



Australian
Human Rights
Commission

Arif v Commonwealth of Australia (DIBP)

[2014] AusHRC 75

© Australian Human Rights Commission 2014.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to the Australian Human Rights Commission and abide by the other licence terms.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

Electronic format

This publication can be found in electronic format on the website of the Australian Human Rights Commission:
www.humanrights.gov.au/publications/index.html.

Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Communications Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

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

Report into arbitrary detention

[2014] AusHRC 75

Australian Human Rights Commission 2014



**Australian
Human Rights
Commission**

Contents

1	Introduction	3
2	Summary of findings	3
3	Recommendations	3
4	The Complaint by Mr Arif	3
5	The Commission's human rights inquiry and complaints function	4
6	Immigration detention	4
	6.1 Act or practice of the Commonwealth?	4
	6.2 Inconsistent with or contrary to human rights?	5
7	Recommendations	6
	7.1 Consideration of compensation	6
	7.2 Recommendation that compensation be paid	7
8	Commonwealth's response to findings and recommendations	8



**Australian
Human Rights
Commission**

June 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 a complaint made by Mr Shumile Arif.

I find that the failure of the Minister for Immigration and Border Protection (Minister) to place Mr Arif into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

By letters dated 28 April 2014 and 8 May 2014, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, and the Department of Immigration and Border Protection (Department), provided responses to my findings and recommendations. I have set out the responses of the Minister and the Department in Part 8 of my report.

Please find enclosed a copy of my report.

Yours sincerely

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

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission and the reasons for those findings following an inquiry by the Commission into a complaint lodged by Mr Shumile Arif.
2. Mr Arif alleges that his treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.

2 Summary of findings

3. I find that the failure of the Minister to place Mr Arif into community detention or another less restrictive form of detention was inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

3 Recommendations

4. In light of my findings regarding the acts and practices of the Commonwealth, I recommend that the Commonwealth pay compensation to Mr Arif in the amount of \$200,000.

4 The Complaint by Mr Arif

5. On 14 February 2006, Mr Arif arrived in Australia from Pakistan on a Postgraduate Sector Student visa.
6. On 28 April 2008, Mr Arif's student visa expired. Mr Arif was then granted a number of Bridging visas in order to allow him to lodge an application for a further Student visa. Mr Arif did not lodge a further Student visa application.
7. Between 16 June 2008 and 22 September 2008, Mr Arif was granted a series of four Bridging visas on departure grounds. However, Mr Arif did not depart Australia and on 25 October 2008 he became an unlawful non-citizen.
8. On 18 March 2009, the Commonwealth detained Mr Arif pursuant to section 189(1) of the *Migration Act 1958* (Cth) (Migration Act) in Villawood Immigration Detention Centre (VIDC).
9. On 19 March 2009, Mr Arif lodged an application for a Protection visa. This was refused by the Minister's delegate on 7 May 2009. Subsequently, Mr Arif applied to the Refugee Review Tribunal (RRT) for merits review of the Minister's decision. The RRT affirmed the decision of the Minister's delegate to not grant a Protection visa to Mr Arif.
10. On 19 August 2009, Mr Arif applied to the Federal Magistrates Court (FMC) for judicial review of the RRT decision. On 22 December 2009, the FMC found that the RRT's decision was affected by jurisdictional error; it set aside the decision and remitted the matter back to the RRT for reconsideration according to law.

11. On 3 February 2010, the Minister appealed the decision of the FMC to the full court of the Federal Court of Australia (Full Court). In May 2010, the Full Court allowed the Minister's appeal and upheld the RRT decision.
12. On 7 June 2010, Mr Arif applied to the High Court for special leave to appeal from the decision of the Full Court. On 9 March 2011, the High Court of Australia dismissed Mr Arif's application for special leave.
13. On 13 June 2011, Mr Arif was removed from Australia and returned to Pakistan.
14. Mr Arif claims that his detention in VIDC was arbitrary within the meaning of article 9(1) of the ICCPR.

5 The Commission's human rights inquiry and complaints function

15. Section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) provides that the Commission has a function to inquire into any act or practice that may be inconsistent with or contrary to any human right.¹
16. Section 3(1) of the AHRC Act defines 'act' to include an act done by or on behalf of the Commonwealth. Section 3(3) provides that the reference to, or the doing of, an act includes the reference to the refusal or failure to do an act.
17. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where an act complained of is not one required by law to be taken.²

6 Immigration detention

18. Mr Arif complains about being detained by the Commonwealth within an immigration detention centre from 18 March 2009, when he was placed in immigration detention, until 13 June 2011, when he was removed from Australia.

6.1 Act or practice of the Commonwealth?

19. There are a number of powers that the Minister could have exercised so that Mr Arif was detained in a less restrictive manner than in immigration detention.
20. The Minister could have made a residence determination in favour of Mr Arif. Under section 197AB of the Migration Act, if the Minister thinks that it is in the public interest to do so, the Minister may make a determination that particular persons are to reside at a specified place, instead of in immigration detention.
21. The Minister could have approved a less restrictive place than VIDC as Mr Arif's place of detention. The definition of 'immigration detention' includes being held by, or on behalf of an officer in another place approved by the Minister in writing.³

22. On 4 November 2010, the Minister declined to make a section 197AB residence determination in relation to Mr Arif.
23. I find that the failure of the Minister to place Mr Arif in a less restrictive form of detention than in an immigration detention centre constitutes an act within the meaning of the AHRC Act.

6.2 Inconsistent with or contrary to human rights?

24. Mr Arif claims that his detention by the Commonwealth arbitrarily deprived him of his liberty.
25. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁴
26. The Commonwealth does not remove unlawful non-citizens from Australia while they are exercising their right to seek judicial review of the decision to refuse to grant a visa. Given the levels of judicial review available to an unlawful non-citizen, exhaustion of his or her review rights is likely to take a period of months, at a minimum. Mr Arif appears to have sought a review of the decision of the Minister's delegate to refuse to grant him a Protection visa within the statutory time frame for seeking review. Accordingly, by early 2009 Mr Arif had evinced an intention to seek review of the decision to refuse to grant him a Protection visa.
27. The information before me suggests that the Commonwealth did not consider placing Mr Arif in a less restrictive form of detention than immigration detention until early 2010.
28. In June 2010, the Minister indicated that he was willing to consider making a residence determination in relation to Mr Arif. In November 2010, a new Minister declined to make a residence determination in relation to Mr Arif.
29. The submissions that were provided to the Minister by the Department to assist the Minister to consider whether to make a residence determination in relation to Mr Arif note that he was advanced in litigation against the Commonwealth and that he had breached the conditions of his Bridging visas.
30. In its response to my preliminary view, the Commonwealth has stated that '*based on Mr Arif's history of non-compliance with Bridging visa conditions and the risk of absconding should he have been placed in a less restrictive form of detention, the Department assessed that his placement in a detention centre was appropriate, reasonable and justifiable in the individual circumstances of this case*'. I understand that Mr Arif's non-compliance with Bridging visa conditions was a real factor in this assessment.
31. Although Mr Arif breached the condition of his Bridging visa that required him to depart Australia, this does not necessarily indicate that he represented a flight risk.
32. In any event, as the Department's submission to the Minister of October 2010 indicates, if the Minister decided to place Mr Arif in community detention, strict reporting conditions could have been imposed to reflect Mr Arif's previous non-compliance with Bridging visa conditions. In my view, any risk that Mr Arif might abscond could have been mitigated by the imposition of strict reporting conditions on his community detention placement.
33. Given the material before me, I find that Mr Arif's detention in an immigration detention centre for more than two years was arbitrary within the meaning of article 9(1) of the ICCPR, save for a short period of time when the Commonwealth facilitated Mr Arif's removal from Australia and return to Pakistan.

7 Recommendations

34. 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.⁵ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁶
35. 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.⁷

7.1 Consideration of compensation

36. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
37. However, in considering the assessment of a recommendation for compensation under section 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.
38. 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.
39. The tort of false imprisonment is a more limited action than an action for breach of article 9(1). This is because an action for false imprisonment cannot succeed where there is a 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.
40. 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.
41. 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).⁸
42. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,⁹ 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*:¹⁰
- ...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 recognized 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.¹¹

43. 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).¹² In that case, at first instance,¹³ 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.
44. Mr Taylor was detained for two separate periods. The first was for 161 days and the second was for 155 days. Although the award of the District Court was ultimately set aside by the High Court, it provides a useful indication of the calculation of damages for a person being unlawfully detained for a significant period of time.
45. 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.
46. 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.
47. On appeal, the Court of Appeal of New South Wales considered that the award was low but in the acceptable range. The Court noted that ‘as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish’.¹⁴
48. 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,¹⁵ 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 inmates in the same way that Mr Nye did while he was detained at Long Bay Gaol. Taking all of these factors into account, Siopis J stated that he would have awarded Mr Fernando the sum of \$265,000 in respect of his 1,203 days in detention.¹⁶

7.2 Recommendation that compensation be paid

49. I have found that Mr Arif’s detention was arbitrary within the meaning of article 9(1) of the ICCPR and that he should have been placed in community detention, or another less restrictive form of detention, rather than in VIDC.
50. I consider that the Commonwealth should pay Mr Arif an amount of compensation to reflect the loss of liberty caused by his detention at VIDC. Had Mr Arif been transferred to community detention, or another less restrictive form of detention, he would still have experienced some curtailment of his liberty and I have taken that into account when assessing compensation.
51. The information before me indicates that immigration detention had an adverse impact on Mr Arif’s mental health and I have taken this factor into account when assessing compensation.

52. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Mr Arif was detained from 18 March 2009 until 13 June 2011, being a period of approximately 27 months. Neither party has suggested that Mr Arif's removal from Australia should have any impact on my assessment. Taking into account the guidance provided by the decisions referred to above, I consider that compensation in the amount of \$200,000 is appropriate.

8 Commonwealth's response to findings and recommendations

53. On 24 February 2014, I provided a notice to the Department under s 29(2)(a) of the AHRC Act setting out my findings and recommendation in relation to this complaint.
54. By letter dated 28 April 2014, the Hon Scott Morrison MP, Minister for Immigration and Border Protection, provided the following response to my finding that the failure of the Minister to place Mr Arif into community detention, or another less restrictive form of detention, was inconsistent with the prohibition on arbitrary detention in article 9(1) of the ICCPR:

The Australian Government does not accept this view.

...

I am unable to speak on behalf of my predecessors, however, I note that any decisions made under section 197AB of the Act requires the consideration of many factors, including a detainee's immigration pathway, behaviour in detention, risk to the Australian community and connection to the Australian community.

Specifically, with regard to Mr Arif, the Department assessed his placement at Villawood Immigration Detention Centre as appropriate based on his history of non-compliance with bridging visa conditions and the risk of absconding should he have been placed in a less restrictive form of detention.

On 3 July 2010, a former Minister agreed to consider intervening in Mr Arif's case under section 197AB of the Act, to place him into community detention. A further submission was referred to a former Minister for his final decision in Mr Arif's case under section 197AB of the Act.

However, on 4 November 2010, a former Minister declined to intervene in Mr Arif's case under section 197AB, as the Department had tentatively scheduled his involuntary removal for the week commencing 6 December 2010, pending the finalisation of his High Court (HC) matter (which was not finalised until 11 March 2011, and resulted in the HC dismissing his case).

Ultimately, decisions relating to residence determination under section 197AB of the Act are made at the discretion of the Minister, and are a reflection of what is deemed to be in the public interest at that time. Mr Arif's detention was appropriate, reasonable and justified in the individual circumstances of his case and therefore not arbitrary.

55. By letter dated 8 May 2014, the Department provided a response to my recommendation that the Commonwealth pay compensation to Mr Arif in the amount of \$200,000:

The Department maintains that Mr Arif's detention was proportionate with the Australian Government's aim of achieving his removal from Australia and was not unlawful or arbitrary within the meaning of article 9(1) of the ICCPR.

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

56. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

-
- 1 Section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) defines human rights to include the rights recognised by the *International Covenant on Civil and Political Rights*.
 - 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 3 *Migration Act 1958* (Cth)
 - 4 *Van Alphen v Netherlands* Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988, *A v Australia* Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993, *C v Australia* No 900/1999 UN Doc CCPR/C/76/D/900/1999.
 - 5 AHRC Act s 29(2)(a).
 - 6 AHRC Act s 29(2)(b).
 - 7 AHRC Act s 29(2)(c).
 - 8 *Cassell & Co Ltd v Broome* (1972) AC 1027, 1124; *Spautz v Butterworth & Anor* (1996) 41 NSWLR 1 (Clarke JA); *Vignoll v Sydney Harbour Casino* [1999] NSWSC 1113 (22 November 1999), [87].
 - 9 [2013] FCA 901.
 - 10 [2003] NSWSC 1212.
 - 11 [2013] FCA 901 at [121].
 - 12 *Ruddock v Taylor* (2003) 58 NSWLR 269.
 - 13 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
 - 14 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 15 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].
 - 16 *Fernando v Commonwealth of Australia* (No 5) [2013] FCA 901 [139].

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
www.humanrights.gov.au

To order more publications from the Australian Human
Rights Commission download a Publication Order Form at:
www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

