



Australian
Human Rights
Commission

**Ms HM and Master YM
v Commonwealth of
Australia (Department
of Home Affairs)**

[2018] AusHRC 127

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(Department of Home Affairs)**

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Report into arbitrary interference with
family and failure to consider the best
interests of the child

Australian Human Rights Commission 2018



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**Australian
Human Rights
Commission**

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of arbitrary interference with family and failure to consider the best interests of the child made by Ms HM on her own behalf and on behalf of her son, Master YM, against the Commonwealth of Australia—specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department).

Ms HM complains that the then Assistant Minister for Immigration and Border Protection's (Assistant Minister) decision not to intervene in her case, leading to a requirement that Ms HM leave Australia, is an arbitrary interference with family, contrary to articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR). She also complains that the department failed to take Master YM's best interests into account as a primary consideration, contrary to article 3 of the *Convention on the Rights of the Child* (CRC).

As a result of this inquiry, I have found that the decision by the then Assistant Minister not to exercise her discretionary powers to intervene in Ms HM's case, and consequently the requirement that Ms HM not be allowed to remain in Australia at least while Master YM completed his secondary education, was an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

I have also found that Master YM's best interests were not given active consideration in the department's 2015 submission to the Assistant Minister, and accordingly were not taken into account as a primary consideration in breach of article 3 of the CRC.

The department provided a response to my findings and recommendations on 10 October 2018. That response can be found in Part 8 of this report. The Department accepted my recommendation to refer the matter back to the current Minister for further consideration of the use of his public interest powers.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink that reads "Rosalind Croucher".

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

October 2018

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Ms HM and Master YM against the Commonwealth of Australia—specifically, against the former Department of Immigration and Border Protection and now the Department of Home Affairs (department) alleging breaches of his human rights.
2. Ms HM’s son, Master YM, was born in Australia and acquired Australian citizenship when he turned 10 years of age. He was 15 years of age at the time of Ms HM’s complaint to the Commission.
3. Ms HM is a South Korean citizen who arrived in Australia with her then husband and two daughters on 3 September 1998. Ms HM departed Australia in July 2016 after the then Assistant Minister for Immigration and Border Protection (Assistant Minister) declined to exercise her public interest power under s 417 of the *Migration Act 1958* (Cth) to grant Ms HM a visa allowing her to stay in Australia either permanently or for the period of Master YM’s secondary school education. Master YM remains in Australia and is currently completing year 12 at an inner-west high school. He is living in Youth Off the Streets accommodation.
4. Ms HM complains that the Assistant Minister’s decision not to intervene in her case, led to a requirement that she leave Australia and this was inconsistent with Australia’s obligations under the *Convention on the Rights of the Child*¹ (CRC) and the *International Covenant on Civil and Political Rights*² (ICCPR).
5. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
6. As a result of this inquiry, I find the following:
 - the decision of the then Assistant Minister for Immigration and Border Protection on 15 September 2015 not to exercise her discretionary powers to intervene in Ms HM’s case, leading to a requirement that Ms HM leave Australia, is an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR
 - the department’s 2015 submission to the Assistant Minister for the consideration of the exercise of her discretionary powers to grant Ms HM a visa failed to take account of Master YM’s best interests as a primary consideration on the basis of relevant information contemporaneous to the referral, contrary to article 3 of the CRC.
7. Ms HM has requested that her name and the name of her son not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect their human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to the mother and son by the pseudonyms ‘HM’ and ‘YM’, respectively, in this document.

2 Complaints

8. Ms HM arrived in Australia with her then husband and two daughters on 3 September 1998. Prior to her departure on 11 July 2016, Ms HM had lived in Australia for more than 17 years, with only brief periods offshore.
9. Ms HM's son, Master YM, was born in Australia on 24 February 2000. Master YM acquired Australian citizenship on 24 February 2010 by virtue of s 12(1)(b) of the *Australian Citizenship Act 2007* (Cth). Master YM has lived in Australia all his life and completed all his education in Australia, save for a period of seven months when he returned to South Korea with his family. Master YM is currently completing year 12 at an inner-west high school.
10. Ms HM's elder daughter was eight years old when she first arrived in Australia in 1998. Having completed her secondary schooling in Australia, she returned to South Korea on 31 October 2009 to study and has subsequently visited her family in Australia. Ms HM's younger daughter arrived in Australia when she was two years old. She completed all her primary and secondary education in Australia. She returned to South Korea on 15 November 2015 following the decision of the Assistant Minister not to exercise her public interest power to grant her a visa allowing her to stay in Australia either permanently or temporarily.
11. Ms HM and her husband divorced on 24 April 2008. Ms HM's former husband now lives in South Korea.
12. Ms HM submits that she and her son have lived together in Australia as a family for a significant period and they have integrated into Australian society. Ms HM says that she volunteered at various local Korean-Australian churches, including the Australian Philadelphia Church, which was founded by her then husband. She was also involved with the Sydney Full Gospel Church, assisting with church events, attending weekly bible study groups and as a member of the church choir. Ms HM submits that she was awarded a missionary student diploma attained through a program run by the Sydney Full Gospel Church. Ms HM has provided letters of support from two Pastors of the Sydney Full Gospel Church, the Korean Society of Sydney and a congregation member. The department has also received a petition containing 329 signatures from congregation members. The department notes that these documents confirm Ms HM's activities, character, and the connection of herself and her children with the church.
13. Ms HM was granted permission to work in February 2012, and she advises that she worked cash-in-hand as a cleaner for several friends and associates.
14. Ms HM also describes Master YM's strong ties to the Australian community. She submits that he is involved in programs through the Sydney Full Gospel Church, including participating in a mission to Vanuatu in January 2014 and missions to Dubbo in 2014–2017. He is also involved in the Church drama team and in Church-organised outreach programs assisting disadvantaged people.

15. Master YM has undertaken casual employment throughout his schooling, including working at McDonalds in 2014 and Mojee Strathfield Restaurant in 2015. In a letter to the Commission received on 27 November 2017, Master YM submits that he has deep and enduring ties to the Australian community, including through his friendships and through the church. Master YM states:

These past 2 years have been quite a challenge for me, struggling to adjust to the sudden changes due to my mother's absence. Despite these hardships my mother and I both agreed for me to continue residing in Australia. I have been to Korea before when I was in year 1, living there for about 6 months. While there, I had to study in a Korean school and was very startled at how different it was to Australia ... My parents did speak Korean at home ever since I was young but it's hard for me [to] express fluently in Korean. It was difficult to communicate with my classmates in Korean and hard for me to understand the Korean classes and culture itself ...

Honestly education is not the main reason [to stay in Australia], the reason why I want to stay here is because I want to be with my friends, go to the church that I have been serving since I was young and I want to be able to freely express my ideas without restrictions.

I believe these are the basic rights that a person should have; I want to live in a place where I'd truly feel attached.

16. Master YM was 16 years old when his mother departed Australia. Since her departure, Master YM has lived at multiple residences. He now lives at Youth off the Streets, an organisation suggested to him by his school counsellor.
17. Master YM communicates with his mother and sisters daily via applications such as Facetime and Messenger.

3 Migration history

18. Ms HM first entered Australia with her then husband and two daughters in 1998. They arrived as holders of Subclass 976 visas and were subsequently granted Tourist (Long Stay) (Subclass 686) visas to expire on 3 March 1999.
19. On 24 February 1999, Ms HM's husband made an application for a Specialist Entry (Religious Worker) (Subclass 428) visa, including Ms HM and their children as dependants. In the interim, a Bridging visa A was granted, succeeded on 25 July 2000 by a Bridging visa B.
20. On 23 January 2002, the department refused Ms HM's husband's Subclass 428 visa application. On 26 February 2003, the Migration Review Tribunal (MRT) affirmed the department's decision.
21. Ms HM's husband founded the Australian Philadelphia Church and on 30 August 2003, subsequent to the failure of his previous application, he, Ms HM and their children were granted Subclass 428 visas (valid for two years).

3 Migration history

22. On 24 August 2005, Ms HM's husband applied for a Subclass 856 Employer Nomination Scheme visa nominated by the Australian Philadelphia Church. The department requested further information to progress the application, however, Ms HM's husband unexpectedly left Australia on 29 March 2006 without his family before a decision on the application was made. The application was withdrawn and in June 2006 Ms HM left Australia with her children for South Korea.
23. On 17 January 2007, Ms HM and her children returned to Australia. Ms HM's husband did not accompany the family.
24. Ms HM subsequently made two further Subclass 428 visa applications. Ms HM withdrew the first application, sponsored by the Australian Philadelphia Church. The department refused Ms HM's second application, sponsored by Sydney Sae Saran Presbyterian Church Incorporated, on the basis that the 'duties' she undertook at that church were more accurately described as the 'duties' of an 'adherent' rather than a 'religious worker'. On 12 May 2008, this decision was affirmed on appeal by the MRT.
25. On 19 September 2008, Ms HM made her first request for Ministerial intervention under s 351 of the Migration Act. According to the department, Ms HM claimed 'that the return of her spouse to South Korea in 2006 had forced the withdrawal of their Subclass 856 application and the family's return to South Korea where the marital relationship subsequently broke down'. Ms HM further claimed that the children could not come to terms with the Korean education system and were treated as outsiders. She claimed that her former husband did not want her or the children to live with him and she therefore returned to Australia. On 9 February 2011, the then Minister decided not to intervene under s 351 in Ms HM's first application for ministerial intervention.
26. On 15 March 2011, Ms HM made a second ministerial intervention request under s 351 including her daughters as dependants. The department states that this request reiterated previous claims and made further claims in respect of Master YM and the hardship he would experience if she and his sister had to depart. Ms HM also made claims as to the family's integration into the Australian community over the almost 13 year period they had lived in Australia and provided supporting documentation in the form of school reports, a psychiatrist report for Master YM, a petition from the Australian Korean community and two letters from Ms HM's eldest daughter.
27. On 17 May 2011, Ms HM lodged a Protection visa (PV) application. As a result of lodging this application the department decided it was 'inappropriate to progress' Ms HM's second ministerial intervention request pending the outcome of the PV application. The department subsequently refused Ms HM's PV application, a decision that was affirmed on appeal to the Refugee Review Tribunal in November 2011.
28. On 29 December 2011, Ms HM made a third request for ministerial intervention, this time under s 417 of the Migration Act.

29. On 12 July 2013, the former Parliamentary Secretary for Multicultural Affairs made a decision to begin consideration of the case of Ms HM and her younger daughter under s 417 of the Migration Act to grant a Subclass 151 Former Resident visa subject to health and character checks and the provision of a signed Australian Values Statement. The Parliamentary Secretary made this decision following consideration of the department's submission that stated under the heading 'Preferred option ...The Department considers that intervention under section 417 of the Act may be appropriate in this case'. The department has not provided any information as to why the grant of this visa was not progressed following the Secretary's decision.
30. On 15 September 2015, following a further submission from the department recommending that the Assistant Minister intervene to grant Ms HM and her younger daughter a visa on either a permanent or a temporary basis, the Assistant Minister decided not to exercise her public interest power under s 417 of the Migration Act in relation to Ms HM and her younger daughter. Ms HM's younger daughter departed Australia for South Korea on 15 November 2015 following this decision of the Assistant Minister.
31. On 11 December 2015, Ms HM applied for a Medical Treatment Support Visa (UB602) which was refused on 14 December 2015.
32. Ms HM was granted a Bridging Visa E until 11 January 2016 in order to make 'alternative guardianship arrangements for her son Master YM so he can continue his education in Australia'.
33. Ms HM departed Australia on 11 July 2016. Ms HM says that her migration agent and Customs informed her upon her departure that she would be unable to return to Australia for 3 years.
34. It is noteworthy that Ms HM has been generally compliant with Australian migration law for the period of time she resided in Australia.

4 Legislative framework

4.1 Functions of the Commission

35. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
36. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
37. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

4.2 What is a human right?

38. The rights and freedoms recognised by the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.³ The following articles of these treaties are relevant to the acts and practices the subject of the present inquiry.

39. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

40. Article 23(1) of the ICCPR provides:

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

41. Article 3 of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

4.3 What is an ‘act’ or ‘practice’

42. The terms ‘act’ and ‘practice’ are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in ‘by or on behalf of the Commonwealth’. Section 3(3) provides that a reference to, or the doing of, an act includes a reference to the refusal or failure to do an act.

43. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken, that is, where the relevant act or practice is within the discretion of the Commonwealth.⁴ Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission’s human rights inquiry jurisdiction.

44. Section 417 of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Refugee Review Tribunal, a decision that is more favourable to the applicant.

45. The exercise of this power is conditioned upon the Minister being satisfied that it is in the public interest to do so. This emphasises the breadth of the Minister’s power, as the expression ‘in the public interest’ has ‘no fixed and precise content and involves a value judgment often to be made by reference to undefined matters’.⁵ Consistent with what was said in *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, such an exercise of discretionary power may be the subject of an inquiry under s 11(1)(f).

46. I find that the decision by the then Assistant Minister on 15 September 2015 not to exercise her discretionary power under s 417 of the Migration Act constitutes an act within the definition of the AHRC Act. I have also considered the department's submission to the Assistant Minister and in particular, whether it demonstrates that Master YM's best interests were explored and taken into account as a primary consideration.

5 Best interests of children

47. Article 3 of the CRC requires that, in all actions concerning children, their best interests must be a primary consideration of the decision maker.
48. The United Nations Children's Fund (UNICEF) Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on the interpretation of 'primary consideration' under article 3:

The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests...

The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.⁶

49. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
50. In *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, (*Wan v MIMA*) the Full Court of the Federal Court held that it was necessary for the decision-maker to identify what the best interests of the children were in determining whether to grant a permanent residence visa to an applicant with two Australian citizen children, where character concerns about the applicant were raised by the department.
51. In the decision of the United Kingdom Supreme Court, *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,⁷ which considered the rights of citizen children born to a mother unlawfully residing in the UK, Lady Hale for the majority stated:

Although nationality is not a 'trump card' it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8).

...

Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults.⁸

52. In *Wan v MIMA*, the court regarded the following issues as important:

- (a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki* per Burchett J at 232; 614)⁹...
- (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
- (c) the loss of educational opportunities available to the children in Australia; and
- (d) their resultant isolation from the normal contacts of children with their mother and their mother's family.¹⁰

53. Master YM engages article 3 of the CRC as he was under 18 at the time of the department's referral of his mother's case to the Minister, and at the time of the Minister's decision.¹¹ The case law and guidelines indicate that his best interests must be the subject of *active* consideration by the department, and may be balanced with other considerations, such as the need to uphold the integrity of Australia's migration system, consideration of their parents' migration histories and integration into the Australian community.

54. The starting point is to identify what decision the best interests of the child suggest should be made.¹² This requires an examination of each child's best interests, bearing in mind their individual circumstances.¹³ The CRC requires that consideration must be given to the holistic development of each child, which includes consideration of family life, social networks and education.

55. These interests then must be balanced against relevant competing interests. In *Wan v MIMA*, the Court described the balancing of interests decision makers must consider as follows:

... the Tribunal might have concluded that the best interests of Mr Wan's children required that Mr Wan be granted the visa, but that the damage to their interests that would flow from his being refused the visa would be of only slight or moderate significance. If the Tribunal had also concluded that the expectations of the Australian community were that a non-citizen who engaged in conduct of the kind engaged in by Mr Wan would not be granted a visa, and that a decision to grant such a visa would be a most serious affront to the expectations of the Australian community, it would be entitled to conclude that, in the circumstances of the case, the best interests of the children were outweighed by the strength of community expectations.¹⁴

56. This balancing of interest is elaborated on by Lady Hale in the United Kingdom Privy Council case *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49:

The decision-maker has to balance the reason for the expulsion against the impact upon other family members, including any alternative means of preserving family ties. The reason for deporting may be comparatively weak, while the impact on the rest of the family, either of being left behind or being forced to leave their own country, may be severe. On the other hand, the reason for deporting may be very strong, or it may be entirely reasonable to expect the other family members to leave with the person deported.¹⁵

5.1 The department's referrals to the Minister

57. The department referred Ms HM's case to the Assistant Minister in September 2015 to consider the exercise of her discretionary powers under s 417 of the Migration Act to grant a visa to Ms HM and her younger daughter. The department recommended that the Minister intervene to grant Ms HM a visitor visa for three years, or grant her a Former Resident (Subclass 151) permanent visa. The department's submission noted that in 2013 the former Parliamentary Secretary had made a decision to begin considering the grant of a Former Resident (Subclass 151) permanent visa to Ms HM.
58. In its submission to the Assistant Minister in 2015, the department did not refer to the best interests of Master YM at all, other than noting that Ms HM had an Australian citizen son, who was 15 years of age.
59. The department's submission did attach earlier submissions from the department to former Ministers relating to Ms HM and her family. These earlier submissions prepared in 2011 and 2013 both considered the engagement of article 3 of the CRC.
60. The 2013 submission contained the following analysis of the best interests of the children. The department stated:
- In terms of your consideration of the impact of a decision not to intervene in this case, as it might affect family unity and the best interests of the child, you may wish to take into account the following:
- [Ms HM's] daughter, [redacted] is 17 years old (she attains majority on 15 November 2013). She arrived in Australia when she was two years old and she has lived here for a cumulative period of more than 13 years. [Master YM] is 13 years old and is an Australian citizen.
- With the exception of a seven-month period, both children have completed all their education in Australia. Both children are also at significant stages in their education. [Ms HM's daughter] completing senior high school studies in Year 11 at [removed] Girls' High School and [Master YM] completed Year 7 at [removed] Boys' High School.
61. The department noted that, in South Korea, school education is free between the ages of six and fifteen, and senior high school students pay modest tuition fees. The medium of instruction is Korean. The department noted that, in 2010, the Department of Foreign Affairs and Trade advised that children with limited Korean would face educational disadvantages in Korea.
62. The department noted that Ms HM's children had travelled to Korea previously, however both her younger daughter and Master YM 'are said to have reacted badly to their experiences there'. In this regard, the department referred to a consultant forensic psychiatrist report dated 11 March 2011 for Master YM, which states:

From the information available to the writer, it is the writer's opinion within reasonable medical certainty the [Master YM] has psychiatric diagnoses, as per DSM-IV-TR (American Psychiatric Association 2000), consistent with the early stages of Adjustment Disorder with mixed anxiety and depressed mood, at the prospect of his mother being deported from Australia and him having to leave Australia to be with his mother.

63. The department continues:

In the psychiatrist's opinion, [Master YM] will be at risk of developing a 'Major Depressive Disorder' if he is 'separated from his mother or forced to leave Australia to be with her'. As a 'worst-case scenario', the psychiatrist posits that '[Master YM] may attempt suicide and die'.

64. The department then went on to consider the family's extensive involvement in the Korean community in Australia, the fact that the children are highly familiar with the Korean culture and the Korean language, Master YM's school reports that indicate he has achieved a 'basic' level of writing Korean and the fact that many members of the children's extended family live in Korea and they may have access to support from these family members.

65. The department then concluded:

While [Master YM] as an Australian citizen cannot be removed from Australia, if his family chooses for him to return to Korea, he will continue to hold Australian citizenship and be able to continue living with the parent as a family unit. Your decision does not mean that [Master YM] will be denied the right to know and be cared for by the parent...since the family as a whole is able to return to South Korea to live.

While healthcare and education may not be of the same standard as in Australia, there is access to basic services and this would not place Australia in breach of its international obligations if [Master YM] and [his younger sister] were to depart Australia.

66. The department then identified the 'Preferred option' as intervention under s 417 of the Migration Act to grant a Former Resident (Subclass 151) permanent visa to Ms HM and her younger daughter. As mentioned above, the Parliamentary Secretary agreed with this recommendation and made a decision to begin considering the grant of this visa. The department has provided no explanation as to why this visa was not progressed.

67. In the department's 2015 submission to the Assistant Minister, no individualised consideration is given to changes in Master YM's circumstances since the 2013 referral including the advanced stage of his secondary studies, his social networks and his mental health concerns. This is particularly concerning in light of the fact that:

- the 2013 submission refers to a psychiatrist report dated 11 March 2011 that concludes that 'Master YM will be at risk of developing a "Major Depressive Disorder" if he is "separated from his mother or forced to leave Australia to be with her"', and
- Master YM at 15 years of age is at a critical juncture in his secondary school education.

68. No up to date information in relation to Master YM's mental health or educational status is included in the 2015 submission.

69. I find that Master YM's best interests were not given active consideration in the department's 2015 submission to the Assistant Minister, and accordingly were not taken into account as a primary consideration in breach of article 3 of the CRC.

6 Arbitrary or unlawful interference with family

6.1 Interference

70. Professor Manfred Nowak states that, ‘since life together is an essential criterion for the existence of a family, members of a family are entitled to a stronger right to live together than other persons’.¹⁶
71. For the reasons set out in Commission report [2008] AusHRC 39,¹⁷ the Commission is of the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that that breach is in addition to (or in conjunction with) a breach of article 23(1).
72. To make out a breach of article 17(1) and 23(1) of the ICCPR, the complainants must be able to be identified as ‘families’. The United Nations Human Rights Committee (UNHRC) has confirmed that the term ‘family’ is to be interpreted broadly,¹⁸ but an effective family life or family connection must be shown to exist.¹⁹ In this matter, evidence of effective family life exists in that, prior to her departure Ms HM and Master YM shared their lives together, lived together, had economic ties, and a regular and intense relationship as mother and son. They existed as a family unit and had a long and settled family life in Australia for 16 years.
73. In assessing these complaints, I consider that the relevant act is the Assistant Minister’s decision not to intervene in Ms HM’s case in 2015 pursuant to the discretionary powers contained in s 417 of the Migration Act that led to the requirement that Ms HM leave Australia.
74. The 2013 departmental submissions to the Minister (that were attached to the 2015 submission) assert that a decision not to intervene in this case would not constitute an interference with family on the basis that any family separation would occur only through the volition of Ms HM. This is because Master YM is eligible for citizenship in Korea, and accordingly it is open for the family to remain together in Korea. This is reiterated in the department’s response to the Commission dated 17 December 2015, where it states:

South Korean law provides for dual citizenship for those born abroad to at least one South Korean citizen. As such, the department’s assessment is that requiring [Master YM’s] mother to depart Australia does not in itself impact upon the integrity of her family unit unless she chooses for [Master YM] to remain in Australia after her departure.

DIBP’s judgement is that [Master YM] will not be denied the right to know or be cared for by his parents or be separated from them, since the family as a whole is able to return to South Korea to live.

75. In *Winata v Australia*,²⁰ the UNHRC made findings in relation to a family in similar circumstances where both parents, originally from Indonesia, had overstayed their visas and Australia proposed to deport them. The parents' 13 year old Australian-born son was an Australian citizen who did not speak Indonesian and had never visited Indonesia. The UNHRC commented that:

In the present case, the Committee considers that a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered 'interference' with the family, at least in circumstances where, as here, substantial changes to long settled family life would follow in either case.²¹

76. In *Madafferi v Australia*, the UNHRC reiterated this principle stating that:

In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered 'interference' with the family, at least in circumstances where, as here, substantial changes to long settled family life would follow in either case.²²

77. As has been described, there is substantial evidence of long settled family life in Australia for Ms HM and Master YM. Ms HM and Master YM lived together in Australia for 16 years. Ms HM and Master YM have developed strong social, vocational and cultural networks within the Australian-Korean church community. This is supported by a petition signed by 329 members of the Australian-Korean community provided to the department in support of the 2013 referral. At the time of the last referral to the Assistant Minister in 2015, and the Assistant Minister's refusal to intervene to grant Ms HM a visa, Master YM was 15 years old and enrolled at an inner-west high school. With the exception of a brief six month period when he was in year 1, Master HM's entire life and education has been in Australia. Based on his own letter to the Commission in relation to this matter, it is clear he has relationships and friendships through school and church. In a letter to the Commission, Master YM has detailed his strong and persisting relationship with his mother and the impact of their separation on him. He states:

When my mum got deported obviously as an under aged child I felt scared but I was more afraid of having to live in Korea as a foreign student. I really hope through this letter you'll be able to help me, to bring back my mother to Australia, so that I can be under my mother's care again.

78. Given the established nature of the family unit, I find that the Assistant Minister's failure to intervene, leading to a requirement that Ms HM leave Australia, constitutes an interference with the family.

6.2 Arbitrary or unlawful

79. An unlawful interference with a person's family is prohibited by article 17(1) of the ICCPR. A lawful interference with a person's family will be prohibited by article 17(1) if it is arbitrary.
80. In its General Comment on article 17, the UNHRC confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.
81. In *Canepa v Canada*, the UNHRC discussed what could be seen to constitute 'arbitrary' interference:

The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.²³

82. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness. In relation to the meaning of reasonableness, the UNHRC stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.²⁴

83. While the *Toonen* case concerned a breach of article 17(1) in relation to the right to privacy, these comments apply equally to an arbitrary interference with the family. In *Winata*, the UNHRC observed that:

It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances.²⁵

84. A crucial element of the reasoning in *Winata* which led the UNHRC to the conclusion that removal would be arbitrary was the length of time that the family had been in Australia and the integration of the family into the Australian community. This reasoning was affirmed in *Sahid v New Zealand*,²⁶ where the UNHRC stated:

In extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen after the required years' residence in that country.²⁷

85. I am of the view that similar ‘exceptional’ circumstances exist in this case to those in *Winata*. These circumstances include:
- Master YM’s age at the time of the 2015 referral to the then Assistant Minister
 - Master YM’s lifelong residence in Australia and his integration into the Australian community
 - the advanced stage of Master YM’s secondary school education in Australia, and the fact that his entire education has taken place in Australia.
86. In the present case, the Commission is not aware of additional bases put forward by the Assistant Minister for her refusal to intervene in Ms HM’s case, although I do note that she is not required to give reasons. I am not aware of any additional factors, such as a risk to the community, public order or security, which may otherwise suggest that the failure to intervene would not be arbitrary, in the sense of being necessary in the circumstances to achieve a particular end and being proportional to the end sought. Bearing in mind Ms HM’s and Master YM’s long period of residence in Australia and her and her son’s integration into the Australian community, I consider that additional factors would be required in order to justify the failure to intervene.
87. For the reasons outlined above, I find that the decision of the Assistant Minister not to intervene in Ms YM’s case, and consequently the requirement that Ms HM not be allowed to remain in Australia at least while Master YM completed his secondary education, was an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

7 Recommendations

88. As a result of this inquiry, I find the following:
- the decision of the then Assistant Minister on 15 September 2015 not to exercise her discretionary powers to intervene in Ms HM’s case, leading to a requirement that Ms HM leave Australia, is an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR
 - the department’s 2015 submission to the Assistant Minister for the consideration of the exercise of her discretionary powers to grant Ms HM a visa failed to take account of Master YM’s best interests as a primary consideration on the basis of relevant information contemporaneous to the referral, contrary to article 3 of the CRC.
89. 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.²⁸ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁹ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.³⁰

90. The Minister's guidelines on ministerial powers³¹ outline cases that should and should not be brought to the Minister's attention. Cases that have 'unique or exceptional circumstances' may be referred to the Minister. Unique or exceptional circumstances are defined to include:
- strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident).³²
91. I note that listed under cases that should not be referred to the Minister include where the 'person has left Australia'.
92. The guidelines anticipate that the department may refer a matter back to the Minister for reconsideration of the use of his or her public interest powers in certain circumstances, in particular, where a matter raises 'unique or exceptional' circumstances.
93. I note that the Department may be inclined not to refer the case back to the Minister because Ms HM has left Australia. However, I consider the continuing hardship on Master YM who is currently completing secondary school alone while living in Youth Off the Streets accommodation give rise to strong compelling circumstances warranting referral to the Minister.
94. Accordingly, I recommend that the department refer the matter back to the current Minister for further consideration of the use of his public interest powers. I further recommend that the Minister consider exercising his powers in a manner consistent with the findings set out in this report.

8 The department's response to my findings and recommendations

95. On 17 September 2018, I provided the department with a notice of my findings and recommendations in respect of Ms HM and Master YM's complaint.
96. On 10 October 2018, the department provided the following response to my findings and recommendations:

The Department notes the findings of the AHRC in this case.

The Department takes its international obligations under the ICCPR seriously. Any submission to a relevant Minister for exercise of the public interest powers under section 417 of the Migration Act 1958 encompasses a range of matters including a person's immigration history, family disposition, connections to Australia and overseas as well as relevant international obligations.

The decisions are made at the discretion of the deciding Minister, who deems what is in the public interest at the time of decision. The former Assistant Minister decided that it was not in the public interest to intervene in Ms HM's case, taking into consideration a range of primary considerations as it was within her personal power to do. In these particular circumstances the Department maintains that the decision of the then Assistant Minister is not an arbitrary interference with the family.

Ms HM consequently departed Australia and decided that her then minor Australian citizen son, Master YM, should continue residing in Australia. Master YM was free to depart with his mother, noting that the Department and the Australian Government have no power to compel an Australian citizen to depart Australia. There are no obvious barriers to Master YM reuniting with his family overseas.

...

The Department does not accept the findings that the Department's 2015 submission failed to take account of Master YM's best interests as a primary consideration on the basis of relevant information contemporaneous to the referral, contrary to article 3 of the CRC.

The Department provides a Minister with an assessment of Australia's international obligations when a case is presented for initial consideration on a submission, this being the substantive document that contains the detailed history, claims and circumstances of a case. This same document is presented again when a case is ready for decision.

At the point of decision, it is the Department's practice to inform a Minister of any material changes in circumstances, or significant new claims that a person or their representative chooses to provide to the Department while the case has been prepared for the decision stage.

At the time of decision in Ms HM's case, her Australian citizen son remained a minor and there was no updated information provided by the family to suggest that, with the passage of time, additional CRC or ICCPR assessments were necessary.

It is the Department's view that introduction of a new process of undertaking an assessment against the relevant international obligations at both stages of processing, without clear reason for repeating that assessment, would impose an administrative burden of information collection which is inconsistent with the efficient management of this caseload.

...

Department's Response to Recommendation 1

Although Master YM is no longer a minor and does not engage CRC obligations, Master YM's continuing hardship raises strong compassionate circumstances. The Department will therefore prepare a section 417 submission for Ms HM for the Minister's consideration.

The Department notes that the Minister's intervention powers under section 417 of the Act allows him to grant a visa to a person, if he thinks it is in the public interest to do so. The Minister's public interest powers are non-delegable and non-compellable and he is not required to exercise or consider exercising his power. Further, what is in the public interest is a matter for the Minister to determine.

Department's Response to Recommendation 2

As noted in the response to recommendation 1, the Minister's intervention powers under section 417 of the Act allows him to grant a visa to a person, if he thinks it is in the public interest to do so. The Minister's public interest powers are non-delegable and non-compellable and he is not required to exercise or consider exercising his power. Further, what is in the public interest is a matter for the Minister to determine.

97. I report accordingly to the Attorney-General.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive, flowing style.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

October 2018

Endnotes

- 1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- 2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 3 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. On 22 October 1992, the Attorney-General made a declaration under s 47 that the CRC is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986 – Declaration of the United Nations Convention on the Rights of the Child*.
- 4 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212-3 and 214-5.
- 5 See *Plaintiff S10/2010 v Minister for Immigration and Citizenship* (Plaintiff S10) (2012) 246 CLR 636, 667-668 per Gummow, Hayne, Crennan and Bell JJ. See also the reasons of French CJ and Kiefel J in Plaintiff S10 at 648-649 [30] (and the authorities there referred to) and the reasons of Heydon J at 671 [113].
- 6 Rachel Hodgkin and Peter Newell, UNICEF, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 38.
- 7 [2011] UKSC 4.
- 8 [2011] UKSC 4, 15 [30], [32].
- 9 *Vaitaiki, Tevita Musie v Minister for Immigration & Ethnic Affairs* 150 ALR 607.
- 10 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, 141 [30].
- 11 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [21].
- 12 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [26].
- 13 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [32].
- 14 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [33].
- 15 *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49 [2005] 1 AC 538 [75] (Lady Hale).
- 16 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd ed 2005) 519.
- 17 Human Rights and Equal Opportunity Commission, *Nguyen and Okoye v Commonwealth (Department of Immigration and Multicultural Affairs) and GSL (Australia) Pty Ltd* [2008] AusHRC 39 [80]-[88].
- 18 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) [5]; UN Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) [2]; UN Human Rights Committee, *Views: Communication No. 201/1985*, 33rd sess, UN Doc CCPR/C/33/D/201/1985 (27 July 1988) 24 [10.3] (*Hendriks v the Netherlands*).
- 19 UN Human Rights Committee, *Views: Communication No. 68/1980*, 12th Sess, UN Doc CCPR/C/OP/1 (31 March 1981) ('A.S. v Canada'). See also, Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 669-670.
- 20 UN Human Rights Committee, *Views: Communication No. 930/2000*, 72nd sess, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) (*Winata v Australia*).
- 21 *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000, 11 [7.2].
- 22 UN Human Rights Committee, *Views: Communication No. 1011/2001*, 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 July 2004) 21 [9.8] (*Madafferi v Australia*).
- 23 UN Human Rights Committee, *Views: Communication No. 558/1993*, 59th sess, UN Doc CCPR/C/59/D/558/1993 (3 April 1997) (*Canepa v Canada*).
- 24 UN Human Rights Committee, *Views: Communication No. 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) 11 [8.3] (*Toonen v Australia*).
- 25 *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000, 11 [7.3].
- 26 UN Human Rights Committee, *Communication No. 893/1999*, 77th sess, UN Doc CCPR/C/77/D/893/1999 (28 March 2003) 12 [8.2] (*Sahid v New Zealand*).
- 27 *Sahid v New Zealand*, UN Doc CCPR/C/77/D/893/1999, 12 [8.2].
- 28 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 29 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 30 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).
- 31 Department of Immigration and Home Affairs, *Procedures Advice Manual, PAM3: Act Act – Ministerial powers – Minister's guidelines on ministerial powers* (s 351, s 417 and s 501J), sections 4 and 10.

Further Information

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