



Australian
Human Rights
Commission

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Mr Heyward v
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Commonwealth
.....
of Australia
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[2011] AusHRC 47
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**Mr Heyward v
Commonwealth of Australia
(Department of Immigration
and Citizenship)**

Report into arbitrary detention,
the right of people in detention
to protection of the family and
freedom from arbitrary interference
with the family

[2011] AusHRC 47

Australian Human Rights Commission 2011



**Australian
Human Rights
Commission**



**Australian
Human Rights
Commission**

September 2011

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

Dear Attorney

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

I have found that the acts and practices of the Commonwealth breached Mr Heyward's right not to be subject to arbitrary detention and his right to protection of, and freedom from arbitrary interference with, his family. These fundamental human rights are protected by articles 9(1), 17(1) and 23(1) of the International Covenant on Civil and Political Rights.

By letter dated 20 July 2011 the Department of Immigration and Citizenship provided the following responses to my findings and recommendations:

The Department's response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr Julian Heyward

1. *That the Commonwealth provide a formal written apology to Mr Heyward for the breaches of his human rights identified in the report.*

The Department disagrees with this recommendation.

Mr Heyward did not hold a valid visa to remain lawfully in Australia due to the cancellation of his visa under section 501 of the *Migration Act 1958* (the Act). His immigration detention was therefore lawful in accordance with section 189 of the Act. The Minister considered the circumstances of Mr Heyward's case under section 417 of the Act and decided it was not in the public interest to intervene.

With regard to Mr Heyward's placement while in immigration detention, his case was not referred to the Minister under section 197AB as he withdrew from the litigation relating to his Protection visa refusal and his removal from Australia became imminent.

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

2. *That the Commonwealth pay financial compensation in the amount of \$200,000 to Mr Heyward.*

While we note your findings, in the Department's view Mr Heyward was detained lawfully in accordance with the Act and his detention was not arbitrary.

Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.

Pursuant to the *Australian Human Rights Commission Act 1986* (Cth) please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Catherine Branson'.

Catherine Branson
President
Australian Human Rights Commission

.....
Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission (the Commission) and the reasons for those findings following an inquiry by the Commission into a complaint lodged by Mr Julian Heyward that his treatment by the Department of Immigration and Citizenship (DIAC) involved acts or practices inconsistent with or contrary to human rights.

2 Summary

2.1 Summary of findings

2. I have found that the human rights of Mr Heyward were breached by the actions of DIAC.

(a) Detention in Villawood Immigration Detention Centre

3. I have found that the prolonged detention of Mr Heyward in Villawood Immigration Detention Centre (VIDC) was not proportionate to the Commonwealth's legitimate purpose of regulating immigration into Australia.

4. Mr Heyward could have been detained in the community whilst he pursued his appeal rights. There was no adequate justification for keeping Mr Heyward in VIDC because he was involved in proceedings which, when exhausted, might have led to his removal from Australia. Accordingly, Mr Heyward's detention in VIDC was arbitrary in breach of the prohibition of arbitrary detention in article 9 of the International Covenant on Civil and Political Rights (ICCPR).

(b) Interference with and protection of the family

5. I have found that the interference with Mr Heyward's family occasioned by his detention was not reasonable and was not proportionate to the legitimate aim of DIAC of protecting the community from non-citizens who pose a risk to the community.

6. Accordingly I have found that the failure to place Mr Heyward in a less restrictive form of immigration detention arbitrarily interfered with his family in breach of articles 17 and 23 of the ICCPR.

(c) Treatment in detention

7. I was not provided with evidence to suggest that Mr Heyward experienced exacerbating factors beyond the condition of detention sufficient to establish a breach of article 10 of the ICCPR.

8. Accordingly, I have found that there is insufficient evidence to substantiate a breach of article 10 of the ICCPR in relation to Mr Heyward's treatment in immigration detention.

2.2 Summary of recommendations

9. In light of my findings regarding the acts and practices of the Commonwealth I make the following recommendations:

- That the Commonwealth provide a formal written apology to Mr Heyward for the breaches of his human rights identified in this report.
- That the Commonwealth pay financial compensation in the amount of \$200 000.

3 The complaint by Mr Heyward

3.1 Background

10. On 21 July 2010 Mr Heyward complained to the Commission that the failure of the Minister to place him in a less restrictive form of detention than VIDC amounted to breaches of articles 9(1), 10(1), 17(1) and 23(1) of the ICCPR.
11. Both Mr Heyward and the Commonwealth have provided submissions in this matter.
12. Mr Heyward and the Commonwealth have also had the opportunity to respond to my letter of 22 February 2011 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.
13. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with the human rights defined and protected by the ICCPR.
14. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by international jurisprudence about their interpretation.

3.2 Findings of fact

15. I consider the following statements about the circumstances which have given rise to Mr Heyward's complaint to be uncontentious.
16. Mr Heyward entered Australia in 1987 on a Visitor visa. He was granted a Dependant Spouse visa in 1992 which continued in effect as a Transitional Permanent visa from 1994.
17. In 1992 Mr Heyward was convicted of two counts of assault on police. He was fined \$650 and placed on a two year good behaviour bond. In 1996 he was convicted of driving with a low prescribed blood alcohol limit and was fined \$250 and disqualified from driving for two months. In 1997 Mr Heyward was found to be driving whilst unlicensed and was fined \$100. He was also found to have breached an Apprehended Violence Order that had been made against him. On 17 November 2003 Mr Heyward was convicted of maliciously wounding with intent to commit murder and was sentenced to nine years and four months imprisonment with a non-parole period of six years and four months.
18. On 5 March 2009 a delegate of the Minister cancelled Mr Heyward's visa on character grounds under s 501 of the *Migration Act 1958* (Cth) (Migration Act). On 15 March 2009 Mr Heyward was released from prison and was placed in VIDC.
19. On 31 July 2009 Mr Heyward requested that he be placed in community detention. Mr Heyward remained in VIDC until he was removed from Australia on 10 January 2011.

4 The Commission's human rights and inquiry and complaints function

20. Section 11(1)(f) of the *Australian Human Rights Commission Act* (AHRC Act) gives the Commission the function of inquiring into any act or practice that may be inconsistent with or contrary to any human right and certain related functions. Section 8(6) of the AHRC Act provides that the functions of the Commission under s 11(1)(f) shall be performed by the President.
21. 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 is made to it in writing alleging that an act or practice is inconsistent with or contrary to any human right.

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

22. The expressions '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 under an enactment.
23. Section 3(3) of the AHRC Act also provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.
24. An act or practice only invokes the human rights complaints jurisdiction of the Commission where the relevant act or practice is within the discretion of the Commonwealth, its officers or its agents.¹
25. Mr Heyward was placed in VIDC on 15 March 2009 and was released from VIDC when he was removed from Australia on 10 January 2011.
26. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. Mr Heyward's visa was cancelled on 5 March 2009. Accordingly, when he was released from prison on 15 March 2009 he was an unlawful non-citizen and, as such, had to be detained. However, the Migration Act did not require that Mr Heyward be detained in an immigration detention centre.
27. 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).
28. 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'.²
29. Based on the evidence before the Commission it appears that the Minister never considered Mr Heyward's request to be placed in community detention. It appears that DIAC assessed Mr Heyward's request against its internal guidelines for referral of matters to the Minister and determined that Mr Heyward's request did not meet these guidelines.
30. Regardless of the internal policy that resulted in Mr Heyward's request not being conveyed to the Minister, it was within the power of the Minister to have made a residence determination in relation to Mr Heyward under s 197AB of the Migration Act or to have approved Mr Heyward residing in a place other than VIDC.

31. I consider that the failure by the Minister to place Mr Heyward in a less restrictive form of detention from the time that he entered the custody of the Commonwealth amounts to an act under the AHRC Act.

4.2 'Human rights' relevant to this complaint

32. The expression 'human rights' is defined in s 3 of the AHRC Act and includes the rights and freedoms recognised in the ICCPR, which is set out in Schedule 2 to the AHRC Act.
33. The articles of the ICCPR that are relevant to this complaint are:
- article 9(1) (prohibition on arbitrary detention)
 - article 10(1) (humane treatment of people deprived of their liberty)
 - article 17(1) (prohibition against arbitrary interference with family)
 - article 23(1) (protection of family).

(a) Article 9(1) of the ICCPR

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

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

35. The requirement that detention not be 'arbitrary' is separate and distinct from the requirement that detention be lawful.³

36. In order to avoid any characterisation of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.⁴

37. In *A v Australia*⁵ the United Nations Human Rights Committee (UNHRC) said:

[T]he Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context.⁶

38. The UNHRC further states

. . . the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.⁷

39. Moreover, detention which is otherwise lawful may still be arbitrary where there are less invasive means of achieving compliance with immigration policies.

40. In *C v Australia*⁸ the UNHRC found that detention was arbitrary because:

[t]he State party has not demonstrated that, in light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition.⁹

(b) Article 10(1) of the ICCPR

41. Article 10(1) provides:
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person.
42. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons.¹⁰ However, a complainant must demonstrate an additional exacerbating factor beyond the usual incidents of detention.¹¹
43. In particular, the alleged breach of article 10(1) must impact on one or more human needs other than liberty or freedom.¹² These include, failing to respect the rights and interests of detainees: to light, sanitation and bedding,¹³ to maintain family connections,¹⁴ to know one's own personal information,¹⁵ to company and personal space¹⁶ and to be free from hunger.¹⁷
44. In *Australian Human Rights Commission Report 40*,¹⁸ the Commission expressed the view that arranging for Chinese Officials to interview asylum seekers without explaining the purpose of the interview, causing fear and distress, was a violation of article 10 of the ICCPR.
45. In that report, the Commission expressed the view that ultimately, whether there has been a breach of article 10(1) will require consideration of the facts of each case. The question to ask is whether the facts demonstrate a failure by the State to treat detainees humanely and with respect for their inherent dignity as a human being.¹⁹

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

46. 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.
47. Article 23(1) provides:
- The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
48. Professor Manfred Nowak has noted that:
- [T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.²⁰
49. For the reasons set out in *Australian Human Rights Commission Report 39*²¹ the Commission is of the view that in cases alleging a State's arbitrary interference with a person's family, it is appropriate to assess the alleged breach under article 17(1). 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 that breach is in addition to (or in conjunction with) a breach of article 23(1).
50. In its General Comment on article 17(1), the UNHRC confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.²²

51. It follows that the prohibition against arbitrary interferences with family incorporates notions of reasonableness.²³ In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:²⁴

The [UNHRC] interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁵

5 Forming my opinion

52. In forming an opinion as to whether any act or practice was inconsistent with or contrary to any human right I have carefully considered all of the information provided to me by both of the parties, including the submissions received from the parties in response to my letter of 22 February 2011 which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.

6 Arbitrary detention

53. Mr Heyward claims that his detention in VIDC from 15 March 2009 until 10 January 2011 was arbitrary within the meaning of article 9(1) of the ICCPR.
54. The Commonwealth denies that Mr Heyward's detention was arbitrary. It submits that it considered less restrictive forms of detention for Mr Heyward but determined that it was most appropriate that he be detained in VIDC.
55. Mr Heyward was convicted of a serious criminal offence. Mr Heyward's detention in VIDC would not be arbitrary if he posed a danger to the community and there was no less restrictive way to protect the community from the risk posed by Mr Heyward than to detain him in VIDC.
56. I note that the Administrative Appeals Tribunal (AAT)²⁶ upheld the decision to cancel Mr Heyward's visa, in part, because it was satisfied that he posed a risk to the Australian community. The AAT noted the view of the sentencing judge in Mr Heyward's criminal proceedings that the relevant public, for the purposes of assessing the risk to the public posed by Mr Heyward, were women who may enter a relationship with Mr Heyward.
57. The AAT found that Mr Heyward's previous conduct indicated two contributing factors to his past violent behaviour: alcohol and relationship problems. The AAT held that his rehabilitation in relation to either contributing factor could not properly be established on the basis of his time in prison. The AAT accepted that there was a low risk of recidivism but noted case law that found that a low risk of recidivism can support visa cancellation where, if recidivism occurs, it would cause great harm.
58. While Mr Heyward was convicted of a serious criminal offence, his criminal conviction is not evidence, of itself, that he posed a danger to the community such that the Commonwealth could detain him in no less restrictive way than in VIDC. Further, while the AAT was satisfied that Mr Heyward posed a risk to the Australian community, it accepted that there was a low risk of recidivism in his case and it was not required to determine, and did not determine, whether that risk could be managed by any measure less restrictive than detaining him in VIDC.
59. Mr Heyward served a period of over 6 years imprisonment for his crimes and was determined to be fit to re-enter the community on parole.
60. The pre-release report in relation to Mr Heyward recommends that he be granted parole subject to a number of conditions including:
 - a. abstaining from alcohol;
 - b. not frequenting or visiting Byron Bay or environs and not traveling within 40kms of Byron Bay without written approval from his supervising officer; and
 - c. seeking assistance for his abuse of drugs or alcohol, if directed to do so.
61. Had Mr Heyward been placed in community detention, he would have been required to comply with these parole conditions. Accordingly, it is unclear why any danger that he posed to the community would not have been obviated by the imposition of these conditions.
62. Further, in addition to the parole conditions imposed by the Department of Corrective Services, it was open to the Minister to grant a residence determination in relation to Mr Heyward subject to further conditions.

63. In its letter of 19 April 2010 DIAC advised Mr Heyward that it had determined not to refer his request to be placed in community detention to the Minister because the High Court was shortly expected to make a decision on Mr Heyward's appeal. I note that on 18 June 2010 the High Court refused Mr Heyward's application for special leave to appeal against the decision of the Full Federal Court. However, Mr Heyward was not removed from Australia at this time because he made further applications for a Protection visa and for Ministerial intervention. Accordingly, Mr Heyward was not released from VIDC until his removal from Australia on 10 January 2011. Mr Heyward could have been detained in the community while he pursued his appeal rights. It was not adequate justification to keep Mr Heyward in VIDC because he was involved in proceedings which, when exhausted, may have led to his removal from Australia.
64. For the reasons outlined above I am satisfied that Mr Heyward's detention in VIDC was arbitrary in breach of article 9(1) of the ICCPR.

7 Cruel, inhuman and degrading treatment

65. It is also claimed that Mr Heyward's detention in VIDC amounted to a breach of article 10(1) of the ICCPR.
66. DIAC claims that Mr Heyward was treated with humanity and respect for his dignity in accordance with article 10(1) of the ICCPR. DIAC claims that Mr Heyward's detention was conducted in accordance with relevant departmental procedures which have been developed consistently with human rights.
67. Mr Heyward has not provided evidence to suggest that he has experienced an additional exacerbating factor beyond the usual incidents of detention.
68. Based on the evidence currently before me, I am not satisfied that the Commonwealth has breached Mr Heyward's rights under article 10 of the ICCPR.

8 Interference with and protection of the family

69. Mr Heyward claims that his detention in VIDC interfered with his family in breach of articles 17(1) and 23(1) of the ICCPR. Mr Heyward has an Australian citizen wife and two Australian citizen children from a previous relationship.
70. DIAC claims that Mr Heyward's detention was lawful and proportionate and therefore maintains that the interference with family which flows as a result from Mr Heyward's detention was reasonable in the circumstances and was not a breach of article 17 or 23 of the ICCPR.
71. Mr Heyward has two Australian citizen children, a daughter who is currently 19 and a son who is currently 20.
72. It appears that Mr Heyward has had very limited contact with his Australian citizen children over the course of their lives. There was evidence before the AAT in 2009 that he had recently resumed contact with his son. This contact occurred by way of emails sent from Mr Heyward's son in Australia to his son in the United States, which Mr Heyward's son in the United States forwarded to Mr Heyward. Mr Heyward had also recently received one email from his daughter.
73. In evidence before the AAT, Mr Heyward advised that his son was angry with him and wanted to see proof that he had recovered (from his alcoholism). Mr Heyward's daughter lived with her mother who did not allow Mr Heyward's daughter to have any contact with her father. Based on the evidence before the Commission, I am not satisfied that Mr Heyward's detention in VIDC interfered with his relationship with his son and daughter.
74. Whilst Mr Heyward was in prison, he rekindled his relationship with his former wife, with whom he arrived in Australia in 1987, but whom he divorced in 1990. Mr Heyward remarried his former wife in October 2009.
75. In considering whether any interference with Mr Heyward's family was arbitrary, I must consider whether the interference was reasonable and proportionate to the legitimate end sought by the Commonwealth (protection of the community from non-citizens who pose a risk to the community) and necessary in all of the circumstances.
76. It appears that Mr Heyward's detention in VIDC was arbitrary as it does not appear that any risk that he posed to the community required him to be detained in VIDC rather than a less restrictive form of detention.
77. As a result of his detention in VIDC Mr Heyward was not able to resume cohabitation with his wife when he was released from jail as he would have been able to had he have been detained in the community.
78. Accordingly, I am satisfied that the interference with Mr Heyward's relationship with his wife was arbitrary within the meaning of articles 17(1) and 23(1) of the ICCPR, but I am not so satisfied in respect of his Australian citizen children.

9 Findings and recommendations

9.1 Power to make recommendations

79. 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.²⁷ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁸
80. 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.²⁹

9.2 Consideration of compensation

81. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
82. 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.³⁰
83. 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.³¹
84. 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.
85. 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.
86. 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).³²
87. 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.

88. In *Taylor v Ruddock*,³³ 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.
89. 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.
90. 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.
91. 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.³⁴
92. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range.³⁵ The Court noted that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish'.³⁶
93. In *Goldie v Commonwealth of Australia & Ors (No 2)*³⁷ Mr Goldie was awarded damages of \$22 000 for false imprisonment being wrongful arrest and detention under the Migration Act for four days.
94. In *Spautz v Butterworth*³⁸ 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.

9.3 Recommendation that compensation be paid

95. I have found that on or about 15 March 2009 Mr Heyward should have been placed in community detention rather than detained in VIDC. The failure to consider Mr Heyward's request to be placed in community detention and the failure to place Mr Heyward in a less restrictive form of detention is inconsistent with his right not to be arbitrarily detained.
96. Neither Mr Heyward nor the Commonwealth have made any submissions on an appropriate sum of compensation.
97. I consider that the Commonwealth should pay to Mr Heyward an amount of compensation to reflect the loss of liberty caused by his detention at VIDC and the consequent interference with his family but I have not assessed the quantum of that compensation by utilising a strict 'daily rate'. Had Mr Heyward been transferred to community detention he would still have experienced some curtailment of his liberty, and I have taken this into account when assessing his compensation.

98. I have also taken into account the fact that Mr Heyward's detention in VIDC followed directly on from a period of imprisonment within the New South Wales Correctional System. In this regard, I note the statement of the Court of Appeal in *Ruddock v Taylor*,⁴⁰ that 'as the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.'
99. 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 \$200 000 is appropriate.

9.4 Apology

100. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Heyward for the breaches of his 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.⁴¹

10 DIAC's response to the recommendations

101. On 29 June 2011 I provided a Notice under s 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr Heyward against the Commonwealth (DIAC).
102. By letter dated 20 July 2011 DIAC provided the following response to my findings and recommendations:

The Department's response on behalf of the Commonwealth of Australia to the findings and recommendations of the AHRC with regard to Mr Julian Heyward

1. *That the Commonwealth provide a formal written apology to Mr Heyward for the breaches of his human rights identified in the report.*

The Department disagrees with this recommendation.

Mr Heyward did not hold a valid visa to remain lawfully in Australia due to the cancellation of his visa under section 501 of the *Migration Act 1958* (the Act). His immigration detention was therefore lawful in accordance with section 189 of the Act. The Minister considered the circumstances of Mr Heyward's case under section 417 of the Act and decided it was not in the public interest to intervene.

With regard to Mr Heyward's placement while in immigration detention, his case was not referred to the Minister under section 197AB as he withdrew from the litigation relating to his Protection visa refusal and his removal from Australia became imminent.

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

2. *That the Commonwealth pay financial compensation in the amount of \$200,000 to Mr Heyward.*

While we note your findings, in the Department's view Mr Heyward was detained lawfully in accordance with the Act and his detention was not arbitrary.

Accordingly, the Department advises the Commission that there will be no action taken with regard to this recommendation.

103. I report accordingly to the Attorney-General.



Catherine Branson
President
Australian Human Rights Commission
September 2011

Appendix 1: Functions of the Commission

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

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

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

Section 3 of the AHRC Act defines an ‘act’ or ‘practice’ as including an act or practice done by or on behalf of the Commonwealth or an authority of the Commonwealth.

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

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

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

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

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

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

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- 1 *Secretary, Department of Defence v HREOC, Burgess & Ors (Burgess)* (1997) 78 FCR 208.
- 2 *Migration Act 1958* (Cth), s 5.
- 3 In *Van Alphen v The Netherlands*, the United Nations Human Rights Committee said '[A]rbitrariness is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.' Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 [5.8].
- 4 *C v Australia* Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999 [8.2], *D and E v Australia* Communication No 1050/2002 UN Doc CCPR/C/87/D/1050/2002 [7.2], *Omar Sharif Baban v Australia* Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001 [7.2], *Bakhtiyari v Australia* Communication No 1069/2002 UN Doc CCPR/C/79/D/1069/2002 [9.2].
- 5 Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993.
- 6 *Ibid* [9.2].
- 7 *Ibid* [9.4].
- 8 Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999.
- 9 See above n 3.
- 10 United Nations Human Rights Committee, General Comment 21, Article 10 (Forty-Fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003) 153.
- 11 *Jensen v Australia* UN Doc CCPR/C/71/D/762/1997.
- 12 *Taunoa v Attorney-General* [2008] 1 NZLR 429.
- 13 See *Daley v Jamaica*, Communication No 750/1997, UN Doc CCPR/C/63/D/750/1997 (1998), [7.6]; *Teesdale v Trinidad and Tobago*, Communication No 677/1996, UN Doc CCPR/C/74/D/677/1996(2002), [9.1].
- 14 *Miguel Angel Estrella v Uruguay* Communication No 74/1980 UN Doc CCPR/C/18/D/74/1980.
- 15 *Tatiana Zheludkova v Ukraine* Communication No 726/1996 UN Doc CCPR/C/76/D/726/1996.
- 16 *McTaggart v Jamaica*, Communication No 748/1997, UN Doc, CCPR/C/67/D/748/1997 (1999), [8.5].
- 17 *Michael and Brian Hill v Spain*, Communication No 526/1993, UN Doc. CCPR/C/59/D/526/1993 (1997).
- 18 Australian Human Rights Commission, *Report of Complaints by immigration detainees against the Commonwealth of Australia* [2009] AusHRC 40.
- 19 *Ibid* [106].
- 20 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
- 21 Australian Human Rights Commission, *Complaint by Mr Huong Nguyen and Mr Austin Okoye against the Commonwealth of Australia and GSL (Australia) Pty Ltd* [2007] AusHRC 39, [80]-[88].
- 22 United Nations Human Rights Committee, General Comment 16 (Twenty-third session, 1988), Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [4].
- 23 S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004), 482-3.
- 24 Communication No 488/1992 UN Doc CCPR/C/50/D/488/1992.
- 25 *Ibid* [8.3]. Whilst this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
- 26 *Heyward and Minister for Immigration and Citizenship* [2009] AATA 536 (17 July 2009).
- 27 AHRC Act s 29(2)(a).
- 28 AHRC Act s 29(2)(b).
- 29 AHRC Act s 29(2)(c).
- 30 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 31 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 32 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignall v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 33 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 34 *Ibid*, [140].
- 35 [2003] NSWCA 262 [49]-[50].
- 36 *Ibid*, [49].
- 37 [2004] FCA 156.
- 38 (1996) 41 NSWLR 1 (Clarke JA).
- 39 [2009] AusHRC 41 at para 376.
- 40 (2003) 58 NSWLR 269.
- 41 D Shelton, *Remedies in International Human Rights Law* (2000) 151.



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