



Australian
Human Rights
Commission

Alwy Fadhel v Commonwealth of Australia (DIBP)

[2014] AusHRC 82

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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

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

Report into arbitrary detention

[2014] AusHRC 82

Australian Human Rights Commission 2014



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**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 section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made by Mr Alwy Fadhel.

I find that the failure of the Minister for Immigration and Border Protection to place Mr Fadhel 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). I also find that his continued detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.

By letter dated 13 June 2014, the Department of Immigration and Border Protection provided its response to my findings and recommendation. I have set out this response 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 Alwy Fadhel.
2. Mr Fadhel 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)), involved 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 Mr Fadhel's periods of detention in an immigration detention centre are arbitrary within the meaning of article 9(1) of the ICCPR.
4. I also find that his continued detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.

3 Recommendations

5. In light of my findings regarding the acts and practices of the Commonwealth, I recommend that the Commonwealth pay compensation to Mr Fadhel in the amount of \$400,000.
6. I also recommend that the Department refer Mr Fadhel's case to the Minister without further delay, so that the Minister may consider exercising his power to grant Mr Fadhel a Bridging visa under section 195A of the *Migration Act 1958* (Cth)(Migration Act) or to make a residence determination under section 197AB of the Migration Act.

4 The complaint by Mr Fadhel

7. Mr Fadhel is a national of Indonesia. On 15 November 2007, Mr Fadhel arrived in Australia by plane using a fake passport and was refused immigration clearance. Mr Fadhel was detained pursuant to section 189(1) of the Migration Act and was transferred to Villawood Immigration Detention Centre (VIDC).
8. Mr Fadhel applied for a Protection visa and on 4 March 2008 this application was refused. On 28 August 2008, the Refugee Review Tribunal (RRT) affirmed the decision of the Minister's delegate to refuse to grant Mr Fadhel a Protection visa. On 10 December 2008, the Federal Magistrates Court dismissed Mr Fadhel's application for judicial review of the RRT decision.
9. On or about 27 September 2011, the Minister made a residence determination in relation to Mr Fadhel and he was placed in community detention.
10. On 1 May 2012, Mr Fadhel was returned to VIDC.

11. Mr Fadhel's removal from Australia was scheduled for 3 May 2012, but it appears that on 2 May 2012 he commenced proceedings in the High Court of Australia to challenge his impending removal.
12. Since being returned to immigration detention, Mr Fadhel has made several applications for a Bridging visa but these applications have been deemed to be invalid. Mr Fadhel has also requested that the Minister make a residence determination in his favour but the request was determined not to meet the section 197AB guidelines on a number of occasions.
13. On 12 October 2012, Mr Fadhel lodged a new Protection visa application which was found to be invalid the same day. On or about 18 October 2012, Mr Fadhel sought judicial review of the Minister's decision to refuse to lift the bar to allow him to make another application for a Protection visa on the ground that he is able to claim complementary protection. On 20 November 2012, the Federal Circuit Court decided that the Minister's decision should be overturned as Mr Fadhel's case was assessed as being affected by the same considerations as in another matter before the Court, *SZGIZ v Minister for Immigration and Citizenship*.¹
14. Following the Full Federal Court's decision in *SZGIZ v Minister for Immigration and Citizenship*,² on 24 July 2013 Mr Fadhel's Protection visa application was found to be valid by the Department. The matter appears to be ongoing.
15. In his complaint to the Commission, Mr Fadhel claims that his mental health has deteriorated in detention such that he has been subjected to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.
16. Mr Fadhel remains detained in VIDC. He claims that his detention in VIDC from 15 November 2007 until 30 September 2011 and from 1 May 2012 is arbitrary within the meaning of article 9(1) of the ICCPR.

5 The Commission's human rights inquiry and complaints function

17. 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.³
18. 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.
19. 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.⁴

6 Ongoing immigration detention

20. Mr Fadhel was detained in VIDC from 15 November 2007 until 30 September 2011. Mr Fadhel was returned to VIDC on 1 May 2012. At the time of producing this Report, Mr Fadhel remains detained in VIDC.

6.1 Act or practice of the Commonwealth?

21. There are a number of powers that the Minister could have exercised so that Mr Fadhel was detained in a less restrictive manner than in immigration detention.
22. The Minister could have granted Mr Fadhel a visa. Under section 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 section 189 of the Migration Act.
23. The Minister could have made a residence determination in favour of Mr Fadhel. 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. The Minister made a residence determination in favour of Mr Fadhel on or about 27 September 2011.
24. The Minister could also have approved a less restrictive place than VIDC as Mr Fadhel'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.⁵
25. I find that the failure of the Minister to place Mr Fadhel in a less restrictive form of detention than in an immigration detention centre from 15 November 2007 until 30 September 2011 and from 1 May 2012 constitutes an act within the meaning of the AHRC Act.

6.2 Inconsistent with or contrary to human rights?

(a) Article 7 ICCPR

26. Mr Fadhel appears to claim that the adverse impact of detention on his mental health amounts to a breach of his human rights.
27. Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

28. In *C v Australia*,⁶ 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.⁷
29. The relevant question for the purposes of article 7 of the ICCPR is whether Mr Fadhel's detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment or punishment.
30. There is no information before the Commission to suggest that Mr Fadhel experienced mental health concerns before being placed in immigration detention.
31. Mr Fadhel was on suicide and self-harm watch for the majority of the period from February 2009 until late July 2009.
32. In a report dated 31 July 2009, psychologist Muhamad Ziedni diagnosed Mr Fadhel with major depressive disorder. Mr Ziedni notes that Mr Fadhel disclosed that he had engaged in a number of incidents of self-cutting. Mr Ziedni's report states that 'it is my opinion that Mr Alwy Fadhel needs to live in the community to reduce the risk of further self-harm'.
33. In a report dated 10 September 2009, psychologist Marc Chaussivert stated that Mr Fadhel displayed symptoms that are associated with severe anxiety and depression and that he would benefit from being provided with treatment in the future.
34. In a report dated 4 February 2010, Mr Ziedni stated that it was likely that Mr Fadhel continued to suffer major depressive disorder with psychotic features. The report again recommends that Mr Fadhel be allowed to live in the community.
35. In a report dated 22 January 2013, psychiatrist Dr Antonio Simonelli, diagnosed Mr Fadhel with post-traumatic stress disorder and major depression. Dr Simonelli's report states that Mr Fadhel's mental health conditions 'appear clearly linked' to his detention. Dr Simonelli's report further states that Mr Fadhel's release into the community is 'essential for effective treatment'.
36. In a report dated 28 February 2013, Mr Ziedni diagnosed Mr Fadhel with post-traumatic stress disorder. Mr Ziedni's report states that this condition was worsened by reactive depression following his return to immigration detention after living in the community. The report recommends that Mr Fadhel be allowed to live in the community and states that 'should Mr Fadhel continue to live in detention, poor prognosis is warranted and he is certainly at risk of suicide...'

37. This medical history indicates that Mr Fadhel's mental health has significantly deteriorated whilst he has been detained in immigration detention. He has repeatedly engaged in self harm and has required constant or very regular observation for long periods. Mental health professionals assessing Mr Fadhel have repeatedly recommended his release into the community, stating that his release from detention is essential for his treatment. The Department has also been warned by Mr Ziedni, who has assessed Mr Fadhel on a number of occasions, that should Mr Fadhel's detention continue he would be at risk of suicide.
38. I note that in its 6 February 2014 response to my preliminary view, the Department has stated that 'IHMS has consistently offered Mr Fadhel a high level of support for his health issues, however, over the past six months he has refused to engage with the Mental Health Team'. That Mr Fadhel is now refusing treatment for his mental health issues within the detention centre environment is of serious concern.
39. Based on all of the material before me, I find that Mr Fadhel's continued detention has caused a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.

(b) Article 9(1) ICCPR

40. Mr Fadhel claims that his detention by the Commonwealth has arbitrarily deprived him of his liberty.
41. Under international law, to avoid being arbitrary within the meaning of article 9(1) of the ICCPR, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁸
42. There is no information before me to suggest that it was necessary to detain Mr Fadhel in an immigration detention centre.
43. It appears that Mr Fadhel was detained by the Commonwealth from 15 November 2007 until 30 September 2011 because the Commonwealth was unable to determine his identity and obtain a travel document for Mr Fadhel to allow him to be returned to Indonesia.
44. However, Mr Fadhel's identity had not been confirmed when he was placed in community detention in September 2011. This suggests that it was not necessary to confirm Mr Fadhel's identity before placing him in community detention.
45. Mr Fadhel appears to have been returned to VIDC on 1 May 2012 because the Commonwealth had succeeded in obtaining a travel document for him.
46. In August 2013, the Department assessed Mr Fadhel's case against the section 197AB guidelines and found that the case did not meet the guidelines.
47. There is no information before me to support the view that it is necessary to detain Mr Fadhel in immigration detention. Mr Fadhel lived in the community without incident for a period of over seven months.

48. It appears that Mr Fadhel:

- was returned to immigration detention on 1 May 2012 in order to facilitate his return to Indonesia on 3 May 2012;
- commenced legal proceedings on 2 May 2013 to challenge his imminent removal from Australia; and
- has since been engaged in litigation, including in relation to his Protection visa application on complementary protection grounds.

49. In light of the ongoing litigation, it appears to me that his removal from Australia is not imminent. I note here that in its 6 February 2014 response to my preliminary view, the Department has stated that Mr Fadhel's case will be referred to the Minister, for possible consideration under section 195A of the Migration Act, in 'due course'.

50. Based on the material before me, I find that Mr Fadhel's detention in an immigration detention centre is arbitrary within the meaning of article 9(1) of the ICCPR.

7 Recommendations

51. 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.⁹ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁰

52. 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.¹¹

7.1 Recommendation that alternatives to closed detention be considered

53. I recommend that the Department refer Mr Fadhel's case to the Minister without further delay, so that the Minister may consider exercising his power to grant Mr Fadhel a Bridging visa under section 195A of the Migration Act or to make a residence determination under section 197AB of the Migration Act.

54. I note that in its 6 February 2014 response to my preliminary view, the Department stated that Mr Fadhel's case will be referred to the Minister for possible consideration under section 195A of the Migration Act 'in due course'. I recommend that this occur without delay.

7.2 Consideration of compensation

55. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
56. 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.
57. 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.
58. 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.
59. 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.
60. 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).¹²
61. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹³ 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*:¹⁴

...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.¹⁵
62. 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).¹⁶ In that case, at first instance,¹⁷ 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.
63. 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'.

64. 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.¹⁸
65. 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'.¹⁹
66. 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,²⁰ 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.²¹

7.3 Recommendation that compensation be paid

67. I have found that Mr Fadhel's detention was arbitrary within the meaning of article 9(1) of the ICCPR. I have also found that Mr Fadhel's continued detention has caused him a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment within the meaning of article 7 of the ICCPR.
68. I consider that the Commonwealth should pay Mr Fadhel an amount of compensation to reflect the loss of liberty caused by his detention at VIDC and that his continued detention has caused him a level of mental impairment such that it amounts to cruel, inhuman or degrading treatment.
69. I note that had Mr Fadhel been transferred to community detention, or another less restrictive form of detention, he would still have experienced some curtailment of his liberty. I have taken this factor into account when assessing compensation.
70. Assessing compensation in such circumstances is difficult and requires a degree of judgment. Mr Fadhel has been detained in VIDC from 15 November 2007 until 27 September 2011 and from 1 May 2012 to date, being a period of almost 6 years. His detention has had a markedly adverse effect on his mental health, causing a level of mental impairment such that his detention amounts to cruel, inhuman or degrading treatment. Taking into account the guidance provided by the decisions referred to above, I consider that compensation in the amount of \$400,000 is appropriate.

8 Commonwealth's response to findings and recommendations

71. On 8 April 2014, I provided a Notice to the Department under section 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to this complaint.

72. By letter dated 13 June 2014, the Department provided a response to my recommendation that it refer Mr Fadhel's case to the Minister without further delay, so that the Minister may consider exercising his power to grant Mr Fadhel a Bridging visa under section 195A of the Migration Act or make a residence determination under section 197AB of the Migration Act. Its response was:

The Department has previously provided the Australian Human Rights Commission with the history of the decisions that have been made in relation to Mr Fadhel's requests for alternative management under sections 195A and 197AB of the Migration Act...

The then Minister considered the circumstances of Mr Fadhel's case on several occasions under section 197AB of the Act. On each occasion, the then Minister determined that it was not in the public interest to intervene in Mr Fadhel's case.

On 18 March 2014, the Department referred Mr Fadhel's case to the Minister for possible consideration under section 195A or 197AB of the Act. On 2 April 2014, the Minister declined to consider intervening in Mr Fadhel's case under either section 195A or 197AB.

...

As noted in the Department's last submission to the Commission, alternative management options such as placement at the Sydney Immigration Residential Housing have previously been assessed as inappropriate due to Mr Fadhel's behaviour. However, Mr Fadhel's case manager will continue to monitor the progression of his immigration matters and review his detention placement on a regular basis.

73. In the same letter, the Department provided its response in relation to the recommendation that the Commonwealth pay compensation to Mr Fadhel in the amount of \$400,000:

The Department notes the President's recommendations in regards to compensation payable to Mr Fadhel. The Commonwealth maintains its position that Mr Fadhel's immigration detention was carried out in accordance with applicable statutory procedure prescribed under the Migration Act and that Mr Fadhel's detention was not arbitrary within the meaning of article 9(1) of the ICCPR.

...

The Department is of the view that as Mr Fadhel's immigration detention was lawful there is no meaningful prospect of liability under Australian domestic law and as such, no proper basis to consider payment of compensation. Further, the Department considers that neither the material in the complaint, nor the President's findings and recommendations, reveal a meaningful prospect of liability under Australian domestic law for an action in tort in connection with the psychological harm Mr Fadhel claims to have suffered as a result of his detention. The Department therefore is unable to pay compensation to Mr Fadhel on this basis and the Department advises that no further action will be taken in relation to this recommendation.

74. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

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- 1 [2013] FCAFC 71.
 - 2 [2013] FCAFC 71.
 - 3 Section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) defines human rights to include the rights recognised by the ICCPR.
 - 4 See, *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
 - 5 *Migration Act 1958* (Cth) s 5.
 - 6 Communication No 900/1999. UN Doc CCPR/C/76/D/900/1999.
 - 7 Communication No 900/1999. UN Doc CCPR/C/76/D/900/1999 [8.4].
 - 8 *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.
 - 9 AHRC Act s 29(2)(a).
 - 10 AHRC Act s 29(2)(b).
 - 11 AHRC Act s 29(2)(c).
 - 12 *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].
 - 13 [2013] FCA 901.
 - 14 [2003] NSWSC 1212.
 - 15 [2013] FCA 901 at [121].
 - 16 *Ruddock v Taylor* (2003) 58 NSWLR 269.
 - 17 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)).
 - 18 *Taylor v Ruddock* (unreported, 18 December 2002, NSW District Court (Murrell DCJ)) [140].
 - 19 *Ruddock v Taylor* [2003] 58 NSWLR 269, 279.
 - 20 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].
 - 21 *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

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