HUMAN
RIGHTS
COMMISSION

REPORT NO. 18

THE HUMAN RIGHTS OF AUSTRALIAN-BORN CHILDREN WHOSE PARENTS ARE DEPORTED

August 1986

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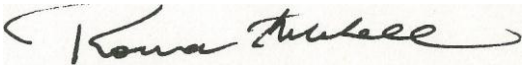
12 August 1986

The Hon. Lionel Bowen, M.P.,
Deputy Prime Minister and Attorney-General,
Parliament House,
CANBERRA ACT 2600

Dear Attorney-General,

Pursuant to section 9(1)(b)(ii) of the Human Rights Commission Act 1981, we present this report to you, following the Human Rights Commission's inquiry into and endeavours to effect a settlement of a number of complaints related to the deportation of families with Australian-born children of tender years.

Yours sincerely,



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FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 reads:

9.(1) The functions of the Commission are-

(a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;

(b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and-

(i) where the Commission considers it appropriate to do so - endeavour to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters-to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;

(c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

(d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;

(e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;

(f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

(g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

(h) to perform-

(i) any functions conferred on the Commission by any other enactment;

(ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and

(iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not-

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.

I. PROPOSAL

Over the past two years the Commission has drawn attention in the Commission's Reports Nos. 10[1] and 15[2], to the human rights of Australian-born citizens who are the children of prohibited non-citizens, temporary entrants or visitors. The Government has responded by introducing legislation in the Parliament which will have the effect of removing the right of automatic citizenship for such children.

2. This Report is directed towards achieving final resolution of the complaints the Commission has received, and of the situations of the limited number of people who might complain in the future. The Commission believes the enactment of amendments to the Australian Citizenship Act and the Migration Act will remove the objection that it is contrary to the human rights of Australian citizens, including infant citizens, to be subject either to what amounts to deportation or to forced separation from their parents.

3. In the recent past ten families with Australian-born children have been deported or have left on their own account under threat of deportation despite the Commission's intervention on their behalf because of the human rights involved. In each of these cases, the family complained to the Commission. The Commission attempted to assist the complainants to reach a settlement with the Department of Immigration and Ethnic Affairs on the basis of respecting the human rights of the Australian-born child, who is thereby an Australian citizen, by allowing the parents to remain. The parents either went of their own accord under threat of deportation, or were deported, taking their Australian-born children with them. A note of each of the cases appears at Appendix 1.

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1. Human Rights Commission, Report No. 10. The human rights of Australian-born children: a report on the complaint of Mr and Mrs R.C. Au Yeung, AGPS, Canberra, 1985

2. Human Rights Commission, Report No. 15. The human rights of Australian-born Children: a report on the complaint of Mr and Mrs M. Yilmaz, AGPS, Canberra, 1985.

4. Seventeen further families have complained to the Commission. Their cases are summarised in Appendix 2. A further two families have made inquiries, and their cases are summarised in Appendix 3. They, including their Australian-born child or children, are still in Australia but they are threatened with deportation. In several cases the Australian-born child is now four years old or more and has lived in Australia all his or her life, and the question arises whether his or her parents should remain under continuing threat of deportation. As the Commission indicated in its report reviewing the Migration Act, a stage is reached when the balance of rights of a prohibited non-citizen (PNC), particularly one with family ties, e.g. a wife and/or children, tips in favour of the PNC and associated family. That stage would be reached when, for example, the PNC has been in Australia for some years, has not evaded tax and has demonstrated ability to settle effectively (it is recalled that persons of permanent resident status can now qualify for citizenship after two years). Of the twenty-seven families who have lodged complaints, eleven have close relatives residing permanently in Australia. In a further four cases, the spouse is an Australian citizen or permanent resident. At least eight of those in the nineteen families not deported have been in Australia for three years or more as PNCs without deportation (in addition to the time here legally), and this fact should add weight to the claim that they be allowed to stay with their Australian-born citizen children

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3. Human Rights Commission, Report No. 13. Human rights and the Migration Act 1958, AGPS, Canberra, 1985, especially at paragraphs 199-200 and 235-236.

4. See also Human Rights Commission, Report No. 8. Deportation and the family: report on the complaints of Mrs M. Roth and Mr C.J. Booker, AGPS, Canberra, 1984, where the rights of the family are discussed.

5. The Commission recognises that the Government has been concerned lest acceptance of the rights of Australian-born infant citizens to remain in Australia with their parents might lead to a substantial volume of uncontrolled migration from over-staying entrants and others. At the same time, it is of the view that the risk can be over-stated. It considers the suggestion that 'the floodgates' might be opened is without foundation. Over the past five years, the Commission has received only twenty-seven complaints (and two inquiries) relating to Australian-born children whose parents are under threat of deportation or have been deported. Appendixes 1, 2 and 3 describe the twenty-nine cases, including two which have been the subject of Reports to the Parliament. Allowing all of these persons to stay, or to return to Australia, where they have been deported, would hardly constitute a trickle, let alone a flood. Nor is it likely that many more cases will emerge, given that the legislation recently passed by Parliament will soon become law. No such cases will then be able to occur, because the infant born here will not receive Australian citizenship.

6. The Commission observed in its Reports on the Yilmaz family (No. 15) and the Au Yeung family (No. 10) that more effective supervision of temporary entrants would, by achieving quicker departures, remove the kind of problems arising in these cases from long stays in Australia. The Commission notes that the Department of Immigration and Ethnic Affairs has had considerable difficulty keeping track of persons who overstay their entry permits. In the twenty-nine cases before the Commission, the families have been in Australia for an average of just over four years. On average, two years elapsed from the date of entry before the first child was born in Australia. It is hoped that moves to computerise the Department's record-keeping, in line with the recommendations of the Joint Select Committee on an Australia Card and the 'Efficiency Audit Report' by the Auditor-General, will go some way to reducing the period it takes to locate prohibited non-citizens.

7. The Commission recommends that the Minister:

(a) reconsider the policy in relation to the deportation of the relatively small and diminishing group of prohibited non-citizens with Australian-born children who are Australian citizens, having in mind the contents of this and earlier Reports from the Commission; and

(b) determine that families who have Australian-born children who are Australian citizens, i.e. were born before the new legislation came into operation, be allowed to remain in Australia.

8. It seems unlikely that the number of families involved in these recommendations will be large, compared to the overall size of Australia's immigration program. Many of the children born in Australia to people who are not permanent residents or citizens will depart with their parents in the normal way when the purpose of the visit is completed, e.g. a period of service with a company in Australia, particularly if the Department's checking system improves. Further, the rate of complaints has not been high. Finally, apart from the very small numbers of children acquiring Australian citizenship in the future because they would otherwise be Stateless, any children born after the Act comes into operation will not have Australian citizenship status and therefore the number eligible has a defined terminus.

9. Most especially, the Commission would welcome acceptance of the recommendations in paragraph 7 because of the positive response in the observance of human rights this would represent. The Commission would also welcome, as indeed presumably would the Department, the easing in the work of complaint handling and enforcement that would result from adopting the recommendations.

10. In the next section of this Report, the Commission discusses briefly the human rights issues involved. It notes in particular the one European Commission case directly relevant - Uppal v. United Kingdom and distinguishes three others that have been mentioned as not supporting the view of the Commission.

II. THE ISSUES

11. The Commission identified and discussed in some detail the human rights of the Australian-born children of prohibited non-citizens in Chapter III of Report No. 10, The human rights of Australian-born children: a report on the complaint of Mr and Mrs R.C. Au Yeung. The position of Australian-born children of prohibited non-citizens will change materially when the amendments to the Australian Citizenship Act and the Migration Act referred to earlier become law, but this Report deals with the situation of children born in Australia before that time.

12. The Commission does not propose to reiterate in detail the arguments contained in Report No. 10. It is sufficient to emphasise its view that to deport the parents of an infant Australian-born child, and thereby in effect to deport the child or else separate it from its parents when they are deported and it remains in its own country, raises human rights issues under Articles 23 and 24.1 of the International Covenant on Civil and Political Rights (ICCPR), and under Principles 2, 3, 6 and 7 of the Declaration of the Rights of the Child. The text of these provisions is set out in Appendixes 5 and 6.

13. Article 24.1 of the ICCPR provides that:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

14. Having acquired Australian nationality, these children become entitled to the same measures of protection on the part of the State as it extends to other Australian children. However, the realities of the situation are that when the parents are forced to leave, the child is forced

to leave too, thereby depriving the child of the right to protection to which the child is entitled and which the State has a duty to provide. The child is discriminated against by virtue of birth to prohibited non-citizens, despite the right under Article 24.1 to be treated without discrimination as to race, national or social origin, or birth.

15. The Commission has been criticised for concluding that the reality of the situation in these cases is that Australian citizens are being expelled from Australia. The Commission has reconsidered its position in this matter and adheres to the view that it has accurately described the realities of the situation in such cases. It is mere legalism to argue that such children are not expelled because no deportation order bearing their name is in existence or that their parents can with perfect propriety leave their infant children behind them. It is not an answer to say that the parents have infringed the law by overstaying in Australia or entering the country illegally. In the case of infant children born in Australia, the sins of the parents are not the sins of the children and they should not bear the taint of them.

16. The Commission, in its Reports Nos. 10 and 15, also supported its arguments by reference to Article 23 of the ICCPR, which states in paragraph I that:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The families of Australian-born children of prohibited non-citizen parents deserve protection under Article 23, as do the children in their own right under Article 24. The appropriate protection in these cases is to allow the families, including the children, to remain in Australia. This view of Article 23 is consistent with European human

rights jurisprudence relating to the analogous provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

17. The equivalent to Article 23 of the ICCPR in the European Convention is Article 8. Article 8.1 of the European Convention provides that:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8.2 qualifies this right in a way not mirrored in Article 23 of the ICCPR by providing that there is to be no interference by a public authority with the exercise of the right except in accordance with the law and as is necessary in a democratic society for specified reasons.

18. The general rule applied by the European Commission in deportation and immigration cases was cited with approval by the European Court of Human Rights in Abdulaziz. Cabales and Balkandali v. United Kingdom (1985) 7 EHRR 471 at page 495, and is that:

> the right of a foreigner to enter or remain in a country was not as such guaranteed by the Convention, but immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a State where members of his family were living might raise an issue under Article 8.

It is rare for a case before the European Commission of Human Rights or the European Court of Human Rights to involve issues directly analogous to those dealt with in this report. This is because citizenship in Europe is rarely based on the ius soli as far as births to alien families are concerned. The ius soli is the right to citizenship of a country flowing from birth in that country irrespective of whether the parents of the child concerned are nationals of that country. However, one such case has

been located, Uppal v. United Kingdom (No. 1) (1979) DR 17, 149. It involved facts substantially similar to those in the type of case under consideration in this report. The two parents were overstayers, as distinct from illegal immigrants, and were threatened with deportation. They had children born to them in the United Kingdom who, as the law then stood, had a right to remain as citizens of the country. They also had parents who had been in the United Kingdom for many years and had a right to remain there.

19. The European Commission agreed that, considered by themselves, the husband and wife being overstayers, not only lacked rights to remain under United Kingdom law, but also under the European Convention. However, the European Commission did not confine itself to a narrow analysis of the lack of rights of the husband and wife as individuals or spouses. It looked also at the rights of the children, and the grandparents, under the Convention and of the family as a whole. The case did not get beyond an admissiblity decision in favour of the Uppals in the European Commission, because that admissibility decision was followed by a friendly settlement under Article 28 of the Convention. This friendly settlement gave the Uppals all they wanted, which was the right to remain permanently in the United Kingdom. The admissibility decision had foreshadowed a finding in later proceedings which would be adverse to the United Kingdom, making the friendly settlement procedure an appropriate way of resolving the matter.

20. When tabling the Commission's Report No. 15 you indicated, as Attorney-General, both that you did not consider deportation of prohibited non-citizens amounts in practice to deportation of Australian-born infant citizens and that the view of the Commission was not well based on

the relevant principles of international human rights law. In the preceding paragraphs, these two points have been considered and the views of the Commission expounded.

21. Further, it seems to the Commission that it would hardly be conscionable for the Government to argue that the proper course for the parents to adopt is to leave their infant Australian citizen child in Australia to enjoy his or her rights as an Australian citizen. This would be to expect the parents to act against Principle 6 of the Declaration of the Rights of the Child which provides that a child is wherever possible to grow up in the care and under the responsibility of its parents. Other principles enjoin special protection and care for the child. Thus the humanitarian objectives to which Australia assented when supporting the Declaration of the Rights of the Child argue for the family to be kept together to avoid breaching the provisions of the Declaration. If the child leaves Australia with its parents, and the emphasis is on the whole family departing, then the rights of the child as an Australian citizen are breached. If the child remains but its parents are deported, then the principles of the Declaration are infringed. Nor is it legitimate to argue that once the child has left Australia, there need no longer be any concern for its human rights. The child is an Australian citizen and as such is entitled to enjoy Australia's protection wherever he or she may be. It is precisely this 'Catch 22' situation that will be resolved by the recent amendments of the Australian Citizenship and Migration Acts.

22. The Commission recognises that the primary objective of the Government is to retain control over immigration, and that the parents of the relevant children are illegally in Australia. Two important principles are involved: control over immigration and protection of the rights of

Australian citizens. In the view of the Commission, the rights of Australia's infant citizens to remain in Australia with their parents should prevail over the right to expel the parents, particularly having in mind the smallness of the numbers involved.

23. It remains to review the three cases considered by the European Commission of Human Rights that have been drawn to the attention of the Commission as not supporting the position it has taken. They are X v. Sweden (1981) 4 EHRR 408, X and Y against the United Kingdom (1972) CD 39, 104 and X and X against the United Kingdom (1972) CD 42, 146. None of these, in the view of the Commission, is directly relevant to the issue of the Australian-born child whose parents are prohibited non-citizens. They do not involve the effective deportation of infant citizens. They deal with the question whether the 'family' would in certain circumstances include members other than parents and their children, and whether persons voluntarily emigrating to a new country can claim a right to have other members of their family join them subsequently so that the unity of the family is preserved: they do not raise the rights of infant citizens and the rights of children under the Declaration of the Rights of the Child, the two key issues in the cases before this Commission.

24. A summary of the three cases appears in Appendix 4. In brief, the case of X v. Sweden involved a person emigrating to Sweden and then seeking to have her parents, brothers and sisters join her from Turkey: she was not a Swedish citizen and the family originally arranged the separation, so the case is not directly relevant. The case of X and Y against the United Kingdom concerned the issue of whether an adult woman, having to leave England because her husband was refused permanent residence, could claim

that she and her parents consituted a 'family unit': in this case, there were no citizen children involved, and so again the case is not directly relevant. In X and X against the United Kingdom the question was whether a woman, emigrating to the United Kingdom from Kenya with her child, had the right to have her husband, an Indian citizen then living in Kenya, join her permanently in the United Kingdom: again, the case is not directly relevant because the child was not born in the United Kingdom.

25. Accordingly, the Commission makes the recommendations set out in paragraph 7 of this Report, which are designed to respect the human rights of infant Australian citizens of prohibited non-citizen parents and to remove any remaining anomalies arising from the enactment of the Australian Citizenship Amendment Act 1986 and the Migration Amendment Act 1986.

III. REFERENCE OF THE REPORT TO THE DEPARTMENT

26. In discharging its obligations under ss. 14 and 16(2) of the Human Rights Commission Act to give the Department of Immigration and Ethnic Affairs a reasonable opportunity to respond to its conclusions and to supply advice as to whether any action is being taken as a result of the findings and recommendations of the Commission, a copy of this report was made available in draft to the Department on 3 July 1986. On 14 July 1986 the Secretary to the Department advised that it was not proposed to take any action as a result of the findings and recommendations in this matter. The Commission regrets the failure to observe the human rights of infant Australian citizens which this entails.

Appendix 1

PERSONS WHO HAVE BEEN DEPORTED OR WHO HAVE LEFT AUSTRALIA UNDER THREAT OF DEPORTATION

MR AND MRS AQBAL

Mr and Mrs Aqbal first came to Australia from Fiji in December 1973 for an eleven month visit. During that time a child was born to them.

On their return to Fiji, the Aqbals applied to migrate to Australia but were unsuccessful even though their child is an Australian citizen and they have relatives in Australia. Mr and Mrs Aqbal visited Australia in 1977 and again in December 1981. On this last visit they overstayed their visas.

Mr Aqbal was apprehended by the Department of Immigration and Ethnic Affairs (DIEA) and deportation orders were signed against him and his wife. They complained to the Commission in November 1983 and also began proceedings in the Federal Court. In November 1984, the Federal Court granted a stay of deportation to the Aqbals pending the High Court decision which was handed down in December 1985. The Aqbals subsequently lost their proceedings in the Federal Court and the decision to deport them was upheld.

Mr and Mrs Aqbal were deported in May 1986, accompanied by their Australia born child aged eleven years, who had spent most of her school years in Australia.

MR AND MRS AU YEUNG

Mr and Mrs Au Yeung came to Australia in August 1982 on tourist visas to see Mrs Au Yeung's mother. They overstayed their visas and entered employment.

In December 1983 a child was born to them in New South Wales. In May 1984 they were apprehended by the DIEA. They departed Australia in December 1984 to avoid deportation. This matter was the subject of a report by the Commission to the Attorney-General (Report No. 10).

MR AND MRS YILMAZ

Mr and Mrs Yilmaz entered Australia in March on one month temporary entry permits. Mr Yilmaz obtained employment.

In September 1982 a child was born to them in Victoria and two years later another child was born in August 1984 in New South Wales. Deportation orders were issued in October 1984 against Mr and Mrs Yilmaz. In November 1984 they complained to the Commission. They left Australia in December 1984 to avoid deportation. This matter was the subject of a report by the Commission to the Attorney-General (Report No. 15).

MR AND MRS STOTT

Mr and Mrs Stott came to Australia from England with twelve month working visas, in November 1981. In September 1982 they applied for permanent residence. Their applications were rejected by DIEA in May 1983 and subsequent reviews confirmed the decision. In 1984 Mrs Stott gave birth to a child in Perth. An application in the Federal Court for review of the decision in March 1985 was unsuccessful.

Mr and Mrs Stott were given a direction in July 1985 by DIEA to depart Australia in 30 days. In August 1985, they complained to the Commission that enforced departure from Australia would be inconsistent with the rights of their Australian-born child.

They complied with the DIEA direction and departed Australia in August 1985.

Subsequently they returned to Australia as migrants in January 1986.

MR AND MRS TOPUZ

Mrs Topuz arrived in Australia in March 1981 from Turkey, with her son and daughter, to visit relatives in Mildura. Following the death of their son, Mr Topuz joined his family in Australia in July 1981. Both he and Mrs Topuz overstayed their visitor's visas and in August 1982 a son was born to them.

The DIEA rejected an application for permanent residence in April 1982 and a deportation order was issued early in 1983. The Federal Court issued a stay of deportation until February 1986. Mrs and Mrs Topuz departed Australia in March 1986 at their own expense, accompanied by their Australian citizen child, aged three and a half years, and their other daughter, with the intention of applying to migrate to Australia from Turkey.

MR **AND MRS NASIO**

Mr and Mrs Nasio arrived in Australia from Tonga with two children in July 1983 on a four month 'Temporary entry permit' (TEP). Mrs Nasio has a sister living in Australia. They overstayed and Mr Nasio found employment. A child was born to them in September 1984.

A deportation order was signed in July 1985. Applications for permanent residence made after their arrest by DIEA were rejected. A complaint was made to the Human Rights Commission in early August 1985.

The Nasio family were deported to Tonga on 14 August 1985 with their Australia born child who was one year old.

MR W. VIDETO

Mr Wayne Videto, a Canadian citizen, came to Australia in December 1984 on a six month TEP which prohibited him from engaging in employment. His visit followed the death of his former wife, whom he had married during a previous visit to Australia. A twelve year old son from that marriage was in the custody of the maternal grandmother.

On arrival in Australia, Mr Videto spent three weeks with his son, and spent eight months travelling through Australia seeking employment. He kept in touch with his son by telephone and letters, sending money occasionally.

Mr Videto was apprehended by the DIEA in July 1985, and a deportation order was signed. An interim injunction staying the deportation was granted in the Federal Court in August, and in September the deportation was set aside by the Federal Court. Another deportation order was signed in September 1985.

Mr Videto complained to the Human Rights Commission in September. In October Mr Videto was deported. However, the DIEA advised that the normal five year ban on return to Australia of deportees would be waived. With sponsorship by the maternal grandmother and by his son, Mr Videto was approved for return to Australia, arriving in early May 1986.

MR J. FALEOLO

Mr Faleolo entered Australia as a tourist from Western Samoa in October 1982 to vist relatives. He commenced a defacto relationship with an Australian citizen and overstayed his visa, living in Queensland. In July 1984 a child was born to them.

In 1985 Mr Faleolo was arrested by DIEA officers while working in Melbourne. After making a complaint to the Human Rights Commission, Mr Faleolo left Australia in October 1985 to avoid deportation.

MR C. HARDJOPRAMOTO

Mr Hardjopramoto came to Australia from Indonesia on a student visa in 1975. In Australia, he married an Indonesian citizen who had arrived here in 1979. A child was born to the couple in late 1984.

In August 1983 they applied for permanent residence, which application was rejected by DIEA. Several reviews of that decision were made. In October 1985 Mr Hardjopramoto complained to the Commission that the DIEA had advised him that he and his family should depart Australia within twenty-eight days, or be deported.

The family did not comply with this advice and were deported in April 1986, with their child aged eighteen months.

MR **AND MRS KOH**

Mr and Mrs Koh and daughter Elaine (then two years old) arrived in Australia in January 1980 on a three month TEP. They applied for permanent residence however when this was refused they did not depart Australia.

They purchased a restaurant which they have now operated for over three years. In September 1983 a child was born to them in Newcastle. A deportation order was signed in February 1986. Mr and Mrs Koh appealed to the Federal Court against the deportation orders, however this was dismissed in April 1986. A complaint was lodged with the Commission in May 1986.

The Koh family were deported to Malaysia on 21 June 1986 with their two year old Australian born child.

Appendix 2

PERSONS LIABLE FOR DEPORTATION BUT STILL IN AUSTRALIA

MR C. CHOW

Mr Chow and Ms Li arrived in Australia in July and November 1981 respectively, Mr Chow as a stowaway and Ms Li on a one month TEP. Mr Chow has several family permanently residing in Australia. They remained in Australia, took up employment and married. In May 1982 a child was born to them in Melbourne.

Mr Chow was arrested by the DIEA in August 1983. Deportation orders were signed in September 1983. The orders were subsequently revoked by the Department and the family were allowed to apply for permanent residency which they did in November 1983. They were advised of the final decision to reject the applications in May 1986. They have been requested to depart Australia.

MR J. CHANDRA

Mr John Chandra, formerly known as Vinesh Raj first came to Australia from Fiji in October 1972. His defacto wife, Angina Pal, arrived in September 1973. They overstayed their visas and obtained employment. Mr Chandra was apprehended by the DIEA and deported in August 1974. He returned to Australia in September 1974 allegedly using a false name and re-joined his defacto wife. A child was born to them in April 1977 in perth. Both applied under the Regulation of Status Program (ROSP) for permanent residence.

Mr Chandra complained to the Commission in October 1983 after his application was rejected, while Ms Pal was allowed to proceed with her application on the understanding that it would not affect the Department's intention to deport Mr Chandra.

Mr Chandra, who has custody of his nine year old Australian-born child, made another application for permanent residence and is currently waiting for a decision to be made.

MR AND MRS KIOA

Mr Kioa arrived in Australia from Tonga in September 1981. Mrs Kioa and their child joined him in November 1981. Mr Kioa held a student visa and, on completion of his studies, applied for an extension of his TEP. He obtained employment in March 1982. A child was born to them in November 1982.

In July 1983 Mr and Mrs Kioa were apprehended by DIEA and in September 1983 were advised that the application for an extension of TEP was refused. Deportation orders were signed in October 1983.

Mr and Mrs Kioa complained to the Commission and also made an application for review in the Federal Court. In December 1985 the High Court set aside the deportation order, and their applications for permanent residence are presently being considered by the DIEA.

MR AND MRS HAKALO

A complaint was made to the Commission on behalf of Mr and Mrs Mosese Hakalo who had applied for permanent residence under the ROSP in November 1980. In December 1984, they were advised that their application was unsuccessful.

A child was born to Mr and Mrs Hakalo in September 1982. The whereabouts of the family are not known.

MR AND MRS LEUNG

Mr and Mrs Leung and their child arrived in Australia from Hong Kong in March 1982. They overstayed one month TEPs and their second child was born in Australia in July 1983. Mr Leung found employment while Mrs Leung cared for an elderly disabled grandparent, who was a permanent resident.

Mr and Mrs Leung were apprehended by the DIEA and deportation orders were signed in February 1985. Mr and Mrs Leung complained to the Commission that their deportation would be inconsistent with the rights of their Australian-born child and also began proceedings in the Federal Court which subsequently upheld the deportation order. Mr and Mrs Leung moved shortly before they were to be deported and their whereabouts are now not known.

MR AND MRS KAUFUSI

Mr and Mrs Kaufusi came separately to Australia from Tonga in October 1980 and March 1981 respectively. They overstayed their TEPs and Mr Kaufusi found employment. In March 1983 they married and subsequently a child was born to them.

In February 1985 Mr Kaufusi was taken into custody by DIEA. A second child was born to them in May 1985. Deportation orders were signed in March and April 1985 for Mr and Mrs Kaufusi respectively. They complained to the Commission and took action in the Federal Court. In February 1986 the Federal Court upheld the deportation orders. The whereabouts of Mr and Mrs Kaufusi are not presently known.

MR AND MRS RANJAN

Mr and Mrs Ranjan and their son arrived in Australia in February 1981, from Indonesia. Most of Mrs Ranjan's family live in Australia. They overstayed their visas and in June 1982 a child was born to them in Sydney.

Mr and Mrs Ranjan separated in about May 1985 and shortly after were taken into custody by DIEA. Mrs Ranjan was released to care for the children. In early July 1985 deportation orders were signed and Mr Ranjan was deported. However, Mrs Ranjan failed to notify the DIEA of her whereabouts and could not be located.

SHIEKH TAJ ELDIN HAMET ABDALLA AL HILALY

Sheikh Al-Hilaly, his wife and his children came to Australia in March 1982 on a TEP to take up the position of Imam of the Lakemba Mosque, in Sydney.

In 1984, Sheikh Al-Hilaly applied for permanent residence and lodged further applications to extend his TEP.

Two children were born in Australia to Sheikh Al-Hilaly and his wife, in November 1983 and March 1985. He has initiated action in the Federal Court and the matter is yet to be heard.

MS L.M. REID

Ms Reid, a West German citizen, entered Australia in May 1981 on a six month TEP. She overstayed and married an Australian citizen. A child was born to them in July 1983.

In August, 1984 Ms Reid applied for permanent residence, however in June 1985 she separated from her husband.

Ms Reid has care of the child. In June 1986 her application for change of status was rejected. Ms Reid has advised that she intends to abide by the Department's requirement that she leave Australia.

MR S.P. LAVULO

Mr Lavulo, a Tongan citizen came to Australia by posing as a New Zealand citizen in October 1980. He applied for permanent residence in Australia under the ROSP.

In April 1983 he married a permanent resident of Australia and two children were born to them in January 1982 and September 1984. Mrs Lavulo already had one child from a previous marriage. In December 1984 the DIEA informed Mr Lavulo that he was not eligible under the ROSP scheme. He then reapplied for permanent residence on the ground of his marriage but his application was refused in December 1985. The DIEA is currently considering whether he is to be deported.

MS A. BRADSHAW

Ms Bradshaw entered Australia in July 1983 from England with a ten month TEP. She has a sister living in Australia who is an Australian citizen.

Ms Bradshaw applied for permanent residence and was interviewed by DIEA in April 1984.

In May 1985 she gave birth to a daughter and in August 1985 the DIEA rejected her application for permanent residence.

The matter is currently being reviewed by DIEA.

MS S. OFA

Ms Ofa arrived in Australia from Tonga in April 1980 on a one month TEP. In January 1983 she gave birth to a child in Sydney. The child's father, a Tongan citizen has since returned to Tonga.

Ms Ofa's present whereabouts are not known.

MR AND MRS ROKOMAQISA

Mr and Mrs Rokomaqisa and their one year old child came to Australia from Fiji in June 1981. Mr Rokomagisa had a twelve month work permit which was renewed four times before expiring in June 1985. A child was born to the couple in April 1983 in Sydney. Mr Rokomaciisa's adoptive parents are permanent residents of Australia.

Mr and Mrs Rokomagisa applied for permanent residence but the application was rejected in October 1985. They complained to the Commission in November 1985.

MRS A. FONG

Mrs Fong arrived in Australia from Fiji in February 1985 on a three month TEP with her three children. At the time of her arrival she was expecting another child which was born in October 1985 in Sydney. A number of Mrs Fong's family live in Australia, however her husband is still in Fiji. She applied for permanent residence in Australia before the birth of the Australian born child.

The DIEA is considering Mrs Fong's application.

MR AND MRS NAIDU

Mr and Mrs Naidu came to Australia from Fiji in February 1982 to seek medical treatment for their daughter. They overstayed their TEPs and were apprehended by the DIEA in March 1985. Mr Naidu states that he had arranged for someone to apply on his behalf for permanent residence. However, after being apprehended he discovered that no application had been made.

In October 1985 a child was born to them in Sydney. Mr and Mrs Naidu were issued with a direction to depart Australia by 1 April 1986.

MR S. McMURDIE

Mr McMurdie arrived in Australia in October 1981 from England with a work permit valid until August 1982 but he overstayed.

He married an Australian citizen and in mid 1985 a child was born to them. In April 1986 Mr McMurdie applied for permanent residence but this was refused in May 1986. Mr McMurdie was required to have left Australia in June 1986, however further representations were made to DIEA in regard to Mrs McMurdie's medical condition and a decision has now been made to accept a change of status application for Mr McMurdie.

MRS S. KHAN

Mr and Mrs Khan came to Australia in July 1984 from Pakistan, as students. They separated and in February 1985 Mrs Khan gave birth to a child.

Mrs Khan currently awaits the outcome of an application for permanent residence.

Appendix 3

MR X.

An enquiry was received in the Commission in October 1985 from Mr X, a Nigerian student who had come to Australia with his wife and whose course of study was to be completed at the end of 1985. They had an Australian born child aged fifteen months, but were having difficulty in obtaining application forms from DIEA so that they could apply for permanent residence.

MR AND MRS Y.

In December 1985, the Commission received an enquiry from Mr and Mrs Y, Fijian citizens who were holders of current entry permits to Australian and who had an Australian born child six years old. They were concerned that they would be required to leave Australia at the expiry of their permits and that this would significantly disadvantage their child.

Appendix 4

SUMMARY OF CASES

v SWEDEN (1981) 4 EHRR 408

In this case the applicant was a Turkish citizen who went to Sweden with her brother when they were young and subsequently obtained permanent residence in Sweden. It appeared that it was intended that the rest of her family would subsequently join her and her brother in Sweden. She subsequently applied to the Swedish authorities for a permit for her parents and seven brothers and sisters to immigrate to Sweden. This was refused and she complained to the European Commission that her right to respect for her family life under Article 8 of the European Convention was infringed.

The Commission decided that her application was manifestly ill-founded and therefore inadmissible. The Commission noted that it had constantly held the view that the exclusion of a person from a country where close members of his family are living may amount to an infringement of Article 8. However, in the present case the Commission noted that the separation of the family was in the first instance brought about voluntarily by the family itself, by sending the applicant and her brother to Sweden.

X & Y v UNITED KINGDOM (1972) 39 CD 104

This case involved a Cypriot citizen who went to England on an entry certificate as a student and subsequently married a girl who, although born in Cyprus, had been living in the United Kingdom with her parents and had since become a U.K. citizen. After the marriage both lived in the same house as her parents.

When the applicant's entry permit expired and he applied to stay on indefinitely in the U.K. his application was refused and he was asked to leave the U.K. Both husband and wife submitted that if the wife had to leave the U.K. to follow her husband to Cyprus it would have meant that she would have had to leave her own parents behind and that this would mean that her right to a family life would be infringed.

The Commission in this case noted its willingness to consider that the exclusion of a person from a country where close members of his family are living may amount to an infringement of Article 8. The Commission went on to examine whether the wife's relationship with her parents could be regarded as 'family life' within the meaning of Article 8. It found, however, that the circumstances of the case did not show that there was such a close link between her and her parents as could be described as amounting to 'family life', and therefore, rejected the application.

Z_A_Z v UNITED KINGDOM (1972) 42 CD 146

The first applicant in this case was a U.K. citizen who married the second applicant who was an Indian citizen. After their marriage they settled in Kenya. Subsequently, the first applicant left Kenya voluntarily when she was granted permission to enter the U.K. Her husband then applied to settle in England with her. This application was refused by the U.K. authorities.

The Commission found the application to be manifestly ill-founded and therefore inadmissible. The Commission could not find anything to indicate that the applicants could not reside legally in India, the second applicant's country of origin.