



Australian
Human Rights
Commission

Mr TA and Miss TB v
Commonwealth of Australia
(Department of Home Affairs)

[2019] AusHRC 132

31 July 2019

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Australian Human Rights Commission
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Report into arbitrary interference with family and failure to consider the best interests of the child

Australian Human Rights Commission 2019

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 Mr TA and Miss TB alleging arbitrary interference with family and failure to consider the best interests of the child.

Mr TA and Miss TB complain that the then Assistant Minister for Immigration and Border Protection's (Assistant Minister) decision not to intervene in Mr TA's case is an arbitrary interference with family, contrary to articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR). They also complain that the department failed to take Miss TB'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 Assistant Minister not to exercise his discretionary powers to intervene in Mr TA's case was an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

I have also found that Miss TB's best interests were not given active consideration in the department's 2016 and 2017 submissions to the Assistant Minister, and accordingly were not taken into account as a primary consideration in breach of article 3 of the CRC.

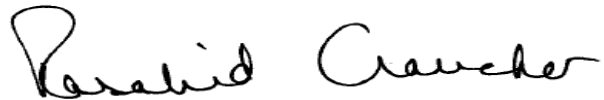
The department provided a response to my findings and recommendation on 28 March 2019. That response can be found in Part 8 of this report.

I note that the department has found that Mr TA and Miss TB's present situation gives rise to compassionate and compelling circumstances and has stated that it is preparing a s 417 submission for the Minister's consideration. I commend the department for this constructive response. I recommend that the Minister consider exercising his powers in a manner consistent with the findings set out in this report.

For this matter, I have decided to exercise the discretion to report pursuant to s 20A of the *Australian Human Rights Commission Act 1986* (Cth).

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

31 July 2019

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1 Introduction to this inquiry

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint by Mr TA and his daughter Miss TB 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 their human rights.
2. Mr TA and his wife arrived in Australia on visitor visas in February 2002. They overstayed their visas and became unlawful non-citizens. Their daughter, Miss TB, was born in Australia in December 2004 and became an Australian citizen when she turned ten. Mrs TA died from cancer in 2016.
3. Since arriving in Australia, Mr TA has been granted a number of bridging visas (BVEs). Departure conditions were placed on Mr TA's last two BVEs—he was asked to depart Australia voluntarily on or before 25 July 2017. Mr TA did not depart Australia.
4. In 2017, the then Assistant Minister for Immigration and Border Protection (Assistant Minister) declined to exercise his discretionary powers under s 417 of the *Migration Act 1958* (Cth) (Migration Act) to grant Mr TA a visa allowing him to stay in Australia until Miss TB completed her secondary education. Mr TA complains that the Assistant Minister's decision led to a requirement that he leave Australia that was inconsistent with his and his daughter's human rights.
5. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and this notice is issued pursuant to s 29(2) of the AHRC Act.

2 Summary of findings

6. As a result of this inquiry, I find the following:
 - the decision of the Assistant Minister on 22 February 2017 not to exercise his discretionary powers to intervene in Mr TA's case, leading to a requirement that Mr TA leave Australia, is an arbitrary interference with family, contrary to articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR)

- the department's 2016 and 2017 submissions to the Assistant Minister for the consideration of the exercise of his discretionary powers to grant Mr TA a visa failed to take account of Miss TB's best interests as a primary consideration, contrary to article 3 of the Convention on the Rights of the Child (CRC).
7. Miss TB has requested that her name not be published in connection with this inquiry. I consider that the preservation of her anonymity is necessary to protect her human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and I will refer to the father and daughter by the pseudonyms 'TA' and 'TB', respectively, in this document.

3 Background

3.1 Migration history

8. Mr and Mrs TA, both Chinese nationals, arrived in Australia on 11 February 2002. They overstayed their visitor visas and became unlawful non-citizens on 26 February 2002. On 11 December 2009, Mr TA lodged a protection visa application. At that time, he was granted a BVE in effect until 2 December 2010. The department refused Mr TA's protection visa application on 8 May 2010. On 4 November 2010, the Refugee Review Tribunal (RRT) affirmed the refusal decision.
9. From the date of the RRT decision until 27 June 2017, Mr TA was granted a number of additional BVEs, submitted two further protection visa applications (the first was deemed invalid, the second refused), and made several requests for Ministerial Intervention under ss 48B and 417 of the Migration Act.¹ Some of these Ministerial Intervention requests were not referred by the department to the Minister for Immigration and Border Protection (Minister), some were not considered by the Minister and, for others, the Minister declined to intervene.
10. Most relevantly, on 25 January 2017, the department recommended to the Assistant Minister that he intervene under s 417 to grant Mr TA a Visitor (Subclass 600) visa for 7 years. As stated by the department in its submission:

The grant of a Subclass 600 visa would give Mr TA lawful status in Australia and allow him to apply for a Parent visa, sponsored by his Australian citizen child ... when [she] turns 18 ...

...

Mr TA does not have any health or character concerns that would preclude a visa grant.

11. On 22 February 2017, the Assistant Minister decided not to intervene in Mr TA's matter. The Assistant Minister is not required to provide written reasons for his decision and, in this case, he did not.
12. As noted above, departure conditions were placed on Mr TA's last two BVEs. He was asked to depart Australia voluntarily on or before 25 July 2017. Mr TA agreed to those conditions and provided evidence to the department of a fully paid ticket departing Australia on 25 July 2017. Mr TA did not depart Australia. He is currently unlawful within the community and has no ongoing immigration matters.

3.2 Family history

13. Mr and Mrs TA's daughter, Miss TB, was born in Australia in December 2004. In December 2014, Miss TB turned 10 and acquired Australian citizenship by virtue of s 12(1)(b) of the *Australian Citizenship Act 2007* (Cth).
14. In the fifth request for Ministerial Intervention dated 23 November 2015, Mr and Mrs TA's migration agent includes, inter alia, information about the anticipated effect of Mr and Mrs TA's departure on Miss TB. The request states:

If [Miss TB's] parents are forced to return to China, [Miss TB] will be left in Australia without the care of her parents. She will be forced to live with strangers. For a child in the formative years, forcing her to separate from her loving parents to live with strangers would not be in the child's best interest, in fact, it would be against the Australian government's international protection obligations of children.
15. In September 2015, Mrs TA was diagnosed with penultimate stage 4 lung cancer. The cancer was progressive despite chemotherapy and her life expectancy was 6 to 12 months. She died in 2016. Miss TB was aged 11 at the time and in her last year of primary school. Miss TB now has no immediate or close family members living in Australia other than her father.
16. Mr TA has now lived in Australia for over 15 years. He and Mrs TA (prior to her death) both worked as cleaners. They had access to medical services through Medicare. Mr TA cared for Mrs TA (and received a carer's benefit) for a little over a year, and during this time also received some financial assistance from the non-governmental organisation Life Without Borders. Since Mrs TA's death, Mr TA has resumed working as a cleaner to support himself and Miss TB.

17. Provided to the department in April and May 2017 were supporting statements made by Miss TB and Mr TA, a joint letter from several NSW Ministers of Parliament, and a letter from Miss TB's school principal.
18. Mr TA's statement outlines Miss TB's reliance on him and the disadvantages his daughter would suffer if he were required to leave Australia. He states:

The primary thing in my life now is to regularise my status and not to be separated from my daughter, Miss TB ... she has just started her high school and if [sic] without a father she will suffer disadvantages in her development and be affected in progressing with her studies ... I cannot conceive of being deprived of my right and duty to care for Miss TB and at the same time it will be injustice to see a potential and irreversible harm and hardship on Miss TB ... Should I be separated from my daughter, it will be seriously traumatic for us and leave us in utter despair ... I implore [the Minister] to understand that I could not possibly take my Australian citizen daughter to China to live and that my only hope of being able to live as a unified family is in Australia.

19. Miss TB is now 13 years old and has lived in Australia her entire life. She has never been to China, and although she speaks some Mandarin at home, she is worried about successfully integrating into an unfamiliar educational and cultural environment. She writes:

Throughout 2014-2016, I have worked diligently to get into the school I am attending now ... and have made many friends. I do not know how to read or write Chinese so it would be extremely problematic for me. I would also not be able to receive the same tuition that I receive in Australia if I was to leave to China. As my education is one of my main focuses, this poses a great problem for me.

20. In a statement written to support Miss TB's ongoing education, the Principal of the selective high school she attends attests to Miss TB's intelligence, dedication and potential:

Despite the family circumstances and recent sad events Miss TB has been able to secure a place in a highly competitive context, where thousands of aspirants apply through the Selective Schools Test for limited places in NSW selective schools. Miss TB is one of 150 highly gifted girls in their first year of secondary school in Year 7 at ... one of the top schools in the state and nation. She is making admirable progress in the first term of secondary school and is academically very able.

4 Legislative framework

4.1 Functions of the Commission

21. 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.
22. 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.
23. 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?

24. The rights and freedoms recognised by the ICCPR and the CRC are ‘human rights’ within the meaning of the AHRC Act.² The following articles of these treaties are relevant to the acts and practices the subject of the present inquiry.
25. 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.
26. 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.
27. 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 primarily consideration.

4.3 What is an ‘act’ or ‘practice’

28. 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.

29. 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.³ 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.
30. 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 RRT, a decision that is more favourable to the applicant.
31. 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'.⁴ 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).
32. I find that the decision by the then Assistant Minister on 22 February 2017 not to exercise his 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 Miss TB's best interests were explored and taken into account as a primary consideration.

5 Best interests of children

33. Article 3 of the CRC requires that, in all actions concerning children, their best interests must be a primary consideration of the decision maker.
34. 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.⁵

35. 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.
36. 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.
37. In the decision of the United Kingdom Supreme Court, *ZH (Tanzania) (FC) v Secretary of State for the Home Department*,⁶ 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.⁷
38. 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)⁸
 - (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
 - (d) their resultant isolation from the normal contacts of children with their mother and their mother’s family.⁹
39. Miss TB engages article 3 of the CRC as she is under 18.¹⁰ The case law and guidelines indicate that her 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 her parents' migration histories and integration into the Australian community.

40. The starting point is to identify what decision the best interests of the child suggest should be made.¹¹ This requires an examination of each child's best interests, bearing in mind their individual circumstances.¹² 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.
41. 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.¹³

42. This balancing of interests 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.¹⁴

5.1 The department's referrals to the Minister

43. The department referred Mr TA's case to the Assistant Minister in January 2017 to consider the exercise of his discretionary powers under s 417 of the Migration Act to grant a visa to Mr TA. The department recommended that the Minister intervene to grant Mr TA a visitor visa for seven years.

44. In its submission, the department did not refer to the best interests of Miss TB at all, other than noting that Mr TA had an Australian citizen child who was 12 years of age. The department notified the Assistant Minister that Mrs TA passed away in August 2016, but no statement is made as to how this affected Miss TB.
45. The department did not provide information in relation to Miss TB's education status, including the fact that she had completed her primary school education and was about to commence her secondary schooling. And no information was provided as to whether Miss TB had any support networks available in Australia to allow her to complete her secondary school education in Australia. No information was provided as to Miss TB's Chinese language skills and the difficulties she may experience continuing her education in China. The department also did not inform the Assistant Minister that Miss TB had never been to China.
46. The department's submission attached an earlier submission from the department to a former Minister relating to Mr TA and Mrs TA. This earlier submission, prepared in June 2016, mentioned that the TAs had no other family in Australia and briefly considered the engagement of article 3 of the CRC but did not actively identify or consider Miss TB's best interests. The department stated:
29. In relation to Australia's obligations under the CROC, you may wish to consider that [Miss TB] is a minor child in Australia and therefore engages Australia's obligations under the CROC.
30. As an Australian citizen, [Miss TB] is able to remain permanently in Australia. Any decision to take her to the PRC would be for the parent/s to make. If they choose for [Miss TB] to travel to the PRC, country information indicates that she would have access to basic health care and other basic services. It has not been established that the PRC, which is a State Party to the CROC, would breach those obligations in respect to the provision of such services.
32. Available information indicates that the People's Republic of China does not recognise dual nationality. However, as long as [Miss TB]'s parents are citizens of China [Miss TB] may be registered as a Chinese citizen if she renounces her Australian citizenship. Alternatively, [Miss TB] may be able to obtain a Certificate of Permanent Residence of Aliens valid for five years if she is to reside in China as an Australian citizen [reference omitted].
47. I find that Miss TB's best interests were not identified, nor were they given active consideration in the department's 2016 or 2017 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

48. For the reasons set out in Commission report [2008] AusHRC 39,¹⁵ 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).
49. In assessing this complaint, I consider that the relevant act is the Assistant Minister's decision not to intervene in Mr TA's case in February 2017 pursuant to the discretionary powers contained in s 417 of the Migration Act that led to the requirement that Mr TA leave Australia.

6.1 Family

50. To make out a breach of articles 17(1) and 23(1) of the ICCPR, complainants must be identifiable as a 'family'.
51. In its General Comment 16, the United Nations Human Rights Committee (UN HR Committee) states:
- Regarding the term 'family', the objectives of the Covenant require that for the purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.¹⁶
52. The UN HR Committee has confirmed that the term 'family' is to be interpreted broadly,¹⁷ but an effective family life or family connection must be shown to exist.¹⁸
53. In this matter, Mr and Mrs TA lived together as husband and wife from when they arrived in Australia in 2002 until Mrs TA passed away in 2016. Miss TB is their biological daughter and lived with her parents from birth until the death of her mother, and with her father since then. Mr TA and Miss TB have shared their lives together while in Australia, with Miss TB now dependent on her father for financial, developmental, physical and emotional support.
54. As a widower father and biological (only) child, I am satisfied that Mr TA and Miss TB are a 'family' for the purposes of article 17 of the ICCPR and have had a long-settled family life in Australia.

6.2 Interference

55. In *Winata v Australia*,¹⁹ the UN HR Committee made findings in relation to a family in similar circumstances to those of Mr TA and Miss TB. In *Winata*, 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 UN HR Committee 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.²⁰

56. In *Madafferi v Australia*, the UN HR Committee 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.²¹

57. I recognise that Mr and Mrs TA were unlawful non-citizens for substantial periods of time since overstaying their original visas. Nevertheless, as has been described, there is substantial evidence of long settled family life in Australia for Mr TA and Miss TB. They have lived together in Australia for the entirety of Miss TB's life, and all of her education has been in Australia. Miss TB has succeeded in gaining a place at a prestigious academically selective secondary school, even while her mother was dying from cancer. It is clear from her own statement and that of the School Principal, that she has clear ties to this school community and friendships developed there.
58. Miss TB's statement outlines the emotional and practical care and support her father has provided to her, particularly while her mother was sick and following her mother's death. Miss TB also outlines the difficulties she would face in living in Australia alone, if her father was to return to China. She states:

[Mr TA] has always been a wonderful and caring parent and if he was to leave Australia I would have no one to look after me.

...

If my father was to leave the country, I would struggle to care for myself. There is also no one in the country that could be appointed as my guardian meaning that [I], at the age of 12, would have to live alone which would mean hardship.

...

I am quite frightened for my future if my father was to leave for China. I would have no parents in the country nor anyone to supervise me as I grow up... I do not know too much about the situation but I do know that I love my father dearly and I do not want to leave such a great country...

59. Given the established nature of the family unit, I am of the view that the Assistant Minister's failure to intervene, leading to a requirement that Mr TA leave Australia, constitutes an 'interference' with the TA family.

6.3 Arbitrary or unlawful

60. 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.
61. In its General Comment on article 17, the UN HR Committee 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.
62. In *Canepa v Canada*, the UN HR Committee 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.²²

63. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness. In relation to the meaning of reasonableness, the UN HR Committee 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.²³

64. 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 UN HR Committee 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.²⁴

65. A crucial element of the reasoning in *Winata* which led the UN HR Committee 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*,²⁵ where the UN HR Committee 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.²⁶

66. I am of the view that similar 'exceptional' circumstances exist in this case to those in *Winata*. These circumstances include:

- Miss TB was 12 years of age at the time of the 2017 referral to the Assistant Minister
- Miss TB's lifelong residence in Australia and her integration into the Australian community
- the advanced stage of Miss TB's secondary school education in Australia, and the fact that her entire education has taken place in Australia

- the fact that Miss TB has no other support network in Australia to support her while she completes her secondary school education
- the fact that Miss TB has never visited China and does not know how to read or write in Chinese.

67. As set out above, these 'exceptional circumstances' were not put by the department to the Assistant Minister for his consideration in making a decision on Mr TA's case.

6.4 Decision of the Minister

68. On 22 February 2017, the Assistant Minister personally considered the department's submissions in Mr TA's matter and declined to intervene. In the referral submission from the department to the Assistant Minister, the following relevant information was included for the Assistant Minister's consideration:

- a) Mr and Mrs TA lived (periodically lawfully and unlawfully) in Australia for more than 14 years.
- b) Mrs TA died from progressive lung cancer in 2016.
- c) Their minor child, Miss TB, was born in Australia and became an Australian citizen in December 2014.
- d) There are no health or character concerns that would preclude a visa grant for Mr TA.
- e) The previous Assistant Minister waived the condition 8503 ("No further Stay") condition attached to Mr TA's last substantive visa and began considering his case for the grant of a Visitor (Subclass 600) visa under s 417.
- f) The grant of a Subclass 600 visa would give Mr TA lawful status in Australia and allow him to apply for a Parent visa, sponsored by Miss TB, when she turns 18.
- g) The department acknowledged that articles 17 and 23 of the ICCPR were engaged by Mr TA's case, but noted *inter alia* that States Parties may lawfully require non-citizens to leave; that family unity is not an absolute right; and that the best interests of the child does not automatically lead to a decision to allow the child's family to remain in Australia.

69. The department recommended that the Assistant Minister:

Intervene under section 417 and substitute for the Administrative Appeals Tribunal (Refugee Division) decision, a decision to grant a Visitor (Subclass 600) visa for seven years with work rights.

70. In the present case, the Commission is not aware of additional bases put forward by the Assistant Minister for his refusal to intervene in Mr TA's case, although I do note that he 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. Indeed, the department's submission noted there were no character concerns. Bearing in mind Mr TA's and Miss TB's long period of residence in Australia and his and his daughter's integration into the Australian community, I consider that additional factors would be required in order to justify the failure to intervene.

6.5 Consideration

71. I have taken particular note of the length of time that Miss TB has spent in Australia, the stage at which she is at in her secondary school education, the death of her mother and the potential psychological effects caused by either her father leaving her alone in Australia, or the dislocation from her established life in Australia if she were to move with him to China.

72. For the reasons outlined above, I find that the decision of the Assistant Minister not to intervene in Mr TA's case, and consequently the requirement that Mr TA not be allowed to remain in Australia at least while Miss TB completes her secondary education, was an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR.

7 Recommendation

73. As a result of this inquiry, I find the following:

- the decision of the Assistant Minister on 22 February 2017 not to exercise his discretionary powers to intervene in Mr TA's case, leading to a requirement that Mr TA leave Australia, is an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR
- the department's 2016 and 2017 submissions to the Assistant Minister for the consideration of the exercise of his discretionary powers to grant Mr TA a visa failed to take account of Miss TB's best interests as a primary consideration on the basis of relevant

information contemporaneous to the referral, contrary to article 3 of the CRC.

74. On 5 September 2018, I provided the department and the Minister with these findings as part of my preliminary view in respect of Mr TA and Miss TB's complaint. On 10 October 2018, the department provided a letter responding to my preliminary view, responding also on behalf of the Minister. In its letter, the department stated:

The Department notes the preliminary views of the AHRC regarding this case and does not accept the views of the AHRC, in relation to the past actions of the then Assistant Minister and of the Department as set out in the s27 Notice. However, as Mr TA's and Miss TB's present situation, as set out in the AHRC's report, gives rise to compassionate and compelling circumstances, the Department will prepare a section 417 submission in relation to Mr TA 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.

75. 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.²⁷ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.²⁸ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.²⁹
76. I note that the department has stated that it will prepare a s 417 submission in respect of Mr TA for consideration by the Minister. Accordingly, I make the following recommendation:

Recommendation

The Minister consider exercising his powers in a manner consistent with the findings set out in this notice.

8 The department's response to my findings and recommendation

77. On 14 February 2019, I provided the department with a notice of my findings and recommendation.

78. On 28 March 2019, the department provided the following response to my findings and recommendation:

The Department maintains the views contained within its response of 10 October 2018 to the section 27 notice, namely that:

- Decisions of Ministers under section 417 of the *Migration Act 1958* encompass a consideration of a range of matters including a person's migration history, family composition, connections to Australia and to other countries and relevant international obligations under the ICCPR and CRC, including the obligation to treat the best interests of the child as a primary consideration. The then Assistant Minister decided it was not in the public interest to intervene in Mr TA's case, taking such matters into consideration, as it was within his personal power to do.
- In the initial submission of 28 May 2016, the Department provided the then Assistant Minister with an assessment of Australia's international obligations including the ICCPR and CRC. At the decision-ready point in 2017, there was no updated information provided by Mr TA's family to suggest that additional ICCPR and CRC assessments were necessary.

As per the departmental response to the section 27 notice, the Department does not accept the view of the AHRC in relation to the decision of the then Assistant Minister and the actions of the Department. The Department however notes that as the current situation of Mr TA and Miss TB gives rise to compassionate and compelling circumstances, the Department is preparing a section 417 submission for the Minister's consideration.

AHRC's recommendation

Following the Department's statement that a section 417 submission will be prepared in respect of Mr TA for consideration by the Minister, the AHRC recommends that the Minister consider exercising his powers in a manner consistent with the findings set out in the section 29 notice.

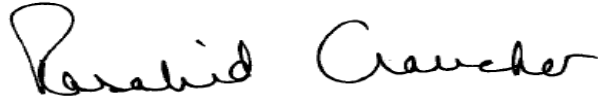
Response to recommendation

As foreshadowed in response to the section 27 notice, a new section 417 submission is being prepared for the Minister's consideration which will include further information about the case as identified by the AHRC in their preliminary views. This information was not available to the Department at the time of the referral of the previous submission.

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 determines 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.

79. I report accordingly to the Attorney-General.

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

31 July 2019

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- ¹ Under s 48A of the Migration Act, a non-citizen may not make a further application for a protection visa where the grant of the visa has been refused. Section 48B allows the Minister to determine that s 48A does not apply. Section 417 of the Migration Act allows the Minister to substitute for a decision of the Tribunal, a decision that is more favourable to the applicant.
- ² 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*.
- ³ 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.
- ⁴ 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].
- ⁵ Rachel Hodgkin and Peter Newell, UNICEF, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 38.
- ⁶ [2011] UKSC 4.
- ⁷ [2011] UKSC 4, 15 [30], [32].
- ⁸ *Vaitaiki, Tevita Musie v Minister for Immigration & Ethnic Affairs* 150 ALR 607.
- ⁹ *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, 141 [30].
- ¹⁰ 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].
- ¹¹ *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [26].
- ¹² 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].
- ¹³ *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 [33].
- ¹⁴ *Naidike v Attorney-General of Trinidad and Tobago* [2004] UKPC 49 [2005] 1 AC 538 [75] (Lady Hale).
- ¹⁵ 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].
- ¹⁶ 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].
- ¹⁷ 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*').
- ¹⁸ 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.

- ¹⁹ 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'*).
- ²⁰ *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000, 11 [7.2].
- ²¹ UN Human Rights Committee, *Views: Communication No. 1011/2001*, 81 sess, UN Doc CCPR/C/81/D/1011/2001 (26 July 2004) 21 [9.8] (*'Madafferi v Australia'*).
- ²² 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'*).
- ²³ 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'*).
- ²⁴ *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000, 11 [7.3].
- ²⁵ 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'*).
- ²⁶ *Sahid v New Zealand*, UN Doc CCPR/C/77/D/893/1999, 12 [8.2].
- ²⁷ *Australian Human Rights Commission Act 1986 (Cth)* s 29(2)(a).
- ²⁸ *Australian Human Rights Commission Act 1986 (Cth)* s 29(2)(b).
- ²⁹ *Australian Human Rights Commission Act 1986 (Cth)* s 29(2)(c).