



Australian
Human Rights
Commission

Ghahani v Commonwealth of Australia (DIBP)

[2015] AusHRC 103

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**Ghahani v Commonwealth
of Australia (Department
of Immigration and Border
Protection)**

[2015] AusHRC 103

Report into arbitrary detention
and cruel, inhuman and degrading
treatment

Australian Human Rights Commission 2015



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**Australian
Human Rights
Commission**

December 2015

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

Dear Attorney,

I have completed my report pursuant to section 11 (1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr Ghahani against the Commonwealth of Australia (Department of Immigration and Border Protection) (the Department).

I have found that Mr Ghahani's detention at Villawood Immigration Detention Centre (VIDC) for the period 7 March 2013 to 10 September 2014 was arbitrary. This is a result of the Department's failure to refer Mr Ghahani's case to the Minister for Immigration and Citizenship or subsequent Minister for Immigration and Border Protection (Minister) for consideration of his discretionary powers under s 197AB or s 195A of the *Migration Act 1958* (Cth) until 30 July 2014. I find this failure to be an act inconsistent with or contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

I have considered Mr Ghahani's complaint that his detention in the VIDC caused him significant psychological harm in breach of article 7 of the ICCPR. I have found that the Department's failure to refer Mr Ghahani's case to the Minister for consideration of his discretionary powers under s 197AB or s 195A of the *Migration Act* until 30 July 2014 was not inconsistent with or contrary to article 7 of the ICCPR.

In light of my findings I recommend that the Commonwealth pay Mr Ghahani appropriate compensation and provide him with a written apology.

The Department provided its response to my findings and recommendations by letter dated 9 November 2015. The Department's response is outlined at part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
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 by Mr Mehdi Ghahani against the Commonwealth of Australia – (Department of Immigration and Border Protection) (the Department) alleging a breach of his human rights.
2. Mr Ghahani complains that his detention in the Villawood Immigration Detention Centre (VIDC) from 2 January 2013 – 10 September 2014 was arbitrary, contrary to article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). Mr Ghahani also complains that his detention caused him significant psychological harm contrary to article 7 of the ICCPR.
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. As a result of the inquiry, I have found that the Department's failure to refer Mr Ghahani's case to the Minister for Immigration and Citizenship or subsequent Minister for Immigration and Border Protection (Minister) for consideration of his discretionary powers under s 197AB or s 195A of the *Migration Act 1958* (Cth) until 30 July 2014 was inconsistent with or contrary to article 9(1) of the ICCPR. I have found that this failure by the Department resulted in Mr Ghahani's detention from 7 March 2013 to 10 September 2014 being arbitrary. I have not found a breach of article 7 of the ICCPR.
5. I have recommended that:
 - The Commonwealth pay to Mr Ghahani appropriate compensation.
 - The Commonwealth provide a formal written apology to Mr Ghahani.

2 Background

6. Mr Ghahani is an Iranian national who arrived on Christmas Island on 11 June 2012 as an undocumented Irregular Maritime Arrival. He was immediately detained pursuant to s 189(3) of the *Migration Act*.
7. He was detained in various locations on Christmas Island until 7 July 2012 when he was transferred, for operational reasons, to the Northern Immigration Detention Centre in the Northern Territory. On 17 August 2012, he was transferred to the Curtin Immigration Detention Centre in Western Australia.
8. On 7 November 2012, Mr Ghahani was placed into community detention in New South Wales following the Minister making a residence determination under s 197AB of the *Migration Act*.
9. On 12 December 2012, Mr Ghahani lodged an application for a Protection Visa.
10. On 13 December 2012, Mr Ghahani was arrested and charged with alleged intimidation of his ex-partner under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). Mr Ghahani had allegedly threatened to kill his ex-partner during a chance meeting in Sydney. On 14 December 2012 he was released on bail and issued a provisional Apprehended Domestic Violence Order.

11. On 21 December 2012, the Minister revoked Mr Ghahani's residence determination under s 197AD of the Migration Act.
12. On 1 January 2013, Mr Ghahani was arrested and charged with failing to abide by his bail conditions. He had failed to report to the Ryde Police Station on two occasions.
13. On 2 January 2013 Mr Ghahani was returned to held detention in the VIDC.
14. On 11 January 2013 the Burwood Local Court issued an Apprehended Domestic Violence Order against Mr Ghahani.
15. On 7 March 2013 the Burwood Local Court dismissed all charges against Mr Ghahani. An email from the Burwood Local Court states that Magistrate Schurr marked the file 'no evidence offered – dismissed'.
16. On 22 July 2013, the Department refused Mr Ghahani's Protection Visa application as he was found not to be owed protection.
17. On 30 September 2013, the Refugee Review Tribunal (RRT) remitted the matter back to the Department, with the direction that Mr Ghahani is a person to whom Australia has protection obligations.
18. On 5 February 2014, the Department again refused to grant Mr Ghahani a Protection Visa. Mr Ghahani commenced a review of this decision in the RRT on 19 February 2014. Mr Ghahani was successful before the RRT, who remitted the matter back to the Department for a second time.
19. Mr Ghahani remained detained at the VIDC until 10 September 2014 when he was granted a Temporary Humanitarian Concern, subclass 786 visa following Ministerial intervention under s 195A of the Migration Act.

3 Legislative framework

3.1 Functions of the Commission

20. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with or contrary to any human right.
21. Section 20(1)(b) of the AHRC Act requires the Commission to perform that function when a complaint is made to it in writing alleging such an act or practice.

3.2 What is an 'act' or 'practice'

22. 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.
23. 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, that is, where the relevant act or practice is within the discretion of the Commonwealth.¹

3.3 What is a human right?

25. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument.
26. 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.
27. Article 7 of the ICCPR relevantly provides:
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

4 Arbitrary detention

28. Mr Ghahani complains that his detention in the VIDC continued beyond a period for which it could be appropriately justified. He complains that his detention was arbitrary, inappropriate and lacked predictability.
29. Mr Ghahani submits that the Minister's failure to place him in a less restrictive form of detention than the VIDC is inconsistent with article 9(1) of the ICCPR.

4.1 Law

30. 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;²
 - (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;³
 - (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;⁴ and
 - (d) detention should not continue beyond the period for which a State party can provide appropriate justification.⁵
31. In *Van Alphen v The Netherlands* the UN Human Rights Committee (UNHRC) 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.⁶

32. The UNHRC has held in several communications 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.⁷
33. The UNHRC has recently stated:
- [a]sylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualised likelihood of absconding, danger of crimes against others, or risk of acts against national security.⁸

4.2 Act or practice of the Commonwealth?

34. Following the revocation of Mr Ghahani's residence determination under s 197AB of the Migration Act, the Commonwealth detained Mr Ghahani in the VIDC for a total period of 21 months from 2 January 2013 to 10 September 2014.
35. Mr Ghahani was detained in the VIDC pursuant to s 189(1) of the Migration Act. Section 189(1) of the Migration Act requires the detention of unlawful non-citizens. As Mr Ghahani arrived in Australia by boat without a valid visa, he was an unlawful non-citizen and therefore the Migration Act required that he be detained.
36. However, there are a number of powers that the Minister could have exercised so that Mr Ghahani was detained in a less restrictive manner than in an immigration detention centre.
37. The Minister could have granted him a visa. Under s 195A of the Migration Act, if the Minister thinks it is in the public interest to do so, the Minister may grant a visa to a person detained under s 189 of the Migration Act.
38. The Minister could have made a residence determination. Section 197AB of the Migration Act provides:
- 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.'⁹
40. Accordingly, the Minister could have granted a visa to Mr Ghahani, made a residence determination in relation to him under s197AB of the Migration Act or could have approved that he reside in a place other than an immigration detention centre.
41. On 30 July 2014, the Department prepared a submission for the Minister to consider exercising his power under s 195A of the Migration Act to grant Mr Ghahani a visa. This was approximately 16 months after the charges against Mr Ghahani were dismissed. The Minister received the submission on 19 August 2014. Following this submission, the Minister ultimately intervened and granted Mr Ghahani a Temporary Humanitarian Concern, subclass 786 visa on 10 September 2014.

42. I therefore find that the failure of the Department to refer Mr Ghahani's case to the Minister for the consideration of his discretionary powers under s 197AB and s 195A of the Migration Act until 30 July 2014 constitutes an act within the meaning of the AHRC Act.

4.3 The Department's response

43. When the Commission asked the Department the reason for Mr Ghahani's detention in an immigration detention centre, the Department responded on 30 July 2014 that:

On 7 November 2012, the Minister exercised his power under section 197AB of the Act to place Mr Ghahani into Community Detention. On 21 December 2012, the Minister exercised his public interest power under section 197AD of the Act to revoke Mr Ghahani's Community Detention, due to criminal charges laid against him while in the Community Detention.

The department considers that Mr Ghahani's continued detention is appropriate at this time. However, the department is preparing a section 195A Ministerial Intervention submission in relation to Mr Ghahani's case.

44. The Department advised that Mr Ghahani's detention placement in the VIDC was reviewed 24 times.
45. During its inquiry, the Commission asked the Department whether alternative, less restrictive detention options had been considered for Mr Ghahani. The Department responded on 30 July 2014 that it 'was currently preparing a s 195A Ministerial Intervention submission'. The Assistant Secretary for the Department authorised the submission on 30 July 2014.
46. In response to my preliminary view in relation to this complaint, the Department informed the Commission that in October 2013, Mr Ghahani's case was assessed as meeting the Minister's guidelines for referral to the Minister to consider exercising his power under s 195A of the Migration Act. The Department stated that there are no departmental records indicating why Mr Ghahani's case was not referred to the Minister around October 2013. The Department maintains that as 'there were no identified vulnerabilities in Mr Ghahani's case, the Department does not accept that referral of his case should have been prioritised for the Minister's consideration prior to his case being referred in July 2014'.
47. The Department also stated that:
- Monthly reviews concluded that Mr Ghahani's placement in held immigration detention was appropriate, given that there were no vulnerabilities in his case that warranted referral under sections 195A and 197AB of the Act.

4.4 Finding

48. The Department decided to detain Mr Ghahani in the VIDC after he was arrested and charged with intimidation of his ex-partner under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). It appears the Department formed the view that this charge demonstrated an individualised risk of danger of crimes against others which justified detention in an immigration detention centre.

49. However, the charges against Mr Ghahani were dismissed for lack of evidence on 7 March 2013. In my view, after the charges were dismissed, there was no longer a basis for considering that Mr Ghahani posed a risk to the Australian community.
50. The Department has not demonstrated that the detention of Mr Ghahani in an immigration detention centre for 19 months after the charges against him were dismissed was necessary or proportionate to the Commonwealth's legitimate aim of protecting the Australian community, or of ensuring the effective operation of Australia's migration system, or of any other legitimate aim of the Commonwealth.
51. As outlined above, in October 2013, Mr Ghahani's case was assessed as meeting the Minister's guidelines for referral to the Minister to consider exercising his power under s 195A of the Migration Act. There are no departmental records indicating why Mr Ghahani's case was not referred to the Minister at that time.
52. It was not until 30 July 2014 that the Department made a submission to the Minister for him to consider exercising his power under section 195A of the Migration Act to grant Mr Ghahani a visa. This was approximately 16 months after the charges were dismissed against Mr Ghahani. The Department has provided no justification for this unreasonable delay. Rather it contends that there were no vulnerabilities in Mr Ghahani's case that warranted referral under sections 195A and 197AB of the Migration Act. The Minister decided to intervene under s 195A of the Migration Act to grant Mr Ghahani a Temporary Humanitarian Concern, subclass 786 visa on 10 September 2014.
53. I find that the Department's failure to refer Mr Ghahani's case to the Minister for consideration of his discretionary powers under s 197AB or s 195A of the Migration Act until 30 July 2014 is an act that is inconsistent with or contrary to the human right recognised in article 9(1) of the ICCPR. I find that the failure to refer Mr Ghahani's case to the Minister until 30 July 2014 resulted in Mr Ghahani's detention from 7 March 2013 to 10 September 2014 being arbitrary.

5 Impact of detention on mental health

54. Mr Ghahani complains that his detention in the VIDC caused him significant psychological harm. He appears to claim that the adverse impact of detention on his mental health amounts to a breach of his human rights.
55. This complaint raises for consideration article 7 of the ICCPR, which prohibits cruel, inhuman or degrading treatment.
56. In *C v Australia*,¹⁰ the United Nations Human Rights Committee found that the continued detention of C when the State party was aware of the deterioration of C's mental health constituted a breach of article 7 of the ICCPR. The Committee stated:

...the State party was aware, at least from August 1992 when he was prescribed the use of tranquilisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt) it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow.¹¹

57. The relevant question for the purposes of article 7 of the ICCPR is whether Mr Ghahani's detention has caused him to sustain a level of psychological impairment such that it amounts to cruel, inhuman or degrading treatment.
58. A report from psychologist Ms Mirjana Askovic dated 21 September 2013 states that Mr Ghahani reported and presented with features of Post-Traumatic Stress Disorder, Anxiety and Depression. She concluded that:
- Mr Ghahani would also benefit if released into community detention where he could receive support from his brother and reduce his social isolation.
59. While in detention it appears that Mr Ghahani was reviewed regularly by mental health professionals and was provided with medication.
60. Whilst I accept that Mr Ghahani found his time in detention in the VIDC distressing, there is no evidence before me that he suffered irreversible psychological impairment such that his detention in the VIDC amounted to cruel, inhuman or degrading treatment.
61. I therefore find that the Department's failure to refer Mr Ghahani's case to the Minister for consideration of his discretionary powers under s 197AB or s 195A of the Migration Act until 30 July 2014 was not inconsistent with or contrary to article 7 of the ICCPR.

6 Recommendations

62. 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.¹² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹³ The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - other action to remedy or reduce the loss or damage suffered by a person.¹⁴

6.1 Compensation

63. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
64. 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.¹⁵
65. 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.¹⁶

(a) Compensation

66. I have been asked to consider compensation for Mr Ghahani being arbitrarily detained in contravention of article 9(1) of the ICCPR.
67. 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 authority for the detention, whereas a breach of article 9(1) of the ICCPR will be made out where it can be established that the detention was arbitrary, irrespective of legality.
68. Notwithstanding this important distinction, the damages awarded in false imprisonment cases provide an appropriate guide for the award of compensation for the breach of article 9(1) of the ICCPR. 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.
69. 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).¹⁷
70. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁸ Siopis J considered the judicial guidance available on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment. Siopis J referred to the case of *Nye v State of New South Wales*:¹⁹
- The *Nye* case is useful in one respect, namely, that the court was required to consider the quantum of damages to be awarded to Mr Nye in respect of his loss of liberty for a period of some 16 months which he spent in Long Bay Gaol. In doing so, consistently with the approach recognised by Spigelman CJ in *Ruddock* (NSWCA), the Court did not assess damages by application of a daily rate, but awarded Mr Nye the sum of \$100,000 in general damages. It is also relevant to observe that in *Nye*, the court referred to the fact that for a period of time during his detention in Long Bay Gaol, Mr Nye feared for his life at the hands of other inmates of that gaol.²⁰
71. Siopis J noted that further guidance on the quantum of damages for loss of liberty for a long period arising from wrongful imprisonment can be obtained from the case of *Ruddock* (NSWCA).²¹ In that case at first instance,²² the New South Wales District Court awarded the plaintiff, Mr Taylor, the sum of \$116,000 in damages in respect of wrongful imprisonment, consequent upon his detention following the cancellation of his permanent residency visa on character grounds.
72. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. In that case, because Mr Taylor's convictions were in relation to sexual offences against children, Mr Taylor was detained in a state prison under a 'strict protection' regime and not in an immigration detention centre. The detention regime to which Mr Taylor was subjected was described as a 'particularly harsh one'.
73. The Court also 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.²³

74. On appeal, in the New South Wales Court of Appeal, Spigelman CJ considered the adequacy of the damages awarded to Mr Taylor and observed that the quantum of damages was low, but not so low as to amount to appellable error.²⁴ Spigelman CJ also observed that:

Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as “the initial shock of being arrested”. (*Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.²⁵

75. Although in *Fernando v Commonwealth of Australia (No 5)*, Siopis J ultimately accepted the Commonwealth’s argument that Mr Fernando was only entitled to nominal damages,²⁶ his Honour considered the sum of general damages he would have awarded in respect of Mr Fernando’s claim if his findings in respect of the Commonwealth’s argument on nominal damages were wrong. Mr Fernando was wrongfully imprisoned for 1,203 days in an immigration detention centre. Siopis J accepted Mr Fernando’s evidence that he suffered anxiety and stress during his detention and, also, that he was treated for depression during and after his detention and took these factors into account in assessing the quantum of damages. His Honour also noted that Mr Fernando’s evidence did not suggest that in immigration detention he was subjected to the harsh ‘strict protection’ regime to which Mr Taylor was subjected in a state prison, nor that Mr Fernando feared for his life at the hands of the inmates in the same way that Mr Nye did whilst he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando in respect of his 1,203 days in detention the sum of \$265,000.²⁷

(b) Recommendation that compensation be paid

76. I have found that Mr Ghahani’s detention in the VIDC from 7 March 2013 to 10 September 2014 was arbitrary within the meaning of article 9(1) of the ICCPR.
77. I consider that the Commonwealth should pay to Mr Ghahani an appropriate amount of compensation to reflect the loss of liberty caused by his detention in accordance with the principles outlined above.
78. The information before me indicates that immigration detention had an adverse impact on the mental health of Mr Ghahani. This factor should be taken into account in the quantum of compensation.

6.2 Apology

79. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr Ghahani. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁸

7 Department's response

80. On 9 November 2015, the Department provided a written response to my findings and recommendations.

81. In relation to my findings and recommendation that Mr Ghahani be paid compensation the Department stated:

The Department maintains that Mr Ghahani's placement in a detention centre was appropriate, reasonable and justified in the individual circumstances of his case.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2005*. The *Legal Service Directions 2005* provide that a matter may only be settled where there is at least a meaningful prospect of liability being established against the Commonwealth. Furthermore, the amount of compensation that is offered must be in accordance with legal principle and practice. The Department considers that Mr Ghahani's detention was lawful and that the decisions and processes were appropriate having regard to his circumstances. The Department therefore considers that there is no meaningful prospect of liability being established against the Commonwealth under Australian domestic law and, as such, no proper legal basis to consider a payment of compensation to Mr Ghahani. The Department therefore is unable to pay compensation to Mr Ghahani.

Although there are limited circumstances in which the Commonwealth may pay compensation on a discretionary basis, Resource Management Guide No. 409 generally limits such payments to situations where a person has suffered some form of financial detriment or injury arising out of defective administration on the part of the Commonwealth, or otherwise experienced an anomalous, inequitable or unintended outcome as a result of application of the Commonwealth legislation or policy. On the basis of the current information, the Department is not satisfied that there is a proper basis for the payment of discretionary compensation at this time.

82. The Department advised that it would not be taking action in relation to my recommendation that the Commonwealth provide a formal written apology to Mr Ghahani.

83. I report accordingly to the Attorney-General.



Gillian Triggs

President

Australian Human Rights Commission

December 2015

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 2 UN Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Article 9)* (1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GNE/1/Rev.1 (1994) 8. 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.
- 3 UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (Oxford University Press, 2nd ed, 2004) p 308, [11.10].
- 4 *Manga v Attorney-General* [2000] 2 NZLR 65 at [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.
- 5 *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 was 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.
- 6 *Van Alphen v The Netherlands* [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988.
- 7 *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, UN Doc CCPR/C/78/D/1014/2001; *D and E v Australia* [2006] UNHRC 32, UN Doc CCPR/C/87/D/1050/2002.
- 8 *F.K.A.G. et al. v Australia*, Communication No 2094/2011 UN Doc CCPR/C/108/D/2094/2011.
- 9 *Migration Act 1958* (Cth), s 5.
- 10 UN Human Rights Committee, *C v Australia*, Communication No 900/1999. UN Doc CCPR/C/76/D/900/1999 (2002).
- 11 UN Human Rights Committee, *C v Australia*, Communication No 900/1999. UN Doc CCPR/C/76/D/900/1999 (2002), [8.4].
- 12 AHRC Act, s 29(2)(a).
- 13 AHRC Act, s 29(2)(b).
- 14 AHRC Act, s 29(2)(c).
- 15 *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 16 *Hall v A&A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 17 *Cassel & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoli v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
- 18 [2013] FCA 901.
- 19 [2003] NSWSC 1212.
- 20 [2013] FCA 901, [121].
- 21 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 22 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 23 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140].
- 24 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 25 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 26 The court awarded nominal damages of one dollar for the unlawful detention of Mr Fernando because as a non-citizen, once he committed a serious crime, he was always liable to have his visa cancelled: *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [98]-[99].
- 27 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901, [139].
- 28 D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1st ed, 2000) 151.

Further Information

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