



Australian
Human Rights
Commission

Stevanovic v Commonwealth (DIAC)

[2013] AusHRC 67

© Australian Human Rights Commission 2013.



ISSN 1837-1183

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

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

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

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

Electronic format

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

Contact details

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

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

Stevanovic v Commonwealth (Department of Immigration and Citizenship)

Report into arbitrary deprivation of
the right to enter one's own country
and freedom from interference with
the family

[2013] AusHRC 67

Australian Human Rights Commission 2013

Contents

1	Introduction	3
2	Summary of findings and recommendations	3
3	The complaint by Mr Stevanovic	3
	3.1 Background	3
	3.2 Findings of fact	4
4	The Commission's human rights inquiry and complaints function	5
5	Assessment	5
	5.1 Act or practice of the Commonwealth?	5
6	Inconsistent with, or contrary to, human rights	6
	6.1 Right to enter own country	6
	6.2 Interference with the family	7
7	Findings and recommendations	8
	7.1 Power to make recommendations	8
	7.2 Consideration of compensation	8
	7.3 Recommendation that compensation be paid	9
	7.4 Apology	9
	7.5 Policy	9



**Australian
Human Rights
Commission**

1 November 2013

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 the complaint made by Mr Sasha Stevanovic.

I have found that the cancellation of Mr Stevanovic's visa had the effect of arbitrarily depriving him of the right to enter his own country within the meaning of article 12(4) of the *International Covenant on Civil and Political Rights* (ICCPR).

I have also found that the interference with Mr Stevanovic's family occasioned by the cancellation of his visa was arbitrary within the meaning of article 17(1) of the ICCPR and breached article 23(1) of the ICCPR.

By letter dated 16 September 2013, Mr Martin Bowles, Secretary of the Department of Immigration and Citizenship, provided a response to my findings and recommendations. I set out his response below. In relation to my recommendation that the payment of compensation in the amount of \$20 000 is appropriate, the Secretary of the Department of Immigration and Citizenship responded:

The Department continues to consider that the Department has not breached Australia's obligations under Article 12(4), 17(1) and 23(1) of the ICCPR for the reasons set out in its previous responses.

The Department notes that the President's recommendations in regards to compensation payable to Mr Sasha Stevanovic. However, the Commonwealth is only able to pay compensation on the basis of potential legal liability where it is consistent with the *Legal Services Division Directions 2005*. The *Legal Services Directions* 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 is of the view that there is not a meaningful prospect of liability under Australian domestic law in these circumstances and therefore is unable to pay compensation to Mr Stevanovic on this basis.

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

In some cases where compensation is not payable on the basis of legal liability, individuals are able to successfully make a claim for discretionary compensation. It does not appear that the present circumstances would support payment of compensation under the discretionary compensation schemes. However, it is open to Mr Stevanovic to make a claim for discretionary compensation if he wishes to do so.

In relation to my recommendation that the Commonwealth provide a formal written apology to Mr Stevanovic for the breaches of his human rights identified in the report, the Secretary of the Department of Immigration and Citizenship responded:

The Department also notes the President's recommendation to provide a written apology to Mr Stevanovic. The Department respectfully disagrees with this recommendation as the department remains of the view that the cancellation of Mr Stevanovic's visa and consequent removal was lawful due to the serious nature of his criminal offences and the need to protect the Australian community.

The Department advises the Commission that there will be no action taken with regard to this recommendation.

Please find enclosed a copy of my report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the left.

Gillian Triggs
President
Australian Human Rights Commission

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 Sasha Stevanovic that his treatment by the Commonwealth of Australia involved acts or practices inconsistent with or contrary to human rights.

2 Summary of findings and recommendations

2. I find that the cancellation of Mr Stevanovic's visa had the effect of arbitrarily depriving him of the right to enter his own country within the meaning of article 12(4) of the *International Covenant on Civil and Political Rights* (ICCPR).
3. I also find that the interference with Mr Stevanovic's family occasioned by the cancellation of his visa was arbitrary within the meaning of article 17(1) of the ICCPR and breached article 23(1) of the ICCPR.
4. In light of my findings regarding the acts or practices of the Commonwealth I make the following recommendations:
 - that the Commonwealth pay financial compensation to Mr Stevanovic in the amount of \$20 000; and
 - that the Commonwealth provide a formal written apology to Mr Stevanovic for the breaches of his human rights identified in this report.

3 The complaint by Mr Stevanovic

3.1 Background

5. On 18 November 2011 Mr Stevanovic lodged a complaint alleging that the cancellation of his visa which required him to leave Australia breached his human rights.
6. Mr Stevanovic and the Commonwealth have had the opportunity to respond to my preliminary view dated 17 September 2012, and to my amended preliminary view dated 19 March 2013, which set out the acts or practices raised by the complaint that appeared to be inconsistent with or contrary to human rights.
7. My function in investigating complaints of breaches of human rights is not to determine whether the Commonwealth has acted consistently with Australian law but whether the Commonwealth has acted consistently with human rights defined and protected by the ICCPR.
8. It follows that the content and scope of the rights protected by the ICCPR should be interpreted and understood by reference to the text of the relevant articles of the international instruments and by the international jurisprudence about their interpretation.

3.2 Findings of fact

9. I consider the following statements about the circumstances which gave rise to Mr Stevanovic's complaint to be uncontentious.
10. On 9 October 1970 Mr Stevanovic and his parents migrated from Serbia to Australia. Mr Stevanovic was three and a half years old. Mr Stevanovic was considered to hold a Transitional (Permanent) visa.
11. Mr Stevanovic was convicted of a range of offences in 1986 and 1987. He was fined \$200 for 'Receiving', fined \$200 and placed on a two year good behaviour bond for 'Break, enter and steal' and fined \$300 for 'Offensive language'.
12. Between 1988 and 1991 Mr Stevanovic was convicted of a range of driving offences.
13. On 27 April 1994 Mr Stevanovic was convicted of 'Self-administering a prohibited drug' and was fined \$400.
14. Between 1994 and 1997 Mr Stevanovic was charged with a number of drug offences. In December 1997 Mr Stevanovic was sentenced to imprisonment for a minimum term of seven years and three months for the offences of manufacture of a commercial quantity of a prohibited drug, conspiracy to manufacture a prohibited drug and knowingly take part in the manufacture of a prohibited drug.
15. On 22 September 2000 the Minister cancelled Mr Stevanovic's Transitional (Permanent) visa pursuant to section 501(2) of the *Migration Act 1958* (Cth) (Migration Act) (cancellation of visa on character grounds).
16. On 30 September 2004 Mr Stevanovic was released from prison and was removed to Serbia.
17. In or about 2006, as a result of the decision in *Nystrom v Minister for Immigration and Multicultural Affairs*,¹ the Commonwealth reviewed the decision to cancel Mr Stevanovic's visa. On 29 September 2006 Mr Stevanovic was notified that he continued to hold a Transitional (Permanent) visa and an absorbed persons visa and that the Department was considering cancelling both visas under section 501(2) of the Migration Act.
18. As a result of the appeal decision in *Minister for Immigration and Multicultural Affairs v Nystrom*² the Department formed the view that the 22 September 2000 decision to cancel Mr Stevanovic's visa was, in fact, valid. However, the Department considered that this decision was most likely invalid on other grounds. On 8 February 2007 the Minister cancelled Mr Stevanovic's visas pursuant to section 501(2) of the Migration Act.
19. Mr Stevanovic wants to return to Australia. However, it is likely that if Mr Stevanovic were to apply for a visa, his application would be rejected because he is unable to satisfy Special Return Criteria 5001(c).³ The Minister cancelled Mr Stevanovic's visa because he reasonably suspected that Mr Stevanovic did not pass the character test outlined in section 501(6) Migration Act. Mr Stevanovic claims that the cancellation of his visa had the effect of arbitrarily depriving him of his right to enter his own country within the meaning of article 12(4) of the ICCPR.
20. Mr Stevanovic also claims that the cancellation of his visa had the effect of arbitrarily interfering with his family within the meaning of articles 17(1) and 23(1) of the ICCPR.

4 The Commission's human rights inquiry and complaints function

21. 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.⁴
22. 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.
23. 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.⁵

5 Assessment

5.1 Act or practice of the Commonwealth?

24. Mr Stevanovic complains about being required to leave Australia.
25. Based on the information provided to the Commission, it appears that Mr Stevanovic was removed from Australia pursuant to section 198(1) of the Migration Act because he was an unlawful non-citizen who asked the Minister, in writing, to be so removed. Mr Stevanovic's removal from Australia did not involve an exercise of discretion.
26. However, Mr Stevanovic became an unlawful non-citizen because the Minister exercised his discretion under section 501(2) of the Migration Act to cancel Mr Stevanovic's visa.
27. Whilst Mr Stevanovic's removal from Australia did not involve an exercise of discretionary power, the decision to cancel his visa did. I consider that the decision of the Minister to cancel Mr Stevanovic's visa was an act of the Commonwealth within the meaning of section 3 of the AHRC Act.

6 Inconsistent with, or contrary to, human rights

6.1 Right to enter own country

28. The United Nations Human Rights Committee (UNHRC) has indicated that the first question relevant to the assessment of whether an individual has been arbitrarily deprived of the right to enter his or her own country is whether the country was in fact that person's own country.⁶ The concept of 'own country' is not limited to nationality but extends to an individual who, because of his or her special ties to country, cannot be considered to be a mere alien.⁷
29. The Commonwealth claims that Australia was not Mr Stevanovic's own country. The Commonwealth claims that Serbia is Mr Stevanovic's own country because he retained Serbian nationality and did not seek to acquire Australian nationality despite no unreasonable impediments being placed on Mr Stevanovic's ability to obtain Australian citizenship.
30. Mr Stevanovic arrived in Australia when he was three and a half years old. All of his immediate family live in Australia. Mr Stevanovic advised that at the time of his removal from Australia, he did not know anyone in Serbia and did not speak Serbian.
31. Mr Stevanovic claims that he did not obtain Australian citizenship because he did not realise that he had to. Mr Stevanovic claims that, because he came to Australia on his mother's passport, he thought that he would automatically become an Australian citizen when his mother became an Australian citizen. I note that Mr Stevanovic held an absorbed persons visa.
32. I am satisfied that Australia was Mr Stevanovic's 'own country' within the meaning of article 12(4) of the ICCPR in light of the strong ties connecting him to Australia: the presence of his family in Australia, the language that he speaks, the duration of his stay in Australia and the lack of any ties, other than nationality, with Serbia.
33. The next question relevant to determining whether Mr Stevanovic's rights have been breached under article 12(4) is whether the Commonwealth has arbitrarily deprived Mr Stevanovic of the right to enter his own country. Consideration of the arbitrariness of the interference requires that I consider the balance between the Commonwealth's reasons for removing Mr Stevanovic and the degree of hardship that he would encounter as a consequence of the removal.
34. The Commonwealth states that it has not arbitrarily deprived Mr Stevanovic of the right to enter his own country. The Commonwealth states that the Australian Government has an obligation to ensure, wherever possible, the protection of the Australian community.
35. On 22 September 2000 the Minister cancelled Mr Stevanovic's visa pursuant to section 501(2) of the Migration Act. Section 501(2) of the Migration Act provides that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that he or she passes the character test. The Minister is not required to cancel a visa on the ground that a person does not pass the character test, but has a discretion to do so.

36. The Commonwealth has been unable to produce a copy of the Minister's decision of 22 September 2000. I note that Mr Stevanovic was a person with a 'substantial criminal record' within the meaning of section 501(7) of the Migration Act because he was a person who was sentenced to a term of imprisonment of 12 months or more. As a person with a 'substantial criminal record' he does not pass the character test (section 506(6) Migration Act).
37. The effect of the cancellation of Mr Stevanovic's visa pursuant to section 501(2) of the Migration Act is that Special Return Criteria 5001 applies to him and he is permanently excluded from returning to Australia. Without Ministerial intervention in his favour, he is permanently barred from entering Australia.
38. Mr Stevanovic was granted parole and was released from prison. Whilst he is a person with a criminal record, there is no evidence before me that he is a person who poses a risk to the Australian community.
39. The UNHRC has stated that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.⁹ I have found that Australia was Mr Stevanovic's own country.
40. I am of the view that the considerations that weighed in favour of not cancelling Mr Stevanovic's visa (including the presence of his family in Australia, the language he speaks, the duration of his stay in Australia and the lack of any ties other than nationality to Serbia) should have outweighed the factors that favoured cancelling Mr Stevanovic's visa. Accordingly, I find that the cancellation of Mr Stevanovic's visa arbitrarily deprived him of his right to enter his own country within the meaning of article 12(4) of the ICCPR.

6.2 Interference with the family

41. The first question relevant to whether Mr Stevanovic's rights have been breached under articles 17(1) and 23(1) of the ICCPR is whether there has been an interference with the family. The Commonwealth's decision to cancel Mr Stevanovic's visa had the effect of removing him from the country that he had lived in for the vast majority of his life and separating him from his mother, father, brother and sister. Mr Stevanovic states that he knew nobody in Serbia at the time that he was removed from Australia. I consider that the cancellation of Mr Stevanovic's visa which led to his removal from Australia interfered with his family.
42. The next question relevant to determining whether Mr Stevanovic's rights have been breached under articles 17(1) and 23(1) is whether the Commonwealth's interference with Mr Stevanovic's family was arbitrary. Consideration of the arbitrariness of interference with the family requires that I consider the balance between the Commonwealth's reasons for removing Mr Stevanovic and the degree of hardship that his family would encounter as a consequence of the removal.⁹
43. As noted in paragraphs 35-36, the Minister cancelled Mr Stevanovic's visa pursuant to section 501(2) of the Migration Act. It appears likely that the Minister cancelled Mr Stevanovic's visa because he was a person who had been sentenced to a term of imprisonment of 12 months or more. However, Mr Stevanovic served his term of imprisonment and was granted parole. There is no information before me to suggest that Mr Stevanovic posed a risk to the Australian community.
44. Considering the hardship to Mr Stevanovic and his family, I note that Mr Stevanovic had no family ties in Serbia and did not speak Serbian at the time that he was removed from Australia. Mr Stevanovic had lived in Australia since he was three and a half years old and his entire immediate family lives in Australia.

45. There is little information before the Commission about the nature of Mr Stevanovic's family relationships. Whilst Mr Stevanovic had been in prison for seven years immediately before being removed from Australia, I do not consider that this is evidence that he did not have strong ties to his family. I note that in 2006, following his removal from Australia, Mr Stevanovic's mother visited him in Serbia for a period of one month. This suggests that Mr Stevanovic maintained a close relationship at least with his mother at the time he was removed from Australia.
46. Whilst Mr Stevanovic can maintain contact with his family via telephone and email, Mr Stevanovic is not permitted to return to Australia, either permanently or for a visit, without the Minister intervening in his favour.
47. For the reasons outlined above, I am of the view that the interference with Mr Stevanovic's family life was disproportionate to the legitimate aim of protecting the Australian community from non-citizens with a criminal record. Accordingly, I find that the interference with Mr Stevanovic's family was arbitrary within the meaning of articles 17(1) and 23(1) of the ICCPR.

7 Findings and recommendations

7.1 Power to make recommendations

48. 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
49. 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

7.2 Consideration of compensation

50. There is no judicial guidance dealing with the assessment of recommendations for financial compensation for breaches of human rights under the AHRC Act.
51. 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
52. 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
53. I have considered any economic and non-economic loss experienced by Mr Stevanovic.

7.3 Recommendation that compensation be paid

54. I have found that the Minister's cancellation of Mr Stevanovic's visa breached articles 12(4), 17(1) and 23(1) of the ICCPR.
55. Mr Stevanovic did not suffer any economic loss as a result of his removal from Australia. Mr Stevanovic was not employed at the time that he was removed from Australia and had been in prison for the preceding seven years.
56. Considering Mr Stevanovic's non-economic loss, Mr Stevanovic has provided no evidence of psychological or other injury caused by his removal from Australia. However, he has described the significant hardship that he has experienced as a result of being required to leave his family and the country that he had lived in since he was three and a half years old to live in a country where he knew no one and did not speak the language.
57. Assessing compensation in such circumstances is difficult and requires a degree of judgment. I consider that the Commonwealth should pay Mr Stevanovic an amount of \$20 000 to compensate him for the pain and suffering that he experienced as a result of the breaches of his rights under articles 12(4), 17(1) and 23(1) of the ICCPR.

7.4 Apology

58. In addition to compensation, I consider that it would be appropriate for the Commonwealth to provide a formal written apology to Mr Stevanovic 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.¹⁵

7.5 Policy

59. I have also considered whether the Commonwealth should amend its policies with respect to the cancellation of visas under section 501 of the Migration Act.
60. Ministerial Direction 55 provides direction to decision makers with respect to performing functions and exercising powers under section 501 of the Migration Act. Ministerial Direction 55 replaced Ministerial Direction 41¹⁶ and commenced on 1 September 2012.
61. The Minister is not bound to follow Ministerial Directions but other decision makers are so bound.
62. Ministerial Direction 55 states that in deciding whether to cancel a person's visa pursuant to section 501 the strength, duration and nature of the person's ties to Australia are primary considerations.¹⁷ Ministerial Direction 55 further states that other relevant considerations include but are not limited to:
 - (b) Effect of cancellation of the person's visa on the person's immediate family in Australia, if those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely.
 - (d) The extent of any impediments that the person may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country) taking into account:
 - i The person's age and health
 - ii Whether there are substantial language or cultural barriers; and
 - iii Any social, medical and/or economic support available in that country.¹⁸

63. When the Minister cancelled Mr Stevanovic's visa in 2007, Ministerial Direction 21 was in force. The primary considerations for decision makers under Ministerial Direction 21 did not include the strength, duration and nature of the person's ties to Australia.
64. Ministerial Direction 21 provided that the extent of disruption to the non-citizen's family, business and other ties to the Australian community was one of the 'other considerations' relevant to the decision to cancel a visa.
65. Ministerial direction 21 stated that the 'other considerations' although not primary considerations may be relevant and that it is appropriate that other considerations be taken into account, but that generally they be given less individual weight than that given to the primary considerations.
66. It is to be welcomed that Ministerial Direction 55 provides for a more explicit consideration of a person's connection to Australia and the hardship that a person may experience if returned to an unfamiliar country.
67. In the circumstances, I make no recommendation in this regard.



Gillian Triggs
President
Australian Human Rights Commission

1 November 2013

-
- 1 [2005] FCAFC 121.
2 [2006] HCA 50.
3 Special return criterion 5001(c) requires the decision maker to be satisfied that the visa applicant is not a person whose visa has been cancelled under section 501, wholly or partly because of paragraph 501(6)(a)(substantial criminal record).
4 Section 3(1) of the AHRC Act defines human rights to include the rights recognised by the ICCPR.
5 See, Secretary, *Department of Defence v HREOC, Burgess & Ors* ('Burgess') (1997) 78 FCR 208.
6 United Nations Human Rights Committee, General comment 27: Freedom of Movement. CCPR/C/21/Rev.1/add [20]-[21].
7 United Nations Human Rights Committee, General comment 27: Freedom of Movement. CCPR/C/21/Rev.1/add [20]. See also *Stewart v Canada* Communication No 538/1993, UN Doc CCPR/C/58/D/538/1993 (1996), *Canepa v Canada* Communication No 558/1993 UN Doc CCPR/C/D/558/1993 (1997), *Nystrom v Australia* Communication No 1557/2007 UN Doc CCPR/C/102/1557/2007, *Warsame v Canada* Communication No 1959/2010 UN Doc CCPR/C/102/D/1959/2010.
8 *Nystrom v Australia* Communication No 1557/2007 UN Doc CCPR/C/102/1557/2007 [7.6].
9 *Madafferi v Australia* Communication No 1011/2001. CCPR/C/D/1011/2001[9.8].
10 AHRC Act s 29(2)(a).
11 AHRC Act s 29(2)(b).
12 AHRC Act s 29(2)(c).
13 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
14 See *Hall v A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
15 D Shelton, *Remedies in International Human Rights Law* (2000) 151.
16 Ministerial Direction 41 replaced Ministerial Direction 21, which was in force at the time that Mr Stevanovic was removed from Australia.
17 Ministerial Direction No.55, 9(b).
18 Ministerial Direction No.55, 10(a), (d).

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

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

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

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

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

