



Australian
Human Rights
Commission

AH v

Commonwealth of
Australia (DIBP)

[2014] AusHRC 88

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AH v Commonwealth of Australia (Department of Immigration and Border Protection)

Report into arbitrary detention

[2014] AusHRC 88

Australian Human Rights Commission 2014



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**Australian
Human Rights
Commission**

September 2014

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

I have found that the Commonwealth's failure to detain Mr AH in the least restrictive manner possible is inconsistent with the prohibition on arbitrary detention in article 9(1) of the *International Covenant on Civil and Political Rights*. In light of my findings, I recommended that the Commonwealth pay compensation to Mr AH in the amount of \$200,000 and refer Mr AH's case to the Minister for Immigration and Border Protection (Minister) without further delay, so that the Minister may consider exercising his power to make a residence determination under section 197AB of the *Migration Act 1958* (Cth).

By letter dated 20 August 2014 the Department provided a response to my finding and recommendations. I have outlined the Department's response in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs'.

Gillian Triggs
President
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 and the reasons for those findings following an inquiry by the Commission into the complaint lodged by Mr AH.
2. Mr AH alleges that his treatment by the Commonwealth of Australia – Department of Immigration and Citizenship (subsequently redesignated as the Department of Immigration and Border Protection (Department)), involves acts or practices inconsistent with or contrary to his human rights under the *International Covenant on Civil and Political Rights* (ICCPR).

2 Summary of findings

3. I find that the Commonwealth's failure to detain Mr AH in the least restrictive manner possible is inconsistent with the prohibition on arbitrary detention in article 9(1) of the ICCPR.

3 Recommendations

4. In light of my findings regarding the acts and practices of the Commonwealth, I recommend that:
 - i. the Commonwealth pay compensation to Mr AH in the amount of \$200,000; and
 - ii. the Department refer Mr AH's case to the Minister without further delay, so that the Minister may consider exercising his power to make a residence determination under section 197AB of the Migration Act.

4 The complaint by Mr AH

5. Mr AH made a written complaint to the Commission dated 21 March 2012.
6. Mr AH is a national of Sri Lanka who arrived on Christmas Island on 25 April 2009 as an undocumented Irregular Maritime Arrival (IMA). He is currently detained in Villawood Immigration Detention Centre (VIDC).
7. On 22 June 2009 Mr AH was found not to be a refugee as a result of the Refugee Status Assessment process. Mr AH did not lodge an Independent Merits Review.
8. On 16 September 2009 Mr AH was transferred to Perth where he was met at the airport by the Australian Federal Police (AFP) and taken into custody.
9. On 30 September 2009 Mr AH was transferred into criminal detention at Hakea Prison on charges related to people smuggling. He was granted a Criminal Justice Stay subclass ZB951 visa (CJV).
10. On 19 November 2010 Mr AH was convicted of people smuggling related offences and sentenced to five years imprisonment.
11. On 22 March 2011 Mr AH lodged a Protection Visa application. This was refused on 14 June 2011. The Refugee Review Tribunal (RRT) affirmed this decision on 13 January 2012.

12. On 24 January 2012 the Western Australian Court of Appeal upheld Mr AH's appeal against his people smuggling conviction and ordered that he be retried. As the Director of Public Prosecutions elected not to further prosecute Mr AH, his conviction for people smuggling was set aside.
13. On or about 27 January 2012 Mr AH was released from Hakea Prison, the Department cancelled Mr AH's CJV and transferred him to Perth Immigration Detention Centre (PIDC).
14. On 8 February 2012 Mr AH was transferred to Curtin Immigration Detention Centre (CIDC).
15. On 26 March 2012 Mr AH lodged a judicial review application, of the RRT's decision, in the Federal Magistrates Court. This application was dismissed on 14 September 2012.
16. On 19 April 2012 Mr AH was transferred to VIDC where he remains.
17. On 5 October 2012 Mr AH lodged a notice of appeal in the Federal Court in relation to the judgment against him in the Federal Magistrates Court. This appeal was dismissed on 14 December 2012.
18. On 11 February 2013 Mr AH filed an application in the Federal Circuit Court in relation to a decision that his application for a Protection visa was not valid due to section 48A of the *Migration Act 1958* (Cth) (Migration Act). The Department advises that Mr AH's protection visa application was confirmed as being invalid on 10 September 2013.
19. Mr AH claims that his detention by the Commonwealth is arbitrary within the meaning of article 9 of the ICCPR.

5 The Commission's human rights inquiry and complaints function

20. Section 11(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) identifies the functions of the Commission. Relevantly section 11(1)(f) gives the Commission 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 the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
22. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.
23. Section 3(1) of the AHRC Act defines 'human rights' to include the rights and freedoms recognised by the ICCPR.
24. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of the 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.
25. 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.
26. 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.¹

6 Assessment

6.1 Act or practice of the Commonwealth?

27. I find that the Commonwealth's failure to place Mr AH in a less restrictive form of detention than an immigration detention centre during his period of immigration detention constitutes an act under the AHRC Act.
28. Mr AH has been detained by the Commonwealth in immigration detention centres during the periods 25 April 2009 to 16 September 2009 and from 27 January 2012 to date.
29. Mr AH was detained under section 189(3) of the Migration Act while on Christmas Island. On 27 January 2012 Mr AH was transferred from Hakea Prison to Perth IDC where he was detained under section 189(1) of the Migration Act.
30. At the time Mr AH was detained on Christmas Island, section 189(3) of the Migration Act stated that '[i]f an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer *may* detain the person' (emphasis added). There was no requirement for the Commonwealth to detain Mr AH while he was on Christmas Island.
31. While in immigration detention on the mainland Mr AH was detained under section 189(1) of the Migration Act. Whilst section 189(1) requires the detention of unlawful non-citizens, it does not require that unlawful non-citizens are detained in an immigration detention facility.
32. Section 197AB(1) 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).
33. 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
34. Accordingly, the Minister could have made a residence determination in relation to Mr AH under section 197AB of the Migration Act or could have approved that he reside in a place other than an immigration detention centre.

6.2 Inconsistent with or contrary to human rights?

35. I find that the failure to place Mr AH in community detention or another less restrictive form of detention is arbitrary and inconsistent with his right to liberty in article 9(1) of the ICCPR.
36. The following principles relating to arbitrary detention under article 9 of the ICCPR arise from international human rights jurisprudence:
- 'detention' includes immigration detention;³
 - 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;⁴

- 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 predictability⁵ and
 - detention should not continue beyond the period for which a State party can provide appropriate justification;⁶ every decision to keep a person in detention should be open to periodic review, in order to reassess the necessity of detention.⁷
37. The United Nations Human Rights Committee has held in several cases that there is an obligation on the State Party to demonstrate that there was not a less invasive way than detention to achieve the ends of the State Party's immigration policy (for example the imposition of reporting obligations, sureties or other conditions) in order to avoid the conclusion that detention was arbitrary.⁸
38. The Department states that the Government's immigration policy 'is that all unauthorised arrivals be detained for the purpose of managing health, identity and security risks to the community'. The Department has variously stated that Mr AH's continued detention is appropriate as he is 'not security cleared and his immigration pathway has not been finally determined' and because his 'identity is not yet established'.
39. Based on the information before the Commission, it appears that Mr AH was first considered for less restrictive detention in May 2012. The Department advises that:
- On 4 May 2012 Mr AH's case manager requested the Department's Complex Case Resolution Section (CCRS) to consider Mr AH for a referral to the Minister under section 195A of the Migration Act.
 - On 18 July 2012 the Department's consideration of a possible Ministerial referral under section 197AB of the Migration Act was initiated.
 - On 25 October 2012 the Department assessed Mr AH as meeting the guidelines for referral to the Minister under sections 195A and 197AB of the Migration Act and commenced preparing a submission for the Minister.
 - On 21 December 2012, the submission was discontinued as Mr AH signed a voluntary removal request from Australia. Mr AH later withdrew this request and involuntary removal was scheduled for 12 February 2013. Mr AH's scheduled removal was not completed as he lodged a request for judicial review of the Department's decision that his Protection Visa application lodged on 8 February 2013 was invalid.
 - On 21 March 2013, a further referral for sections 195A and 197AB consideration was made and on 6 May 2013 the Department provided a submission to the then Minister. On 13 May 2013 the submission was returned unactioned as the then Minister had requested a Departmental briefing on management options for 'double negative' detainees who had been found not to be owed protection. The submission was placed on hold pending provision of this briefing. The Department advised that the referral of Mr AH's case to the Minister was further impacted by changes in the Portfolio Minister and the 2013 Federal Election.
 - The Department advises that it is currently preparing a submission for the Minister regarding Mr AH's case.
40. I note that 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. However to detain them further while their claims are being resolved would be 'arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security'.⁹

41. Mr AH has, cumulatively, been detained in immigration detention centres for nearly three years since April 2009. The Commonwealth has not explained, with reference to Mr AH's particular circumstances, why he was not able to reside in the community or in a less restrictive form of detention (if necessary, with appropriate conditions imposed to mitigate any identified risks) while his immigration status was initially resolved and while ongoing judicial proceedings are determined.
42. It is of significant concern that at the time of forming this view, it has been 19 months since the Department first determined that Mr AH's case met the guidelines for referral to the Minister for temporary management options under sections 195A and 197AB of the Migration Act. The Department advises that a submission was put to the then Minister on 6 May 2013 for the consideration of the exercise of his powers under sections 195A and 197AB of the Migration Act. On 13 May 2013 the submission was returned unacted as the then Minister had requested a departmental briefing on management options for Irregular Maritime Arrivals 'double negative' detainees who had been found not to be owed protection.
43. In the 12 months that have followed, the Department has not referred Mr AH's case to the Minister.
44. On the material before me I am not satisfied that the ongoing detention of Mr AH in an immigration detention centre is proportionate to the aims of the Commonwealth's immigration policy. I find that the failure to place Mr AH in community detention or another less restrictive form of detention is arbitrary and inconsistent with his right to liberty in article 9 of the ICCPR.

7 Recommendations

45. 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.¹⁰ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹¹
46. 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.¹²

7.1 Recommendation that alternatives to closed detention be considered

47. I recommend that the Department refer Mr AH's case to the Minister without further delay, so that the Minister may consider exercising his power to make a residence determination under section 197AB of the Migration Act.
48. I note that in its 7 May 2014 response to my preliminary view, the Department stated that it is currently preparing a submission for the Minister regarding Mr AH's case. I recommend that this submission be finalised and provided to the Minister without delay.

7.2 Consideration of compensation

49. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
50. 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.¹³
51. 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.¹⁴
52. 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.
53. 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.
54. 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).¹⁵
55. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹⁶ 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*:¹⁷

...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.¹⁸
56. 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).¹⁹ In that case, at first instance,²⁰ 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.
57. 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'.
58. 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.²¹

59. 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.²² 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.²³

60. 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 damages²⁴ 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.²⁵

7.3 Recommendation that compensation be paid

61. I have found that Mr AH’s detention is arbitrary within the meaning of article 9(1) of the ICCPR. Mr AH has, cumulatively, been detained in immigration detention centres for nearly three years since April 2009.

62. I consider that the Commonwealth should pay Mr AH an amount of compensation to reflect the loss of liberty caused by his detention. Had Mr AH 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.

63. I have also taken into account the fact that Mr AH had had some experience of detention following his criminal conviction, and the statement of the Court of Appeal in *Ruddock v Taylor*,²⁶ that the effect of false imprisonment on a person progressively diminishes with time.

64. There is no evidence before me to suggest that the circumstances surrounding Mr AH being taken into detention were particularly shocking, that the conditions of that detention were particularly harsh, or that Mr AH feared for his safety while detained.

65. The information before me indicates that at times, Mr AH’s detention in an immigration detention centre has impacted on and continues to impact his mental health. I take this factor into account in the quantum of compensation that I have recommended.

66. Assessing compensation in such circumstances is difficult and requires a degree of judgement. 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 The Department's responses to my finding and recommendations

67. On 11 June 2014, I provided a notice to the Department under section 29(2)(a) of the AHRC Act setting out my finding and recommendations in relation to the complaints dealt with in this report.
68. By letter dated 20 August 2014, the Secretary of the Department provided a response to my notice.
69. In response to my finding, the Department stated:
The Department reaffirms its position that Mr AH's detention was lawful in accordance with the *Migration Act 1958* and consistent with the prohibition of arbitrary detention in article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).
70. In response to my first recommendation that the Commonwealth pay Mr AH \$200,000 in compensation, the Department stated:
The Department maintains that Mr AH's detention was and is lawful, reasonable and proportionate with the Australian Government's aim of effecting his removal from Australia.
...On the basis of the current information, the Department is not satisfied that there is a proper basis for payment of discretionary compensation at this time.
71. In response to my second recommendation that the Department refer Mr AH's case to the Minister without further delay, the Department stated:
On 4 July 2014, the Department referred a section 197AB submission regarding Mr AH's case to the Minister for his consideration of Mr AH's circumstances. The Department awaits the Minister's decision.
72. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

September 2014

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- 1 See, *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 2 *Migration Act 1958* (Cth) s 5.
 - 3 UN Human Rights Committee, General Comment 8 (1982). See also *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993; *C v Australia*, Communication No 900/1999 UN Doc CCPR/C/76/D/900/1999; *Baban v Australia*, Communication No 1014/2001 UN Doc CCPR/C/78/D/1014/2001.
 - 4 UN Human Rights Committee, Draft General Comment 35 (2013) [18], [19]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004), 308 [11.10].
 - 5 *Manga v Attorney-General* [2000] 2 NZLR 65, [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988; *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988; *Spakmo v Norway*, Communication No 631/1995, UN Doc CCPR/C/67/D/631/1995.
 - 6 *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/76/D/900/1993; *C v Australia* Communication No 900/1999 UN Doc CCPR/c/76/D/900/1999.
 - 7 *Shafiq v Australia*, Communication No 1324/2004, UN Doc CCPR/C/88/1324/2004, para 7.2.
 - 8 *C v Australia* Communication No 900/1999 UN Doc CCPR/c/76/D/900/1999; *Shams & Ors v Australia* UN Doc CCPR/C/90/D/1255; *Baban v Australia* CCPR/C/78/D/1014/2001; *D and E v Australia* CCPR/C/87/D/1050/2002.
 - 9 *F.K.A.G. et al v Australia*, Communication No 2094/2011, UN Doc CCPR/C/108/D/2094/2011, para 9.3. Also see *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988, para 9.4. Also see *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/39/D/305/1988, para 9.4.
 - 10 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
 - 11 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
 - 12 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
 - 13 *Peacock v The Commonwealth* 30 (2000) 104 FCR 464, 483 (Wilcox J).
 - 14 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
 - 15 *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 (22 November 1999), [87].
 - 16 [2013] FCA 901.
 - 17 [2003] NSWSC 1212.
 - 18 [2013] FCA 901 at [121].
 - 19 *Ruddock v Taylor* (2003) 58 NSWLR 269.
 - 20 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
 - 21 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
 - 22 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 23 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 24 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].
 - 25 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [139].
 - 26 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.

Further Information

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