



Australian
Human Rights
Commission

HG v

Commonwealth of

Australia (DIBP)

[2015] AusHRC 100

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

[2015] AusHRC 100

Report into arbitrary detention

Australian Human Rights Commission 2015



**Australian
Human Rights
Commission**

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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 HG against the Commonwealth of Australia – Department of Immigration and Border Protection (the Department).

I have found that the Department failed to consider whether Mr HG could be placed in community detention, or another less restrictive form of detention, for a period of approximately 20 months during the period from 21 August 2013 to 2 June 2015. I find this failure arbitrary and inconsistent with Mr HG's right to liberty under article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

In light of my findings, I recommended that the Commonwealth pay an appropriate amount of compensation to Mr HG and apologise to him.

By letter dated 14 September 2015 the Department provided a response to my recommendations. I have set out the Department's response in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr HG against the Commonwealth of Australia (Department of Immigration and Border Protection) (the Department), alleging a breach of his human rights. Namely, the right recognised by article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. This is a report setting out the findings of the Commission in relation to Mr HG's complaint.

2 Summary of findings and recommendations

4. As a result of this inquiry, I have found that the Department failed to consider whether Mr HG could be placed in community detention, or another less restrictive form of detention, for a period of approximately 20 months. I find this failure arbitrary and inconsistent with Mr HG's right to liberty under article 9(1) of the ICCPR.
5. In light of this finding, I recommend that the Commonwealth pay an appropriate amount of compensation to Mr HG, in accordance with the principles outlined in part 6.2 below. I also recommend that the Commonwealth apologise to Mr HG.

3 Background

6. Mr HG is a national of Iran who arrived on Christmas Island as an undocumented maritime arrival on 26 June 2010. He was initially detained on Christmas Island at the North West Point Immigration Detention Centre, before being transferred to the mainland on 1 September 2011.
7. On 30 March 2011, Mr HG was assessed by the Department as not being a refugee within the meaning of the *Convention Relating to the Status of Refugees*. On 20 September 2011, an Independent Merits Review affirmed the Department's decision that Mr HG was not a refugee.
8. On 8 May 2012, the Minister agreed to exercise his public interest powers under section 197AB of the *Migration Act 1958* (Cth) (Migration Act) and made a residence determination for Mr HG to reside in community detention. On 21 May 2012, Mr HG was placed into community detention in Western Australia. Mr HG's period of detention prior to the residence determination is the subject of an earlier complaint by Mr HG to the Commission.
9. On 25 March 2013, Mr HG was granted a Temporary Humanitarian visa and a Bridging visa E (BVE).
10. On 11 July 2013, Mr HG was asked by the Department to sign documentation agreeing to new BVE conditions, including in relation to travel and departure arrangements from Australia. He refused to agree to these conditions and at midnight on 11 August 2013 his BVE expired. At this point, he became an unlawful non-citizen under section 14 of the Migration Act.

11. On 21 August 2013, Mr HG attended the Department's local office for consideration of his BVE re-grant. He was intercepted by Western Australian Police and then transferred into Australian Federal Police custody. Being an unlawful non-citizen, Mr HG was detained under section 189(1) of the Migration Act and placed into Perth Immigration Detention Centre.
12. On 29 August 2013, Mr HG made a second complaint to the Commission, which is the subject of the present inquiry.
13. From 1 October 2013, Mr HG has been primarily detained at Yongah Hill Immigration Detention Centre (IDC), save for three short periods when he was admitted to mental health hospitals: from 2 to 17 January 2014, Mr HG was admitted to Toowong Private Psychiatric Hospital, Queensland; from 21 to 30 March 2015, he was admitted to Graylands Hospital, Western Australia; and from 2 to 27 May 2015, he was admitted to Pine Rivers Private Hospital, Queensland.
14. On 27 May 2015, Mr HG returned to Yongah Hill IDC and on 2 June 2015, he requested voluntary removal from Australia. The Department advised that as at 6 July 2015, it was processing Mr HG's removal request.

4 Legislative Framework

4.1 Functions of the Commission

15. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, section 11(1)(f) gives the Commission the following functions:
 - to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
16. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act or practice is inconsistent with or contrary to any human right.

4.2 What is a ‘human right’?

17. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.¹
18. 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.

4.3 What is an ‘act’ or ‘practice’?

19. 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.
20. Section 3(3) of the AHRC Act provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
21. 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;² that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

5 Assessment

5.1 Act or practice of the Commonwealth

22. I find that the Commonwealth’s failure to consider whether Mr HG could be placed in a less restrictive form of detention than an immigration detention centre, for a period of approximately 20 months, constitutes an act under the AHRC Act.
23. Since 21 August 2013, Mr HG has been detained under section 189(1) of the Migration Act. While section 189(1) requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens be detained in an immigration detention facility.
24. Under section 197AB of the Migration Act, if the Minister thinks 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.
25. 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’.³
26. Accordingly, the Minister could have made a residence determination in relation to Mr HG under section 197AB of the Migration Act or he could have approved that Mr HG reside in a place other than an immigration detention centre.

5.2 Inconsistent with or contrary to human rights

27. Mr HG has been detained in immigration detention centres for approximately 20 months, since 21 August 2013.
28. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁴
29. In its General Comment No. 35, published 28 October 2014, the United Nations Human Rights Committee makes the following comments about immigration detention:

Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum 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 in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.⁵

30. In Mr HG's case, it is necessary to consider whether his prolonged detention in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to him, and in light of the available alternatives to closed detention.
31. On 10 April 2015, the Department confirmed that since Mr HG was placed in detention on 21 August 2013, it has not referred his case to the Minister for consideration of the exercise of his powers under sections 195A and 197AB of the Migration Act. The Department also confirmed that it has not considered Mr HG's case against the Minister's Guidelines for the referral of matters to him for consideration under sections 195A and 197AB of the Migration Act. The Department stated that:

...since receiving this request for further information from the Commission, the Department has reviewed his case and a submission will be progressed for the Minister's consideration. The Department will provide the Commission with an update once the submission has been provided to the Minister's office.

While Mr HG's circumstances in detention were monitored by Departmental case managers and service providers, the Department has not as yet undertaken a formal and documented assessment of Mr HG's case against the Ministerial guidelines. Following a review of his case, the Department is preparing a submission for the Minister's consideration.

32. On 6 July 2015, the Department provided a response to my preliminary view of Mr HG's complaint (Response). It stated that on 2 May 2015, Mr HG was admitted to Pine Rivers Hospital, Queensland. The submission to the Minister was deferred as an occupational therapy assessment, which would help inform the Minister about any proposed community detention placement, could not be obtained during Mr HG's hospital admission period.

33. The Response also included three sets of section 197AB and 197AD Ministerial Guidelines, respectively articulated by the former Minister O'Connor, the former Minister Morrison and Minister Dutton (Guidelines). These Guidelines applied variously during Mr HG's period of detention. Relevantly, each of the Guidelines identified adults with a mental health illness as a category of case the Department should refer to the Minister for consideration under section 197AB (at paragraph 8). At all relevant times since Mr HG re-entered closed detention in August 2013, the Department was aware of his serious mental health diagnosis. For this reason, he fell within the scope of the Guidelines for cases to be referred to the Minister for consideration under section 197AB.
34. There were also factors weighing against referral. Each of the Guidelines provided that where 'a person has had their asylum claims rejected at primary and review stages (finally determined)' the Minister would not expect the Department to refer the case for consideration under section 197AB 'unless there are exceptional reasons' (at paragraph 10). Mr HG's asylum claims were rejected at the primary and review stages, so his case was 'finally determined'.
35. The Department also suggests that because two cases concerning Mr HG (involving possession of a contraband item and damage to property) were referred to the Australian Federal Police (AFP) for investigation, this was a further 'paragraph 10' factor weighing against referral under the Guidelines. The relevant Guidelines state that where a person 'is charged with an offence but is awaiting the outcome of the charges', the Minister would not expect the Department to refer the case for consideration under section 197AB 'unless there are exceptional reasons'. However, Mr HG had not been charged by the AFP in relation to either of these matters. The matters were referred to the AFP for further investigation. Each investigation was finalised by the AFP within a month with no further action required. I do not find that these investigations by the AFP fell within the scope of 'paragraph 10' considerations.
36. In any case, the Department states that 'there are no departmental records indicating why paragraph 10 outweighed paragraph 8 considerations in this particular case.' That is, the Department has no records indicating why the factors against referral outweighed the factors in favour of referral in Mr HG's case.
37. This statement by the Department is consistent with the information provided by the Department on 10 April 2015 that 'the Department has not as yet undertaken a formal and documented assessment of Mr HG's case against the Ministerial guidelines.' The Department's Response does not address the reasons why it has not considered Mr HG's suitability for less restrictive forms of detention and undertaken an assessment of his case against the Guidelines, some 20 months after he re-entered closed immigration detention. The Department has not justified Mr HG's prolonged detention in an immigration detention centre as necessary and proportionate to any legitimate aim of the Commonwealth.
38. This is of particular concern in light of the Department's awareness of the gravity of Mr HG's mental health issues. On this point, the Department's records indicate that Mr HG has:
- reported a history of torture and trauma upon arrival in Australia;
 - been engaged with the IHMS Mental Health Team since April 2011. An IHMS Psychology Report dated 2 September 2014 states 'There has been a documented and consistent history of concern for [Mr HG's] mental health welfare, and regular statements that the risk of further decline would be likely to increase as a function of extended time in detention';

- been involved in at least seven incidents of actual and threatened self-harm during his time in closed detention;
- been admitted as an in-patient at mental health hospitals on four occasions: Graylands Psychiatric Hospital from 1 to 7 September 2011; Toowong Private Psychiatric Hospital from 2 to 17 January 2014; Graylands Psychiatric Hospital from 21 to 30 March 2015; and Pine Rivers Private Hospital from 2 to 27 May 2015; and
- engaged in 57 days of voluntary starvation over the course of August to October 2013.

39. On numerous occasions, the Department was in receipt of advice from mental health professionals that Mr HG's mental health condition could only be adequately addressed in a community environment:

- in September 2013, shortly after Mr HG re-entered closed detention, psychiatric assessments suggested that Mr HG's health problems would be best managed in the community;
- on 9 December 2013, following Mr HG's attempts at self-harm, a psychiatric report recommended that Mr HG be removed to a supportive community detention environment as soon as possible;
- on 23 December 2013, a psychologist's report noted a significant deterioration in Mr HG's mental health and recommended placement in community detention. This was supported by a psychiatrist's report, which further noted that Mr HG was at risk of death in detention;
- in April 2014, a psychiatric report noted that the longer Mr HG was kept in closed detention, the more likely the risk of suicide, and that the solution would be a different form of management in the community;
- in August 2014, a psychiatric report concluded that the only mental health solution would be release into the community;
- in September 2014, a psychologist's report strongly advocated the release of Mr HG into the community to minimise the aggravation of chronic mental health issues which have developed as a result of prolonged detention; and
- in December 2014, an IHMS health summary report reiterated that with regard to Mr HG's health condition, the only solution is for him to be released into the community again.

40. I find that the Department's failure to consider whether Mr HG could be placed in community detention, or another less restrictive form of detention than an immigration detention centre, during the period from 21 August 2013 to 2 June 2015 when he requested voluntary removal from Australia, was arbitrary and inconsistent with his right to liberty under article 9(1) of the ICCPR.

6 Recommendations

6.1 Power to make recommendations

41. 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.⁶ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.⁷
42. The Commission may also recommend:⁸
- (a) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice; and
 - (b) the taking of other action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.

6.2 Consideration of compensation

43. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
44. 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.
45. 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.
46. 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 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.
47. 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.
48. 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).⁹

49. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁰ 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*:¹¹

...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.¹²

50. 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).¹³ In that case, at first instance,¹⁴ 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.

51. 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'.

52. 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.¹⁵

53. On appeal, the New South Wales Court of Appeal 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'.¹⁶

54. 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,¹⁷ 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.¹⁸ On appeal, the Full Federal Court noted that although 'the primary judge's assessment seems to us to be low', it was not so low as to indicate error.¹⁹

6.3 Recommendation that compensation be paid

55. I have found that the detention of Mr HG at Yongah Hill IDC, during an approximately 20 month period, amounted to a breach of his rights under article 9 of the ICCPR.
56. I consider that the Commonwealth should pay to Mr HG an appropriate amount of compensation to reflect the loss of liberty caused by his detention in line with the principles set out above.
57. The information before me indicates that immigration detention had an adverse impact on the mental health of Mr HG. This factor should be taken into account in the quantum of compensation.

6.4 Apology

58. In addition to compensation, I consider that it is appropriate that the Commonwealth provide a formal written apology to Mr HG for the breaches of his human rights. Apologies are important remedies for breaches of human rights. They, at least to some extent, alleviate the suffering of those who have been wronged.²⁰

7 Department's response

59. On 14 September 2015, the Department provided a response to my findings and recommendations.
60. In relation to my recommendation that Mr HG be paid compensation, the Department stated:

The Department maintains that Mr HG's immigration detention was lawful and carried out in accordance with applicable statutory procedure prescribed under the *Migration Act 1958*.

Any monetary claim for compensation against the Commonwealth can only be considered where it is consistent with the *Legal Services Directions 2005*. The *Legal Services 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 HG'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 HG. The Department therefore is unable to pay compensation to Mr HG.

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.

61. In relation to my recommendation that the Department apologise to Mr HG, the Department advised that it would not be taking any action in response to this recommendation.
62. I report accordingly to the Attorney General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs
President
Australian Human Rights Commission
December 2015

- 1 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 3 Migration Act s 5.
- 4 *Van Alphen v The Netherlands* Communication No 305 of 1988, UN Doc CCPR/C/39/D/305/1988, *A v Australia* Communication No 560 of 1993, UN Doc CCPR/C/59/D/560/1993, *C v Australia* Communication No 900 of 1999, UN Doc CCPR/C/76/D/900/1999.
- 5 UN Human Rights Committee, General Comment 35 (2014) at [18].
- 6 AHRC Act s 29(2)(a).
- 7 AHRC Act s 29(2)(b).
- 8 AHRC Act s 29(2)(c).
- 9 *Cassell & 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, [87].
- 10 [2013] FCA 901.
- 11 [2003] NSWSC 1212.
- 12 [2013] FCA 901, [121].
- 13 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 14 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
- 15 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)), [140].
- 16 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 17 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
- 18 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].
- 19 *Fernando v Commonwealth of Australia* [2014] FCAFC 181 [113].
- 20 D Shelton, *Remedies in International Human Rights Law* (2000), 151.

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