



Australian
Human Rights
Commission

Lee family and Misinale family v Commonwealth of Australia (DIBP)

[2016] AushRC 104

© Australian Human Rights Commission 2016.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication and endorses the use of the **Australian Governments Open Access and Licensing Framework (AusGOAL)**.



All material presented in this publication is licensed under the **Creative Commons Attribution 4.0 International Licence**, with the exception of:

- the Commission's logo, any branding or trademarks; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

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

Please give attribution to:

© Australian Human Rights Commission 2016.

ISSN 1837-1183

Further information

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600
Email: communications@humanrights.gov.au.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

**Lee family and Misinale family
v Commonwealth of Australia
(Department of Immigration
and Border Protection)**

[2016] AusHRC 104

Report into the best interest of the
child and the right not to be subject to
arbitrary interference with family

Australian Human Rights Commission 2016



Contents

1	Introduction to this inquiry	3
2	Complainants	3
	2.1 Lee family	3
	2.2 Misinale family	4
3	Migration history	5
	3.1 Lee family	5
	3.2 Misinale family	6
4	Conciliation	7
5	Relevant legal framework	7
	5.1 What is a 'human right'?	8
	5.2 What is an 'act' or 'practice'?	8
6	The complaints	9
7	Best interests of children	9
8	Arbitrary or unlawful interference with family	12
9	Findings and recommendations	15
10	Department's response to recommendations	16



**Australian
Human Rights
Commission**

March 2016

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by two separate families, the Misinale family and the Lee family against the Commonwealth of Australia, Department of Immigration and Border Protection (department).

I have found that the decision by the Assistant Minister for Immigration and Border Protection (Minister) to not intervene in either case, leading to the requirement that each set of parents leave Australia, is an arbitrary interference with family. I find this decision to be an act inconsistent with or contrary to Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).

In light of my findings I recommended that the department refer the matter back to the current Minister for further consideration of the use of his public interest powers. I further recommended that the Minister consider exercising his powers in a manner consistent with the findings set out in this report.

The department provided its response to my findings and recommendations by letter dated 22 December 2015. On the basis of the contents of this report and the passage of time since the matter was considered by the then Assistant Minister, the department agreed to refer both cases to the current Minister for his personal consideration. The department's response is set out in full at part 10 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into separate complaints made by two families against the Commonwealth of Australia, Department of Immigration and Border Protection (department) alleging a breach of their human rights.
2. The children of each of the families were born in Australia and became Australian citizens after living here for more than 10 years. The parents of each of the families currently hold bridging visas but have been refused visas allowing them to remain permanently in Australia. The department has told the parents that they are expected to leave Australia as soon as practicable. The parents claim that this requirement would amount to an arbitrary interference with family.
3. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
4. As a result of this inquiry, I found that the decision of the then Assistant Minister for Immigration and Border Protection (Minister) not to exercise her discretionary powers to intervene in either case, leading to a requirement that each set of parents leave Australia, is an arbitrary interference with family, contrary to Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).
5. In the course of this report, I provided my view to the department and to the current Minister for Immigration and Border Protection. The department provided a response on behalf of the Commonwealth.

2 Complainants

6. The complainants are two families. The parents of each family have resided in Australia for a number of years and each have Australian citizen children.

2.1 Lee family

7. Mr Jong Nam Lee and his wife Ms Young Ju Hwang came to Australia from South Korea when they were 35 and 33 years old. They have resided in Australia for approximately 22 and 20 years respectively. Their children were born in Australia, are Australian citizens and attend university and high school in Sydney.
8. The complainants' son, Mr Kyong Sup Lee, known as Kevin, was born on 28 February 1996 and is now 19 years of age. His younger sister, Miss So Young Lee, known as Katherina, was born on the 27 March 2000 and is currently 15 years old.
9. Mr Lee and Ms Hwang submit that since arriving in Australia in the mid-1990s, they have developed strong business, social and religious ties to the Australian community, particularly in the Sydney suburb of Ashfield where they have lived since their arrival. Mr Lee and Ms Hwang have also engaged with the Australian community through their children's education and busy schedule of extra-curricular activities.

10. Shortly after their arrival in Australia, Mr Lee and Ms Hwang assisted Mr Lee's parents to run a grocery shop in Ashfield. Following the closure of the shop, the couple have operated their own cleaning business, under the registered business name 'Just Clean Power', since 2008. They submit that they have been successful in entering into contracts with two large Sydney hotels, and have paid tax every year since the business was established.
11. In her supporting letter accompanying a request of September 2014 for the Minister to intervene to grant her a visa (ministerial intervention request), Ms Hwang submits that she and her husband have a deep attachment to the local community of Ashfield, where they have lived for over 20 years. Ms Hwang provides examples such as her involvement in the local community, and her husband's commitment to his church.
12. Ms Hwang describes her involvement in her children's school events, including 'cultural days' in which she says she taught Korean painting to Kevin's Visual Arts class, drawing on her experience as a former high school art teacher in South Korea. She submits that she has tertiary qualifications in art from a university in South Korea.
13. Katherina is currently in Year 10. On the information before the Commission, she holds a scholarship at Meriden Independent School. Katherina is a talented swimmer, having competed and placed at national's level for a number of years. She is a member of Macquarie University Swim Club, and has a demanding training schedule.
14. Kevin is currently studying a Bachelor of Commerce at Macquarie University. He attended St Mary's Cathedral College where he was a prefect and was placed in the gifted and talented program for taekwondo and swimming.

2.2 Misinale family

15. Mr Siofilisi Misinale came to Australia as a 21 year old in 1988 on a student visa, and Ms Ilisapesi Teaupā arrived aged 22 in 1992 on a tourist visa. Both are originally from Tonga. The couple married in 2011 and have three children, all of whom were born in Australia and are Australian citizens.
16. Mr Misinale has now spent most of his life in Australia, and is the sole financial provider for the family, having been in long term employment as a store person and fork lift driver. Mr Misinale has been a member of the Hillsdale community, in south-east Sydney, for over two decades. On the material before the Commission, it is clear that Mr Misinale is an active and long term member of Maroubra Uniting Church, and was elected as a church elder. Two Reverends from the Maroubra Uniting Church provided Mr Misinale with character references to support his ministerial intervention request made on behalf of the family on 9 November 2012. These letters demonstrate the significant leadership role that Mr Misinale plays at his church, and his integration into the community through this involvement.
17. Ms Teaupā is also a member of Maroubra Uniting Church, and attends and occasionally hosts the church's bible studies meetings in the family home. Ms Teaupā is not employed herself, but says that she volunteers at a number of her children's school events.

18. The then member for Kingsford Smith, the Hon Peter Garrett MP, wrote a letter of support for the couple dated 23 November 2012 to accompany the couple's ministerial intervention request. The letter emphasised their long term residence of the area and their deep ties to the community, including their membership of the Maroubra Uniting Church.
19. A letter of support from Ms Teauapa's sister, dated 22 November 2012, was also submitted by the Misinale family as part of their ministerial intervention request. This letter describes the reliance the children place on their parents and the inability of Ms Teauapa's sister to care for the children should they stay in Australia without their parents, based on the fact that their aunt already has seven children of her own.
20. The couple's eldest child, Daffodil, was born on 7 August 1995. Daffodil was a prefect at Matraville Public School and completed her Higher School Certificate in 2013 at South Sydney High School. Daffodil wrote a letter dated 26 October 2012 in support of her father's request for ministerial intervention. In her letter, Daffodil describes her strong relationship with her father and her reliance on him for financial and emotional stability. Daffodil also describes the involvement of her father as a volunteer at school activities.
21. Manu 'O Pangai Jr Misinale was born on 19 November 1996 and is currently 19 years of age. He attended Matraville Public School and South Sydney High School. He also wrote a letter supporting his father's ministerial intervention request of November 2012. His letter submits that his father provides the sole source of income for the family, as well as significant moral and spiritual support. Manu stresses the difficulties the family would face should his father face deportation.
22. Melenaité Misinale was born on 31 December 1997 and is currently 17 years old. She was school captain at Matraville Public School and is currently enrolled at South Sydney High School. Melenaité's letter attached to the ministerial intervention request emphasised the emotional attachment she has with her father.
23. An undated reference letter provided by the Matraville Public School principal confirmed all three children had high levels of attendance and participation in extracurricular activities, and stated that they would continue to make positive contributions to society. A letter dated 4 June 2012 confirms the enrolment of all three children at South Sydney High School.

3 Migration history

3.1 Lee family

24. Mr Lee first entered Australia on a tourist visa in 1993. He spent the next three years on various tourist and business visas, exiting and re-entering Australia three times. In September 1995, Mr Lee re-entered Australia on a tourist (long stay) visa with his spouse, Ms Hwang, who entered on a tourist visa.
25. In February of 1996, Ms Hwang gave birth to Kevin. Shortly thereafter, Ms Hwang's tourist visa expired, and she remained in Australia as an unlawful non-citizen. Mr Lee's tourist visa expired in June of 1996, and he remained in Australia as an unlawful non-citizen.

26. Mr Lee and Ms Hwang claim that they initially came to Australia together on a holiday to visit Mr Lee's parents and brother, who operated a grocery store in Ashfield. They remained in Australia after the expiration of their visas to look after Mr Lee's elderly parents, and to assist in the running of the grocery shop. Mr Lee's parents returned to South Korea in 2007, and have since passed away.
27. The complainants had their second child, Katherina, in April 2000. Both children became Australian citizens on their respective 10th birthdays in 2006 and 2010, under s 12(1)(b) of the *Australian Citizenship Act 2007* (Cth).
28. In June 2011, Mr Lee and Ms Hwang were located by Immigration Compliance officers, having remained unlawfully in the community for approximately 15 years. Both were granted bridging E visas.
29. Subsequently, Mr Lee and Ms Hwang made an unsuccessful application for a New Zealand Citizenship Relationship (Temporary) Visa. After the Migration Review Tribunal (MRT) affirmed the refusal, Mr Lee and Ms Hwang applied for ministerial intervention, seeking a permanent Parent (contributory) visa. The Minister made a decision not to intervene on 30 September 2014.
30. Mr Lee and Ms Hwang remain in Australia on bridging visas. In the submission made by the department to the Minister in relation to the family's ministerial intervention request, the department states that, should the Minister decline to intervene, steps to facilitate removal will be made by Compliance. The department confirmed to the Commission on 7 May 2015 that, on that date, it had no plans to remove the couple. Mr Lee and Ms Hwang say that they have been told by the department that they are expected to leave Australia.

3.2 Misinale family

31. Mr Misinale and Ms Teaupa have a complex migration history. Mr Misinale arrived in Australia as a 21 year old in 1988 on a student visa, which was extended once. He disengaged from the department after the expiration of the visa in December 1989 until he was located by compliance officers in 1994, after lodging a worker's compensation claim.
32. Mr Misinale then unsuccessfully applied for a Protection Entry Permit Refugee Status (class 817) visa. Following this, he applied for a Child Visa with his uncle as his sponsor, however this application was also refused, with the decision affirmed on review. He had been granted a bridging visa while these applications were considered. Mr Misinale again disengaged from the department from 1998 to 2012, however after the decision of the Federal Court in *Srey*,¹ it was found that his presence in Australia during this period was not unlawful, as he had not been properly notified of the decisions to refuse him either visa, or of his rights of appeal in relation to either refusal. Mr Misinale's bridging visa was subsequently reinstated. He was renotified of the refusal decision and chose not to appeal either decision, or lodge a new protection visa application.² In 2012, Mr Misinale made a ministerial intervention request under s 351 of the *Migration Act 1958* (Cth) (Migration Act), which was unsuccessful.

33. Ms Teauga came to Australia on a tourist visa in 1992, and disengaged from the department following its expiration. In 2012, she lodged an application for a protection visa, and challenged the department's refusal decision at the Refugee Review Tribunal (RRT) where she was unsuccessful. She then made a ministerial intervention request under s 417 of the Migration Act in April 2013, which was submitted along with Mr Misinale's request under s 351, and which was also refused.
34. In March 2015, Ms Teauga made a repeat request that the Minister intervene under s 351 in her and her husband's case. The department was not satisfied that the request met the requirements for referral to the Minister, and subsequently the department declined to make a further submission to the Minister to consider intervention on behalf of Ms Teauga and Mr Misinale. Ms Teauga and Mr Misinale are currently on bridging visas. In the submission made by the department to the Minister in relation to the family's ministerial intervention request, the department states that, should the Minister decline to intervene, steps to facilitate removal will be made by Compliance. The department confirmed to the Commission on 7 May 2015 that, on that date, it had no plans to remove the couple. Ms Teauga and Mr Misinale say that they have been told by the department that they are expected to leave Australia.

4 Conciliation

35. The Commonwealth indicated that it did not want to participate in conciliation of either matter.

5 Relevant legal framework

36. This inquiry was conducted pursuant to s 11(1)(f) of the AHRC Act which gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
37. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
38. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

5.1 What is a ‘human right’?

39. The rights and freedoms recognised by the ICCPR and the *Convention of the Rights of the Child* (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.

40. 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.

41. 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.

42. 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.

5.2 What is an ‘act’ or ‘practice’?

43. 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’. This includes a refusal or failure to do an act, as per s 3(3)(a).

44. 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 jurisdiction under s 11(1)(f).

45. Sections 417 and 351 of the Migration Act allow the Minister to substitute a more favourable decision for the applicant than a decision by a tribunal. It was open to the Minister to intervene in both the Lee and Misinale families’ cases by exercising this discretionary power.

46. The exercise of the 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).

47. I find that the decision by the Minister not to exercise those discretionary powers constitutes an act within the definition of s 3 of the AHRC Act.

48. For the reasons set out below, I find that this act was inconsistent with or contrary to the rights of the Lee and Misinale families under Articles 17(1) and 23(1) of the ICCPR.

6 The complaints

49. Both families have made complaints to the Commission on the basis that the parents of each are expected to leave Australia and the department may seek to remove them, given that both families have now exhausted all other legal channels and the Minister has declined to intervene in either case. The complainants claim that the requirement that they leave Australia, or any act seeking to remove them from Australia, would be inconsistent with or contrary to Australia's obligations under the CRC and the ICCPR.
50. Given that each of the complainants' children are Australian citizens, there is no power that the department could rely on to remove the children with their non-citizen parents.
51. The complainants seek substantive visas for each parent, to enable them to both remain and work in Australia, in order to continue to support their children. Mr Lee and Ms Hwang seek the grant of a contributory parent visa (subclass 143), or the grant of a visitor visa allowing them to lodge an application for a contributory parent visa. This was requested by their representative on 17 June 2013 in a letter to the department seeking ministerial intervention under s 351 of the Migration Act. Mr Misinale and Ms Teauga have indicated through their representative that they are seeking visas to remain permanently in Australia.⁶

7 Best interests of children

52. Article 3 of the CRC requires that in all actions concerning children, their best interests must be a primary consideration of the decision maker.
53. The United Nations Children's Fund (UNICEF) Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on 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.
54. 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.
55. 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.
56. Katharina and Melenaite engage Article 3 of the CRC as they are both under 18.⁷ Their best interests need to 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.

57. The starting point is to identify what the best interests of the child indicate that the decision maker should decide.⁸ This requires an examination of each child's best interests, bearing in mind their individual circumstances.⁹ 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.

(a) Katherina

58. In its submission to the Minister in relation to the Lee family's ministerial intervention request, the department accepts that Katherina is dependent on her parents. The department also accepts that separation of Katherina from her parents would cause her 'some distress', however the department claims that this would be due to a choice made by Katherina's parents; that is, to have her remain in Australia rather than leave with them to South Korea.

59. The act or practice of refusing to intervene in Katherina's parents' case means practically that she must either leave Australia with them or stay alone. In considering her best interests, the department should holistically assess Katherina's development¹⁰ and consideration should be given to both scenarios.¹¹

60. In the department's ministerial intervention submissions of September 2014, it is suggested that it 'may not be an unrealistic option' for Katherina's older brother, Kevin, to look after her in her final years of high school, or for Katherina to attend boarding school. Ms Hwang has suggested to the department that Katherina's demanding extra-curricular activities coupled with the fact that her adult brother is still only a teenager himself suggests that it would be unrealistic for Kevin to look after Katherina should their parents be removed from Australia. There is no submission from the complainants as to the appropriateness of sending Katherina to boarding school.

61. While South Korea is a developed country, if Katherina were to depart Australia with her parents, her education, school and social networks would be disrupted. Ms Hwang submits that Katharina is not able to read or write Korean fluently, and would have difficulty adjusting to the education system there.

62. Given that Katherina has spent her whole life in Australia, is an Australian citizen and has completed all of her education in Australia; and bearing in mind the difficulties of disrupting her education and social networks by moving to South Korea, I find that Katharina's best interests would be met by allowing her parents to remain with her in Australia and to continue to financially and emotionally support her.

(b) Melenaite

63. In determining Melenaite's best interests, as a dependent minor, the CRC sets out that consideration must be given to the holistic development of the child, which includes consideration of family life, social networks and education.

64. In a second request for ministerial intervention in September 2014, the Misinale family's representative addresses the department's suggestion in its first ministerial submissions of November 2013 that Melenaite could be looked after by her older adult sister. The representative submits that this:

... clearly ignores the fact that [her sister] is a full-time student and that she is not in a position to provide for the emotional and psychological support for her siblings

65. In the department's submission to the Minister in November 2013, the department says:

The couple claim that the children depend fully on their parents for financial emotional and psychological support and that they will suffer irreparable harm and continuing hardship if their parents are forced to depart Australia as they have no close relatives in Australia who are available or willing to provide for them. The department accepts that the minor children would be affected by the departure of their parents, if the parents chose to depart and leave them in Australia. The department accepts that as minors they are dependent on their parents.

66. If Melenaite were to accompany her parents back to Tonga, her education would be disrupted. The department, in its ministerial submissions, states that the Tongan secondary school system requires Melenaite to pass an exam before enrolling, and that secondary education is not free. Furthermore, UNICEF suggests that quality of education is another challenge faced by the system in Tonga.¹²

67. Melenaite's best interests, with reference to the fact that she has spent her whole life in Australia and relies on her parents to care for her, as well as her diminished education opportunities in Tonga, would be to have her parents granted visas to allow them to remain in Australia with her.

(c) Consideration

68. It is legally open to a decision maker to depart from the best interests of the child. In doing so, however, the decision maker must ensure that they do not treat any other factor as inherently more significant than the best interests of the child, and any other relevant considerations must outweigh their best interests.

69. The Minister has the power under sections 351 and 417 of the Migration Act to substitute his or her own more favourable decision for the decision of either the MRT or the RRT to refuse visas for the Misinale and Lee families, if the Minister thinks it is in the public interest to do so. The decisions in each case were made by the then Assistant Minister for Immigration and Border Protection, Senator the Hon Michaelia Cash. In each case, the Minister declined to exercise her powers under sections 351 or 417. The Minister is not required to provide written reasons for refusing to exercise her discretion; therefore it is unclear what factors she took into consideration when departing from Katherina and Melenaite's best interests.

70. The submissions made by the department to the Minister in both cases indicate that the department considered the engagement of Article 3 of the CRC, but determined that the maintenance of Australia's migration system is a countervailing primary consideration in this case. The Minister had these submissions in front of her when she made the decisions not to intervene.

71. In response to my preliminary view in this inquiry, the department submitted:

The former Minister was aware of the need to treat the best interests of the children as a primary consideration when contemplating action that would lead either to the children being separated from their parents (if the parents were removed and did not request that their children depart with them) or living in a country with which they may be less familiar (if their parents chose to take them to live offshore).

When the former Minister made her decision not to consider intervening in these cases, she considered holistically the particular circumstances of the cases and decided that the children's best interests were outweighed by other primary considerations relating to the integrity of the migration system and the parents' history of non-compliance with immigration requirements.

72. In *Wan v MIMA*, the Court described this balancing act 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

73. I find that, with reference to the best interests of each child and the damage to each child's interests if they were to remain in Australia without their parents or depart to their parents' countries of origin, balanced against the community's expectations in relation to Australia's migration network, the act or practice of deciding not to intervene in either case did not constitute a breach of Article 3 of the CRC, as the Commonwealth considered the rights of each child as a primary consideration, and determined that this consideration was outweighed by the need to maintain the integrity of Australia's migration system.

8 Arbitrary or unlawful interference with family

(a) Interference

74. 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'.¹⁴

75. 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).

76. To make out a breach of Articles 17(1) and 23(1) of the ICCPR, the complainants must be able to be identified as 'families'. The UNHRC has confirmed that the term 'family' is to be interpreted broadly,¹⁶ but an effective family life or family connection must be shown to exist.¹⁷ In both instances, clear evidence of an effective family life exists in that family members in both families share their lives together, have economic ties, and regular and intense relationships. This is evidenced by the statements both families have submitted in support of their respective ministerial intervention requests, which demonstrate that in both cases there has been a long and settled family life in Australia.

77. The departmental submissions to the Minister claim that a decision not to intervene in either case would not constitute an interference with family on the basis that any family separation would occur only through the volition of the parents. This is because the children of either family would be eligible for citizenship in their parents' home countries, and it is open to each family to remain together provided they all leave Australia.

78. The department's response to my preliminary view in this inquiry makes the same points. It says that there is no right to family unity under international law and goes on to say:

In circumstances where parents have no right to remain in Australia, the former Minister's decision not to intervene presents the family with a choice about whether it is more appropriate for their children to remain in Australia or to depart with them. This does not, in our view, represent an arbitrary interference with family.

As the former Minister chose not to intervene in these two cases, the Department is, subject to the finalisation of this investigation, obliged to require the departure or removal of Mr Lee and his spouse and of Mr Misinale and his spouse as soon [as] reasonably practicable.

79. In assessing these complaints, I consider that the relevant acts or practices are the Minister's decisions not to intervene in either case under the discretionary powers contained in s 417 or s 351. In the submissions made by the department to the Minister in relation to each family's ministerial intervention request, the department states that, should the Minister decline to intervene, steps to facilitate removal will be made by Compliance. The department has acknowledged that if either set of parents did not request that their children be removed with them, the children could not be removed, given their status as Australian citizens.

80. In *Winata v Australia*,¹⁸ the United Nations Human Rights Committee (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 authors' 13 year old Australian-born son was an Australian citizen who did not speak Indonesian and had never visited Indonesia. The UNHRC held 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.¹⁹

81. In *Madafferi v Australia*, the UNHRC reiterated this principle holding 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.²⁰

82. As has been described, there is substantial evidence of long settled family life in Australia for both families. Mr Lee and Ms Hwang have lived in Australia for over 20 years and Mr Misinale and Ms Teaupa have lived in Australia for over 23 years. All of the children were born in Australia, and there is no evidence before the Commission to suggest that they have visited their parents' countries of origin. Character references and submissions made to the department in each case demonstrates that both families have integrated into the Australian community, evidenced by employment, participation in community activities, sending their children to local schools and universities and volunteering time at school and extracurricular events.
83. Given the established nature of each family unit, a failure to intervene, resulting in removal, would be disruptive to family life in both cases.
84. I find that the act of deciding not to intervene in either case, leading to a requirement that each set of parents leave Australia, constitutes an interference with the respective families.

(b) Arbitrary or unlawful

85. 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.
86. 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.
87. 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.²¹
88. 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.²²

89. Whilst 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 held 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.²³

90. 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 by the UNHRC in *Sahid v New Zealand*.²⁴ In those circumstances, although removal was lawful, it would be arbitrary unless justified by additional factors, beyond the mere enforcement of immigration law.

91. In the present case, the only bases put forward as justifying the Minister's refusal to intervene in Mr Misinale, Ms Teaupa, Mr Lee and Ms Hwang's cases are the breaches of immigration law described earlier in this preliminary view. I am not aware of any additional factors, such as a risk to the community, public order or security, which may otherwise suggest that their removal 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 their long period of residence in Australia and their integration into the Australian community, I find that additional factors would be required in order to justify the decision not to intervene.

9 Findings and recommendations

92. For the reasons outlined above, I find that the decision by the Minister to not intervene in either case, leading to the requirement that each set of parents leave Australia, is an arbitrary interference with family, contrary to Articles 17 and 23 of the ICCPR.

93. 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.²⁵ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice, or for the taking of action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.²⁶

94. The department's Procedures Advice Manual anticipates 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. Unique or exceptional circumstances are defined to include:
- circumstances that may bring Australia's obligations as a party to the ICCPR into consideration (in particular, issues relating to Articles 17 and 23);
 - circumstances that may bring Australia's obligations as a party to the CRC into consideration (in particular, issues relating to Article 3); and
 - 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).²⁷
95. 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.

10 Department's response to recommendations

96. On 4 December 2015 I provided a notice to the department under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaint.
97. I asked that the department advise within 14 days whether the Commonwealth has taken or is taking any action as a result of the findings in the notice so that I could include such details in my report in accordance with s 29(2)(e) of the AHRC Act.
98. By letter dated 22 December 2015 the department provided the following response to my findings and recommendations:

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

With specific reference to obligations in respect of the family, the Department does not accept the AHRC finding that the decisions in these cases represent an arbitrary interference with family, contrary to articles 17 and 23 of the *International Covenant on Civil and Political Rights*.

Interference with family unity is permissible where it is not arbitrary and where it is lawful at domestic law. In this context 'arbitrary' means that any interference with the family must have a legitimate purpose within the framework of the *International Covenant on Civil and Political Rights* in its entirety which includes reasons of public order, national security, public health or morals or the rights and freedoms of others. Such an interference must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved. The appropriateness of measures to maintain family unity can be balanced against other rights and interests, including the integrity of the migration programme and the protection of the Australian community.

The Department submits that it was a matter for the former Minister to balance the information about the parents and their families in its entirety in deciding whether or not to intervene in their cases.

However, the Department notes the passage of time since these cases were last considered by a Minister and the considerations presented in this Notice and recommendation, and advises the AHRC that it will be taking action in referring both cases to the current Minister for his personal consideration.

99. I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs
President
Australian Human Rights Commission
March 2016

- 1 *Chan Ta Srey v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1292.
- 2 As the decision in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 would have enabled Mr Misinale to reapply for a protection visa on complementary protection grounds.
- 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* (2012) 246 CLR 636, 667-668 per Gummow, Hayne, Crennan and Bell JJ. See also the reasons of French CJ and Kiefel J in *S10* at 648-649 [30] (and the authorities there referred to) and the reasons of Heydon J at 671 [113].
- 6 By way of letter to the department requesting ministerial intervention, forwarded to the Commission on 12 November 2014.
- 7 UN Committee on the Rights of the Child, General Comment No. 14 (62nd session, 2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc CRC/C/GC/14 (2013) 7 [21].
- 8 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [26].
- 9 UN Committee on the Rights of the Child, General Comment No. 14 (62nd session, 2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc CRC/C/GC/14 (2013) 9 [32].
- 10 UN Human Rights Committee, General Comment No. 5 (Thirty-fourth session, 2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc CRC/GC/2003/5 (2003) 4 [12].
- 11 *Paul family v Commonwealth of Australia* [2013] AusHRC 63, 7.
- 12 UNICEF (2006) *Tonga. A Situation Analysis of Children, Women and Youth*, 31.
- 13 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [33].
- 14 M Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd ed 2005) 519.
- 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 (Twenty-third session, 1988) *Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, UN Doc HRI/GEN/1/Rev.1 (1988), [5]; UN Human Rights Committee, General Comment No. 19 (Thirty-ninth session, 1990) *Article 23: Protection of the Family, the Right to Marriage and Equality of the Spouses*, UN Doc HRI/GEN/1/Rev.1 (1994) [2]; *Hendriks v Netherlands*, Communication No. 201/1985, UN Doc CCPR/C/33/D/201/1985 (1988), [10.3].
- 17 S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 589.
- 18 UN Human Rights Committee, *Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001).
- 19 UN Human Rights Committee, *Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001), [7.2].
- 20 UN Human Rights Committee, *Madafferi v Australia*, Communication No. 1011/2001, UN Doc CCPR/C/81/D/1011/2001 (2004), [9.8].
- 21 UN Human Rights Committee, *Canepa v Canada*, Communication No. 558/1993, UN Doc CCPR/C/59/D/558/1993, (1997).
- 22 UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994), [8.3].
- 23 UN Human Rights Committee, *Winata v Australia*, Communication No. 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001), [7.3].
- 24 UN Human Rights Committee, *Sahid v New Zealand*, Communication No. 893/1999, UN Doc CCPR/C/77/D/893/1999 (2003), [8.2].
- 25 AHRC Act s 29(2)(a).
- 26 AHRC Act s 29(2)(b) and (c).
- 27 Department of Immigration and Border Protection, *Procedures Advice Manual, PAM3: Act – Ministerial powers – Minister's guidelines on ministerial powers* (s 345, s 351, s 417 and s 501J), sections 12 and 18.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

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

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

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

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

