that these acts in themselves could not be considered to be inconsistent with or contrary to any human right. Whilst I cannot inquire into them as separate 'acts' of the Commonwealth, I have considered them as part of the factual matrix to the complaint, and have taken Dr Ogawa's submissions into account in making my findings.

32. I have also given consideration to the other submissions made by Dr Ogawa including:

...the former President Branson J... in a complaint by Cherkupalli considered whether or not the detention was arbitrary despite that Mr Cherkupalli was an unlawful non-citizen having had his student visa cancelled.

33. In *Cherkupalli v Commonwealth* [2012] AusHRC 49 at [44]-[65] the issue arose as to whether at the time the decision to detain Mr Cherkupalli was made the delegate held a 'reasonable suspicion' that he was an unlawful non-citizen. As set out above, s 189(1) provides that 'if an officer knows or reasonably suspects that a person ... is an unlawful non-citizen, the officer must detain the person.' Former President Branson QC held that the delegate did not hold a 'reasonable suspicion' that Mr Cherkupalli was an unlawful non-citizen, and accordingly the decision to detain under s 189 of the Migration Act was inconsistent with article 9 of the ICCPR as he was deprived of his liberty without the procedures established by law being complied with. That is, former President Branson inquired into the steps the detaining officer took or failed to take to inform herself of the facts sufficient to form the 'reasonable suspicion' required by s 189 of the Migration Act. This fact scenario is markedly different to this complaint where the Department had known for some period of time that Dr Ogawa was an unlawful non-citizen. Dr Ogawa's complaint does not raise the issue of whether the detaining officer had made due inquiry to form the 'reasonable suspicion' required by s 189 of the Migration Act.

34. Dr Ogawa also makes a number of submissions comparing the 'act' of the Commonwealth I have decided to inquire into for the purposes of this complaint with the acts in Mr Cherkupalli's complaint that were considered to be 'acts' of the Commonwealth within the meaning of the AHRC Act. The two complaints do not share a common factual matrix and I see little advantage in pointing out the many differences. My inquiry function is limited to inquiring into 'acts' or 'practices' that 'may be inconsistent with or contrary to any human right'. As set out above, I do not consider that all the 'acts' alleged by Dr Ogawa in themselves could be considered to be inconsistent with or contrary to any human right. Accordingly, I have considered them as part of the background to the complaint and conducted my inquiry into the 'act' of the Commonwealth set out below.
35. Dr Ogawa also submits that:
- On 19 May 2006, the Department took me into detention on its suspicion that I was an unlawful non-citizen. The Department stated in its submission to you and also to the Federal Magistrates Court that my last Bridging Visa had ceased on 17 February 2005. If detention was mandated as asserted by the Department, the Department would have detained me on 17 February 2005. Detention did not occur on 17 February 2005 because obviously, the Department had an option not to form suspicion.<sup>10</sup>
36. This argument does not appear to assist Dr Ogawa. It simply means that the Department could have detained Dr Ogawa long before it did.
37. Whilst s 189(1) requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens are detained in an immigration detention facility.
38. Section 197AB of the Migration Act 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).
39. Further, the definition of 'immigration detention' includes 'being held by, or on behalf of, an officer in another place approved by the Minister in writing'.<sup>11</sup>
40. Therefore, the act of the Commonwealth to which I have inquired into is the failure to place Dr Ogawa in a less restrictive form of detention than an immigration detention centre.
41. For the reasons set out below, I have found that detention in an immigration detention centre was not the least restrictive means of achieving the Commonwealth's aim. I have found that the failure of the Commonwealth to place Dr Ogawa in a less restrictive form of detention was inconsistent with or contrary to Dr Ogawa's rights under article 9 of the ICCPR.

## 5 Principles of arbitrary detention

42. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
- (a) 'detention' includes immigration detention;<sup>12</sup>
  - (b) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to the Commonwealth's legitimate aim of ensuring the effective operation of Australia's migration system;<sup>13</sup>
  - (c) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;<sup>14</sup> and
  - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.<sup>15</sup>
43. In *Van Alphen v The Netherlands* the UN Human Rights Committee found detention for a period of two months to be arbitrary because the State Party did not show that remand in custody was necessary to prevent flight, interference with evidence or recurrence of crime.<sup>16</sup> Similarly, the UN Human Rights Committee considered that detention during the processing of asylum claims for periods of three months in Switzerland was 'considerably in excess of what is necessary'.<sup>17</sup>
44. The UN Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.<sup>18</sup>

## 6 Dr Ogawa's detention

### 6.1 Events surrounding Dr Ogawa's detention

45. When Dr Ogawa was taken into detention on 19 May 2006, there were two grounds on which she argued she was not an unlawful non-citizen.
46. First, Dr Ogawa argued that the bridging visa which was granted to her on 6 July 2004 was still valid. However, the Federal Court confirmed on appeal that her High Court proceedings were deemed abandoned in January 2005, and Dr Ogawa's bridging visa came to an end 28 days later, on 17 February 2005.<sup>19</sup>
47. Second, Dr Ogawa argued that she had a current application before the Minister for Ministerial Intervention under s 351 of the Migration Act, which made her eligible, as at 19 May 2006, the date of her detention, for a bridging visa. However the Federal Court also confirmed on appeal that she did not have an application pending for Ministerial Intervention, and upheld the decision of the delegate of the Minister to refuse her a bridging visa.<sup>20</sup>
48. Therefore, Dr Ogawa was an unlawful non-citizen at the date of her detention.

49. The Department submits that prior to Dr Ogawa's detention at VIDC:

Dr Ogawa was contacted by the Department through written correspondence, telephone calls and emails requesting her to regularise her unlawful immigration status. Dr Ogawa did not comply with any request and remained unlawfully in the community...<sup>21</sup>

50. The delegate of the Minister noted in her decision refusing Dr Ogawa a bridging visa on 19 May 2006:

Ms Ogawa has not been fully co-operative with the Department. Ms Ogawa has been contacted through written correspondence, by telephone and email instructing her to attend the DIMA [sic] office in Brisbane and has refused to attend on each occasion she was contacted.<sup>22</sup>

51. The Department submitted that on 'the last personal contact, Dr Ogawa terminated the call when advised to attend at the departmental office.'<sup>23</sup> According to a letter provided to me by Dr Ogawa, from the Department to the Commonwealth Ombudsman:

...as can be seen from the information and email correspondence extracted..., Ms Ogawa was clearly informed that her Bridging E visa had ceased and that she was an unlawful non-citizen and would need to apply for a further Bridging visa on 27 May 2005, 3 June 2005, 6 June 2005, 17 June 2005, 29 June 2005 and 6 September 2005. Ms Ogawa consistently refused to accept the Department's advice in this regard, and consistently refused to apply for a further Bridging visa.<sup>24</sup>

52. According to the Department, on one of these occasions, 6 June 2005, Dr Ogawa replied by email:

... I told you many times that I have no intention to apply for another bridging visa E as I have a bridging visa E in effect. I do not need two visas of the same class. I will not reply to you any further in relation to this matter.<sup>25</sup>

53. It appears that Dr Ogawa was given repeated warnings to regularise her immigration status or risk being detained.

54. On 19 May 2006, Dr Ogawa was detained by the Australian Federal Police (AFP) in Brisbane under s 189(1) of the Migration Act. She made a request for a bridging visa, which was refused the same day. The undated Detention Report, apparently prepared that day, notes: 'Consideration being given to removal to IDC – Villawood as soon as practicable'.

55. On 21 May 2006, Dr Ogawa was transferred to VIDC.

56. On 22 May 2006, a Detention Review Manager (DRM) conducted a review of Dr Ogawa's detention. The Department submits that the purpose of the DRM review is to:

Review the initial decision to detain a client to ensure four core elements are met: identity, reasonable suspicion that the client is an unlawful non-citizen, relevant case law consideration and that alternatives to detention were considered.<sup>26</sup>

57. There is no information before me to indicate that alternatives to detention in an immigration detention centre were considered. The DRM simply noted, 'To be removed'.<sup>27</sup>

58. There is also no information before me to suggest that Dr Ogawa was a flight risk, who might try to abscond prior to removal. The decision of the delegate of the Minister, refusing her a bridging visa on 19 May 2006, relevantly notes:

Ms Ogawa has not breached the conditions of any previous bridging visa... has not absconded from immigration detention or other custody...

59. However, the delegate noted and concluded:
- Ms Ogawa has been charged with a Commonwealth offence “using a carriage service to menace, harass or cause offence.”... After having regard to Ms Ogawa’s immigration history and taking her current circumstances into account I am not satisfied that she would abide by all of the conditions appropriately imposed on any bridging visas granted to her...
60. It is not clear what conditions imposed by a Bridging Visa the delegate considered Dr Ogawa may not comply with.
61. The Department submits that Dr Ogawa was accommodated in Lima Dorm, a female section (now called Banksia) within Stage 2, the least restrictive accommodation in VIDC at that time (just prior to the opening of the Sydney Immigration Residential Housing facility).<sup>28</sup>
62. I understand that the Department began planning to remove Dr Ogawa from Australia. Her removal was to take place on 25 July 2006.
63. On 21 July 2006, Scarlett FM of the Federal Magistrate’s Court dismissed Dr Ogawa’s application for review of the MRT decision of 5 June 2006 in relation to her student visa. This decision was subsequently appealed.
64. On 28 July 2006, Dr Ogawa was released from immigration detention on a Bridging Visa E. She was held in immigration detention for 68 days.

## 6.2 Was the failure to place Dr Ogawa in a less restrictive form of detention than VIDC a breach of human rights?

65. There is an obligation on the Commonwealth to demonstrate that there was not a less invasive way than detention to achieve the ends of its immigration policy, in order to avoid the conclusion that detention was arbitrary.<sup>29</sup>
66. According to the Department’s submission, Dr Ogawa was detained in order:
- ... to facilitate her removal from Australia, removal which did not eventuate because she applied for... [another] visa (which was refused). This was a proportionate measure, taken only following departmental attempts to resolve Dr Ogawa’s situation using other methods.<sup>30</sup>
67. On the material before me, it does not appear that any other alternatives to detention in an immigration detention centre were considered.
68. As set out above, under s 197AB of the Migration Act, the Minister has the power to specify alternative detention arrangements for people in immigration detention. Further, the definition of ‘immigration detention’ includes ‘being held by, or on behalf of, an officer in another place approved by the Minister in writing’. Accordingly, Dr Ogawa could have been placed in community detention or the Minister could have approved a place in the community as a place of detention.
69. The Department has not explained why Dr Ogawa could not reside in the community or in a less restrictive form of detention (if necessary with appropriate conditions imposed to mitigate any risks) while her immigration status was resolved.
70. I find that the failure to place Dr Ogawa in community detention or another less restrictive form of detention was arbitrary and inconsistent with the right to liberty in article 9 of the ICCPR.

# 7 Recommendations

## 7.1 Power to make recommendations

71. 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.<sup>31</sup> The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>32</sup>
72. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
  - the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>33</sup>

## 7.2 Consideration of compensation

73. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
74. However, in making 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.<sup>34</sup>
75. 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.<sup>35</sup>
76. The tort of false imprisonment is a more limited action than an action for breach of article 9(1) of the ICCPR. This is because an action for false imprisonment cannot succeed where there is lawful justification for the detention, whereas a breach of article 9(1) will be made out where it can be established that the detention was arbitrary, irrespective of legality.
77. 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). 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.
78. 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).<sup>36</sup>
79. I note that the following awards of damages have been made for injury to liberty and provide a useful reference point in the present case. In *Goldie v Commonwealth of Australia (No 2)*, Mr Goldie was awarded damages of \$22 000 for false imprisonment, being wrongful arrest and detention under the Migration Act for four days.<sup>37</sup>
80. In *Spautz v Butterworth*, 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.<sup>38</sup>



## 7.3 Recommendation that compensation be paid

81. I find that the failure to place Dr Ogawa in community detention or another less restrictive form of detention was arbitrary and inconsistent with the right to liberty in article 9 of the ICCPR. She was detained for 68 days.
82. I note that at the time of her detention at VIDC, Dr Ogawa had not previously lost her liberty and she experienced the detention as humiliating and distressing.
83. I consider that the Commonwealth should pay to Dr Ogawa an amount of compensation to reflect the loss of liberty caused by her detention at VIDC.
84. 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 \$50 000 is appropriate.

## 8 Apology

85. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Dr Ogawa 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.<sup>39</sup>



Gillian Triggs  
**President**  
Australian Human Rights Commission

27 February 2014

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- 1 See *Ogawa v University of Melbourne [No 3]* [2004] FMCA 536 (3 September 2004); *Ogawa v University of Melbourne* [2005] FMCA 1118 (8 August 2005); *Ogawa v University of Melbourne [No 2]* [2005] FMCA 1216 (18 August 2005); *Ogawa v University of Melbourne* (2005) 220 ALR 659; *Ogawa v Phipps* (2006) 151 FCR 311.
  - 2 See *Ogawa v Minister for Immigration and Multicultural Affairs* (2006) 156 FCR 246. Dr Ogawa's failed application for waiver of expenses and fees incurred during her detention was subject to an unsuccessful claim for judicial review: *Ogawa v Colbeck [No 2]* [2007] FMCA 2127 (5 December 2007).
  - 3 Document headed 'Attachment A, Ogawa 2007- 400103, Chronology' which appears to be an attachment to the Commonwealth's response to Ombudsman. See also *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), 7-8 [34].
  - 4 *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), 7-8 [34].
  - 5 *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), 10 [45].
  - 6 *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), 9 [39].
  - 7 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).
  - 8 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
  - 9 On 17 April 2012, the Department wrote to Dr Ogawa rejecting her request for compensation.
  - 10 Email from Dr Ogawa to Commission, 6 February 2013.
  - 11 *Migration Act 1958* (Cth), s 5.
  - 12 UN Human Rights Committee, *CCPR General Comment 8: Right to liberty and security of persons* in Article 9 (30 June 1982). See also *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Baban v Australia* [2003] UNHRC 22, UN Doc CCPR/C/78/D/1014/2001.
  - 13 UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (26 May 2004) 3 [6]. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004) p 308, para [11.10].
  - 14 *Manga v Attorney-General* [2000] 2 NZLR 65, 71 [40]-[42] (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; *Spakmo v Norway* [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.
  - 15 *A v Australia* [1997] UNHRC 7, UN Doc CCPR/C/76/D/900/1993 (the fact that the author may abscond if released into the community with not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999.
  - 16 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
  - 17 UN Human Rights Committee, *Concluding Observations on Switzerland*, [100], UN Doc CCPR/A/52/40 (1997).
  - 18 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
  - 19 *Ogawa v Minister for Immigration & Anor* [2006] FMCA 1039 (21 July 2006), 4 [16].
  - 20 *Ogawa v Minister for Immigration and Multicultural Affairs and Anor* [2006] FCA 1694 (15 December 2006), 253 [44].
  - 21 Amended response from DIAC to Commission's question 1, provided 25 May 2012.
  - 22 Bridging Visa (General) Decision Record Subclass 50, applicant Megumi Ogawa, 19 May 2006.
  - 23 Response from DIAC to Commission dated 14 May 2013.
  - 24 Response from DIAC to Commission dated 14 May 2013.
  - 25 Letter from DIAC to Commonwealth Ombudsman dated 24 October 2007.
  - 26 Response from DIAC to Commission dated 19 March 2012, at question 2.
  - 27 Response from DIAC to Commission dated 19 March 2012, attachment 2.
  - 28 Response from DIAC to Commission dated 19 March 2012, at question 3. See also response from DIAC to Commission dated 14 May 2013.
  - 29 *C v Australia* [2002] UNHRC 52, UN Doc CCPR/C/76/D/900/1999; *Shams & Ors v Australia* [2007] UNHRC 73, UN Doc CCPR/C/90/D/1255/2004; *Baban v Australia* [2003] UNHRC 22, CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, CCPR/C/87/D/1050/2002.
  - 30 Response from DIAC to Commission dated 19 March 2012.
  - 31 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(a).
  - 32 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(b).
  - 33 *Australian Human Rights Commission Act 1986* (Cth), s 29(2)(c).
  - 34 *Peacock v The Commonwealth* (2000) 104 FCR 464 at 483 (Wilcox J).
  - 35 *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217 at 239 (Lockhart J).
  - 36 *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].
  - 37 *Goldie v Commonwealth of Australia & Ors* (No 2) [2004] FCA 156.
  - 38 *Spautz v Butterworth* (1996) 41 NSWLR 1 (Clarke JA).
  - 39 D Shelton, *Remedies in International Human Rights Law* (2000) 151.

## Further Information

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