



Australian
Human Rights
Commission

Basikbasik v Commonwealth of Australia (DIBP)

[2014] AusHRC 77

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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

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

Report into arbitrary detention

[2014] AusHRC 77

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 s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into a complaint made by Mr John Basikbasik.

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

By letters dated 28 May 2014 and 29 May 2014, the Hon Scott Morrison MP, Minister for Immigration and Border Protection (Minister), 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 the complaint lodged by Mr John Basikbasik against the Commonwealth.
2. Mr Basikbasik alleges that his treatment by the Commonwealth of Australia – Department of Immigration and Citizenship (as it then was – it has subsequently been redesignated 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 the failure of the Minister to place Mr Basikbasik into community detention or another less restrictive form of detention (if necessary, with conditions) was inconsistent with the prohibition on arbitrary detention in article 9(1) of the ICCPR.

3 Recommendations

4. In light of my findings regarding the act of the Minister in failing to place Mr Basikbasik in a less restrictive form of detention than in an immigration detention centre, I recommend that the Commonwealth pay compensation to Mr Basikbasik in the amount of \$350,000.

4 The complaint by Mr Basikbasik

5. Mr Basikbasik arrived in Australia from Indonesia by canoe on 13 June 1985 and was granted temporary entry into Australia. In November 1993, Mr Basikbasik was granted a Domestic Protection (Temporary) Entry Permit. In January 1996, Mr Basikbasik was granted a Protection visa.
6. Mr Basikbasik was convicted of a range of criminal offences in Australia dating from 1986. In May 2000, Mr Basikbasik was charged with the manslaughter of his de facto spouse. Mr Basikbasik was convicted of this offence and was sentenced to seven years' imprisonment with a non-parole period of two and a half years.
7. On 5 March 2003, the then Minister for Immigration (Minister) cancelled Mr Basikbasik's Protection visa under section 501 of the *Migration Act 1958* (Cth) (Migration Act).
8. Mr Basikbasik was released from prison on 18 June 2007 and was thereafter detained in Villawood Immigration Detention Centre (VIDC).
9. In October 2007, the Department conducted an International Treaties Obligations Assessment (ITOA) and found that it would breach Australia's non-refoulement obligations to return Mr Basikbasik to Indonesia.
10. In December 2008, the Minister intervened in Mr Basikbasik's case to allow him to lodge an application for a Protection visa.

11. On 23 December 2008, Mr Basikbasik lodged an application for a Protection visa. On 26 May 2009, the Minister's delegate refused Mr Basikbasik's application for a Protection visa. This decision was subsequently affirmed by the Administrative Appeals Tribunal (AAT).
12. On or about 10 June 2010, the Minister declined to make a residence determination in favour of Mr Basikbasik pursuant to section 197AB of the Migration Act.
13. A second ITOA, which was completed on 26 July 2011, also found that it would breach Australia's non-refoulement obligations to return Mr Basikbasik to Indonesia.
14. The decision of the Minister's delegate to refuse to grant Mr Basikbasik a Protection visa was affirmed by the Federal Court of Australia in November 2011 and the Full Court of the Federal Court in March 2012.
15. On 24 September 2012, the Minister declined to grant Mr Basikbasik a Bridging visa pursuant to section 195A of the Migration Act, or to make a residence determination in relation to him pursuant to section 197AB of the Migration Act. The Minister indicated that he wished Mr Basikbasik's case to be re-referred to him in six months' time.
16. On 10 April 2013, the High Court of Australia ordered that consideration of Mr Basikbasik's application for a Protection visa be remitted back to the AAT.
17. On 13 June 2013, the AAT ordered that the decision of 29 May 2009 to refuse Mr Basikbasik a Protection visa be set aside and the matter reconsidered. As at April 2014, this matter was still pending.
18. On 7 November 2013, the Minister declined to consider intervening under section 195A of the Migration Act, to grant Mr Basikbasik a Bridging visa, or under section 197AB of the Migration Act, to place Mr Basikbasik into community detention with specific management conditions.
19. Mr Basikbasik remains in an immigration detention centre and claims that his detention is arbitrary within the meaning of article 9(1) of the ICCPR.

5 The Commission's human rights inquiry and complaints function

20. 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
21. 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.
22. 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 Assessment

23. Mr Basikbasik complains about being detained by the Commonwealth within an immigration detention centre.

6.1 Act or practice of the Commonwealth?

24. Mr Basikbasik has been detained by the Commonwealth within an immigration detention centre since he was released from prison in June 2007.
25. There are a number of powers that the Minister could have exercised so that Mr Basikbasik was detained in a less restrictive manner than in an immigration detention centre.
26. The Minister could have granted Mr Basikbasik 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.
27. The Minister could have made a residence determination in favour of Mr Basikbasik. 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.
28. The Minister could have approved a less restrictive place than VIDC as Mr Basikbasik'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
29. In June 2010, the Minister declined to make a section 197AB residence determination in relation to Mr Basikbasik. In September 2012, the Minister again declined to make a residence determination in relation to Mr Basikbasik and also declined to exercise his power under section 195A of the Migration Act to grant Mr Basikbasik a visa. This issue was again considered by the Minister on 7 November 2013, and once more the Minister declined to consider intervening under section 195A or section 197AB of the Migration Act.
30. I find that the failure of the Minister to place Mr Basikbasik 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?

31. Mr Basikbasik claims that his detention by the Commonwealth has arbitrarily deprived him of his liberty. Mr Basikbasik was detained by the Commonwealth in an immigration detention centre on 18 June 2007 and he remains detained by the Commonwealth.
32. The Commonwealth claims that Mr Basikbasik's placement in VIDC is appropriate because he has an extensive and serious criminal history involving the use of violence.
33. Under international law, to avoid being arbitrary, detention must be necessary and proportionate to a legitimate aim of the Commonwealth.⁴
34. Mr Basikbasik has a criminal record that includes a conviction for manslaughter. Mr Basikbasik was released from prison after serving his full sentence for this offence.

35. In a decision dated 2 September 2010, affirming the decision of the Minister's delegate to refuse Mr Basikbasik a Protection visa, the AAT stated that it was 'comfortably satisfied' that Mr Basikbasik posed a real or significant risk of harm to one or more members of the Australian community.
36. However, part of the reason that the AAT found that Mr Basikbasik posed a risk to the Australian community such that he should not be granted a visa was that, contrary to the recommendations of the psychologist who gave evidence, there was no proper management plan in place for Mr Basikbasik's rehabilitation and it did not appear that he had any support in the community.
37. The Commonwealth claims that Mr Basikbasik has been involved in 50 behaviour-related incidents in detention. Some of the incidents committed by Mr Basikbasik appear to have been relatively minor - such as possessing prohibited goods - and some did not involve other people - such as self-harm and starvation. However, I note that on 21 June 2012, Mr Basikbasik was convicted of an assault on a fellow detainee committed in October 2011.
38. In relation to Mr Basikbasik's behaviour in detention, the AAT stated:
- While in immigration detention at Villawood Immigration Detention Centre, there have apparently been nine incident reports about [Mr Basikbasik]. Little detail has been provided. However, four incident reports allege aggressive/abusive behaviour by [Mr Basikbasik] and, in a fifth incident, [Mr Basikbasik] appears to have been the victim of an assault. One incident involved [Mr Basikbasik] allegedly damaging a water-pipe, one incident records 'prohibited article located', and another records that [Mr Basikbasik] was found mailing a camera and film to an external address.⁵
39. In reaching its decision, the AAT stated:
- We must also be conscious of the fact that the tensions experienced in custody and detention are often more extreme than those experienced in the community. Nevertheless, the evidence concerning the incidents in which [Mr Basikbasik] has been involved both in custody and detention indicates that while generally cooperative and polite, he can be aggressive and abusive when confronted by the inevitable frustrations of the system and of other inmates, and that he has sometimes used threats in order to try and get his own way.⁶
40. It appears that Mr Basikbasik has been detained in the less restrictive Hughes or Fowler areas for much of the time that he has been detained at VIDC. However, he appears to have been moved to the more restrictive Blaxland or Murray areas in response to specific behavioural incidents.
41. An International Health and Medical Services (IHMS) report for Mr Basikbasik, dated 15 December 2011, states that although his medical conditions (diabetes, high blood pressure) can be managed in the detention environment, IHMS suggest that he be transferred to a less restrictive placement. The IHMS report notes a psychiatrist's review dated 31 October 2011, which states that Mr Basikbasik's behavioural problems are associated with his prolonged detention and that there is a risk that his mental health will deteriorate if his detention continues.
42. ITOAs undertaken in October 2007 and July 2011 found that it would breach Australia's international obligations to return Mr Basikbasik to Indonesia. Accordingly, it appears that there is no prospect that Mr Basikbasik can be returned to Indonesia. There is no information before me to suggest that the Commonwealth has ever explored sending Mr Basikbasik to a third country.
43. Mr Basikbasik is 51 years old and has been detained in the custodial environment for approximately 13 years. He was assessed by two specialists in connection with his 2 September 2010 AAT proceedings. Dr Kipling Walker, Consultant Psychiatrist, diagnosed him with polysubstance abuse and a personality disorder. Dr Emma Collins, Clinical and Forensic Psychologist, did not consider that he has a personality disorder, but agreed that his personality is a risk factor and that he has pervasive personality traits such as impulsiveness.

44. Anyone with Mr Basikbasik's personal history and custodial background would be likely to require support to re-integrate into the community. There is no information before me to indicate that the Commonwealth considered whether any risk which Mr Basikbasik posed to the community could be mitigated by a management plan to assist with his rehabilitation or by a requirement to reside at a specified location, with curfews, travel restrictions or regular reporting. It does not appear that it was necessary to detain Mr Basikbasik in an immigration detention centre.
45. Given the material before me, I find that Mr Basikbasik's ongoing detention in an immigration detention centre is arbitrary within the meaning of article 9(1) of the ICCPR.

7 Recommendations

46. 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.⁷ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁸
47. 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.⁹

7.1 Consideration of compensation

48. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
49. 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.
50. I am of the view that this is the appropriate approach to take in 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.
51. 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.
52. 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.
53. 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).¹⁰

54. In the recent case of *Fernando v Commonwealth of Australia (No 5)*,¹¹ 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*:¹²
- ...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.¹³
55. 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).¹⁴ In that case, at first instance,¹⁵ 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.
56. 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'.
57. 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.¹⁶
58. 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'.¹⁷
59. 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,¹⁸ 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.¹⁹

7.2 Recommendation that compensation be paid

60. I have found that Mr Basikbasik's detention was arbitrary within the meaning of article 9(1) of the ICCPR. Mr Basikbasik has been detained for almost seven years.
61. I consider that the Commonwealth should pay Mr Basikbasik an amount of compensation to reflect the loss of liberty caused by his detention at VIDC. Had Mr Basikbasik 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. I have also taken into account the fact that Mr Basikbasik has had some experience of detention following his criminal conduct and the statement of the New South Wales Court of Appeal in *Ruddock v Taylor* that, as the term of imprisonment extends, the effect upon the person falsely imprisoned does progressively diminish.²⁰
62. 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 \$350,000 is appropriate.

8 Commonwealth's response to findings and recommendations

63. On 31 March 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.
64. By letter dated 28 May 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 Basikbasik 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 195A or 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 Basikbasik, his significant criminal history and imprisonment as the result of his criminal conviction of *manslaughter* in September 2001 would have been relevant in considering risk to the Australian community.

I can advise that on 7 November 2013, I declined to consider intervening, under section 195A of the Act, to grant Mr Basikbasik a temporary visa or, under section 197AB of the Act, to place Mr Basikbasik into community detention with specific management conditions.

Ultimately, decisions relating to residence determination under section 195A or 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 Basikbasik's detention is appropriate, reasonable and justified in the individual circumstances of his case and therefore not arbitrary.

65. By letter dated 29 May 2014, the Department provided a response to my recommendation that the Commonwealth pay compensation to Mr Basikbasik in the amount of \$350,000:

The department maintains that Mr Basikbasik's detention is not arbitrary within the meaning of Article 9(1) of the International Covenant on Civil and Political Rights.

...

The department is of the view that Mr Basikbasik's immigration detention is lawful, that there is no meaningful prospect of liability under Australian domestic law and as such, no proper basis to consider a payment of compensation in this regard. 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 as a result of this detention. For this reason the department is of the view that there is no proper basis on which to consider payment of compensation in this regard. The department therefore is unable to pay compensation to Mr Basikbasik on this basis and the department advises that no further action will be taken in relation to this recommendation.

66. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

June 2014

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- 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* (ICCPR).
- 2 See, *Secretary, Department of Defence v Human Rights and Equal Opportunity Commission, Burgess & Ors* (1997) 78 FCR 208.
- 3 *Migration Act 1958* (Cth) s 5.
- 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 *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010) [10].
- 6 *BHYK v Minister for Immigration and Citizenship* [2010] AATA 662 (2 September 2010) [46].
- 7 AHRC Act s 29(2)(a).
- 8 AHRC Act s 29(2)(b).
- 9 AHRC Act s 29(2)(c).
- 10 *Cassell & Co Ltd v Broome (No 1)* [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].
- 11 [2013] FCA 901.
- 12 [2003] NSWSC 1212.
- 13 *Fernando v Commonwealth of Australia (No 5)* [2013] FCA 901 [121].
- 14 *Ruddock v Taylor* (2003) 58 NSWLR 269.
- 15 *Taylor v Ruddock* (Unreported, NSW District Court, Murrell DCJ, 18 December 2002).
- 16 *Taylor v Ruddock* (Unreported, NSW District Court, Murrell DCJ, 18 December 2002) [140].
- 17 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 18 *Ruddock v Taylor* (2003) 58 NSWLR 269, 279.
- 19 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].
- 20 *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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