Australian Human Rights Commission

Pak family v Commonwealth of Australia

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Pak family v Commonwealth of Australia (Department of Immigration and Citizenship)

Mr [redacted] Pak, Ms [redacted] Mun, Master [redacted] Pak and Miss [redacted] Pak v Commonwealth of Australia (Department of Immigration and Citizenship)

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

[2012] AusHRC 54

Australian Human Rights Commission 2012

Australian
Human Rights
Commission

Australian Human Rights Commission

July 2012

The Hon. Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr [redacted] Pak and Ms [redacted] on behalf of themselves and their children Master [redacted] and Miss [redacted] Pak.

I have found that the act or practice by the Commonwealth of requiring that Master Pak's parents leave Australia did not treat the best interests of Master Pak as a primary consideration and this requirement and the foreshadowed act or practice of seeking to remove them from Australia are inconsistent with the complainants' right not to be subject to arbitrary interference with their family. These fundamental human rights are protected by article 3 of the *Convention on the Rights of the Child* (CRC) and articles 17(1) and 23(1) the *International Covenant on Civil and Political Rights* (ICCPR).

By letter dated 26 May 2012 the Department of Immigration and Citizenship provided a response to my findings and recommendations. I have set out the response of the department in its entirety in part 9 of my report.

Please find enclosed a copy of my report.

Yours sincerely

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction to this inquiry

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint against the Commonwealth of Australia by Mr [redacted] Pak and Ms [redacted] on behalf of themselves and their children Master [redacted] Pak and Miss [redacted] Pak alleging a breach of their human rights.
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. As a result of the inquiry, the Commission has found that the decision requiring that Master Pak's parents leave Australia did not treat the best interests of Master Pak as a primary consideration and a requirement that Master Pak's parents leave Australia, or any act of seeking to remove them from Australia, would not be in the best interests of Master Pak and would be inconsistent with the complainants' right not to be subject to arbitrary or unlawful interference with their family.

2 Complainants

4. The complainants are a family with two children living in the southern suburbs of Sydney. Mr Pak and Ms [redacted] are originally from South Korea. They first came to Australia when they were 33 and 31 years old respectively and have now resided in Australia for more than 20 years.

5. For the first 10 years that they were in Australia, Mr Pak and Ms [redacted] were employed as cleaners. In 2001, they established a small business called the [redacted]. For the past 10 years they have successfully operated this business and at the time the complaint was lodged the business employed two Australian citizens. Each year since their arrival in Australia they have declared their income and paid income tax. With the proceeds from their business, they have purchased a family home and are paying off a mortgage.

6. Miss [redacted] Pak came to Australia with her parents when she was 14 months old. She has grown up in Australia and completed primary school and high school here. She is currently enrolled in a [redacted] degree at [redacted] University, majoring in [redacted], and intends to become a [redacted]

7. Master [redacted] Pak was born in Australia on [redacted] 1998. In 2003 he was enrolled in kindergarten at [redacted] Public School and has since undertaken all of his primary education there. When he turned 10 years old, he acquired Australian citizenship. The Assistant Principal at [redacted] Public School described him as self-motivated, well behaved and a somewhat shy and sensitive child. He is currently 13 years old and at the time the complaint was lodged he was in year 7 at school.

3 Migration history

8. Mr Pak and Ms [redacted] originally entered Australia in November 1991 as the holders of subclass 660 Tourist visas. Following the expiration of those visas, they remained in Australia.

9. Mr Pak claims that from 1992 until 2005 he did not approach the Department of Immigration and Citizenship as he was frightened of the consequences of not holding a valid visa. In August 2005, he was located by compliance officers of the department and detained at Villawood Immigration Detention Centre for 12 days. Since August 2005, Mr Pak has held a series of bridging visas and has made an unsuccessful application for a protection visa on behalf of himself, Ms [redacted] and Master [redacted] Pak. The decision to refuse them a protection visa was affirmed by the Refugee Review Tribunal and an application for judicial review by the Federal Magistrates Court was dismissed. Mr Pak then made an unsuccessful application for Ministerial intervention pursuant to s 417 of the *Migration Act 1958* (Cth).

10. Ms [redacted] returned to South Korea on six occasions between 1993 and 2004. The department claims that she has travelled on a series of genuine passports in her own name and with the same passport number, but with variations of the anglicised spelling of her name. The department considers that the changes to the anglicised spelling of her name in each passport was done in order to 'bypass any exclusion period' in relation to the visas that were issued to her by Australia. The department considers that as a result of these spelling variations Ms [redacted] 'was able to inappropriately prolong her stay in Australia'.

11. I understand that Miss [redacted] Pak holds a student visa which is valid until March 2014. I understand that Mr Pak and Ms [redacted] currently each hold a bridging visa. The Minister for Immigration and Citizenship has asked his department not to remove Mr Pak or Ms [redacted] pending the finalisation of the Commission's investigation.

4 Complaint

12. The core of the complaint of Mr Pak and Ms [redacted] is that the department has indicated that they are expected to leave Australia[1] and that the department may seek to remove them (possibly along with Miss [redacted] Pak).[2] The department recognises that, given that Master [redacted] Pak is an Australian citizen, the department cannot compel him to leave Australia or remove him with his non-citizen parents.[3]

13. The complainants claim that the requirement that they leave Australia, or any act of seeking to remove them from Australia, would be inconsistent with or contrary to the following human rights provided for in the International Covenant on Civil and Political Rights (ICCPR)[4] and the Convention on the Rights of the Child (CRC):[5]

    - in all actions concerning children, the best interests of the child shall be a primary consideration (CRC article 3);
    - 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 (ICCPR article 17(1), CRC article 16(1));
    - the family is the natural and fundamental group unit of society and is entitled to protection by society and the State (ICCPR article 23(1)).

14. The complainants have asked to be granted a substantive visa which would allow them to remain in Australia while an application by them for a Contributory Parent visa is processed which would allow them to remain permanently in Australia. They recognise that there are substantial fees attaching to a Contributory Parent visa and have confirmed to the department that they are able to pay these fees. They have stated their understanding that once an application for a Contributory Parent visa has been processed and it is ready to be granted, they would need to travel out of Australia for a short period of time in order for the grant to be effected.

5 Conciliation

15. The Commonwealth indicated that it did not want to participate in a conciliation of this matter.

6 Relevant legal framework

16. The Commission has the function, pursuant to s 11(1)(f) of the AHRC Act, of inquiring into any act or practice that may be inconsistent with or contrary to any human right.

17. The Commission is required to perform that function when a complaint is made to it in writing alleging such an act or practice (s 20(1)(b)).

18. 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' or under an enactment (which is in turn relevantly defined to include a Commonwealth enactment). Section 3(3)(a) provides that a reference to, or the doing of, an act includes a reference to a refusal or failure to do an act.

19. The phrase 'human rights' is defined by s 3(1) of the AHRC Act to include the rights and freedoms recognised in the ICCPR, or recognised or declared by any relevant international instrument. A relevant international instrument is an instrument in respect of which a declaration under s 47 is in force. One such instrument is the CRC.[6]

20. 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.

21. 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.

22. 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.

23. Professor Manfred Nowak has noted that:[7]

> [T]he significance of Art. 23(1) lies in the protected existence of the institution "family", whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.

24. For the reasons set out in Australian Human Rights Commission Report 39 at [80]-[88], 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 the breach is in addition to (or in conjunction with) a breach of article 23(1).

7 Findings

7.1 Best interests of the child

25. In *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, the Full Court of the Federal Court considered the way in which a decision maker should assess the requirements of article 3 of the CRC when determining whether to make a decision which would lead to the child's parents being removed from Australia.

26. The starting point is to identify what the best interests of the child indicate that the decision maker should decide.[8] In the present circumstances, the department indicated clearly in its submission to the Minister dealing with the complainants' s 417 application that it was in the best interests of Master [redacted] Pak for him to remain in Australia with his family, and for his parents to be able to apply for substantive visas in Australia.

27. In particular, the submission noted:[9]

> … the department is concerned that if the clients depart Australia, this could adversely impact on their son [redacted], who is an Australian citizen. The department acknowledges the comments made by Mr [redacted], Assistant Principal, [redacted] Public School and agrees that it may be in [redacted]'s best interests to remain in Australia with his family, in a settled environment, where he can continue to attend [redacted] Public School and participate in the pastoral care and specialist programs.
>
> According to Mr [redacted], [redacted] is making progress with his social, emotional and educational development and this progress has also been possible because he has had the support of his family.
>
> If [redacted] remains in Australia whilst his parents return to South Korea, he will be separated from them for six months or possibly longer, depending on any processing delays. If he returns to South Korea with his parents, his development at [redacted] Public School will be disrupted and he may have difficulty temporarily adapting to the unfamiliar South Korean educational environment which is quite dissimilar to that which he is used to in Australia. Therefore the department considers that it would be in [redacted]'s best interests if his family can commence their visa applications in Australia.

28. I consider that this passage accurately describes what is in the best interests of Master [redacted] Pak.

29. An identification of what the best interests of Master Pak require, and the recognition by the decision maker of the need to treat such interests as a primary consideration, do not lead inexorably to a decision to adopt a course in conformity with those interests.[10]

30. It is legally open to a decision maker to depart from the best interests of Master Pak. However, in order to do so there are two requirements:

    (a) the decision maker must not treat any other factor as inherently more significant than the best interests of Master Pak;

    (b) the strength of other relevant considerations must outweigh the consideration of the best interests of Master Pak, understood as a primary consideration.

31. Based on the submissions of the department to the Commission, I find that the Minister did not adhere to the first requirement.

32. The Minister has the power under s 417 of the Migration Act to substitute for a decision of the Refugee Review Tribunal a decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so. The Minister is not required to (and in this case did not) provide written reasons for refusing to exercise his discretion under s 417. Therefore, it is unclear what factors he took into account in departing from the best interests of Master [redacted] Pak.

33. However, in the department's written submission to the Commission in response to the present complaint, the department noted that:

> What is and is not in the public interest is a matter for the Minister to determine. Australia's international obligations under the International Covenant on Civil and Political Rights (ICCPR), including the effect his decision to intervene or not intervene would have on the family as a whole, were taken into account by the Minister as part of his decision. In this case the Minister chose not to intervene as he considered that Mr Pak's and Ms [redacted]'s circumstances were neither unique nor exceptional.

34. The process described by the department does not conform to what is required under article 3 of the CRC. The department's submission suggests that other unspecified public interest factors may have been regarded as inherently more significant than Master Pak's best interests, and that Mr Pak and Ms [redacted] would only have been able to succeed in their application for discretionary intervention by the Minister if they could demonstrate that their circumstances were 'unique or exceptional'. This fails to accord with the test required by article 3, as it suggests that the starting point was not the best interests of Master Pak and a comparison of whether those interests were outweighed by other more substantial interests.

35. The second requirement involves a balancing exercise.

36. The submission from the department to the Minister indicated that there were a number of other 'primary considerations' such as 'the community's expectations and current migration legislation concerning the orderly entry of people into Australia'. Again, because there are no written reasons adopted by the Minister, it is not possible to determine how any other considerations were in fact taken into account.

37. The necessary balancing exercise was described in *Wan v MIMA* as follows:[11]

> … 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.

38. It appears from the submission by the department that it had reached the view that the balancing exercise should result in an intervention by the Minister.[12] In reaching this view, the department had considered analysis by the Risk Analysis and Monitoring Branch of South Koreans who arrived with family groups and who have remained unlawfully in Australia for a number of years. The department noted that South Koreans represented a small cohort of ministerial intervention applications and that the rate of requests from this group had been steadily declining.

39. It is appropriate to consider the community's expectation that migration law will be complied with. In assessing the community's expectation in relation to migration outcomes, it is also necessary to weigh up the community's expectation about acts or practices that may result in an interference with a family that has been present in Australia for more than 20 years, and which may result in the separation of a 13 year old Australian citizen from his parents. I consider these issues in more detail in the following section.

40. Based on the information available to me, I find that the decision requiring that Master Pak's parents leave Australia did not treat the best interests of Master Pak as a primary consideration and a requirement that Mr Pak and Ms [redacted] leave Australia, or any act by the Commonwealth of seeking to remove them from Australia, would be inconsistent with or contrary to article 3 of the CRC.

7.2 Arbitrary or unlawful interference with family

(a) Interference

41. The department submits that the Minister's decision not to intervene under s 417 does not adversely affect Master [redacted] Pak's citizenship or his relationship with his parents. Master Pak will continue to hold Australian citizenship and is able to continue living with his parents as a family unit (although not in Australia, where Master Pak holds citizenship).

42. The department submits that the Minister's decision does not mean that Master Pak will be separated from his parents against their will since the family as a whole is able to return to South Korea to live.

43. In assessing this complaint, in my view the relevant act or practice is not the Minister's decision not to intervene under s 417, but rather the requirement that Master Pak's parents leave Australia, or any act of seeking to remove them from Australia. This is consistent with the way in which the relevant act was considered by the UN Human Rights Committee (UNHRC) in *Winata v Australia* [2001] UNHCR 24 which dealt with a family in similar circumstances.

44. In this case, both the department and the former Minister appear to have recognised that the question of whether Mr Pak and Ms [redacted] are removed from Australia may lead to a different result than the outcome of the s 417 process. In an earlier request for ministerial intervention, the then Minister decided not to intervene, but included a handwritten note stating 'understand removal unlikely'.[13] Similarly, in the department's submission to the current Minister it noted that if the Minister did not intervene to grant a substantive visa and if Mr Pak and Ms [redacted] did not make a request to the department that Master Pak be removed from Australia to South Korea with them, then Master Pak could not be removed. In such circumstances, the department indicated that it 'would consider other options to resolve the family's situation, taking into account the best interests of the child, and possible referral to you for reconsideration of this case'.[14] It was in the context of this advice that the Minister decided not to intervene.

45. As noted above, the case of *Winata* dealt with a family in similar circumstances. In that case, Australia proposed to return two Indonesian nationals who had overstayed their visas and remained illegally in Australia. The authors had a child in Australia who had attained Australian citizenship and was 13 at the time of their proposed return. The authors claimed that it would arbitrarily interfere with their family to return them to Indonesia because their son would have to either remain in Australia without the support and care of his parents or return to a country to which he had no cultural ties. He had never visited Indonesia and did not speak Indonesian.

46. The UNHRC held that:[15]

> 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.

47. In *Madafferi v Australia*, the UNHRC reiterated this principle holding that:[16]

> 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.

48. In this case, there is substantial evidence of a long settled family life in Australia. Mr Pak and Ms [redacted] have lived in Australia for more than 20 years. Their daughter Miss [redacted] Pak, who is 21 years old, was born in South Korea but has lived virtually the whole of her life in Australia. Master [redacted] Pak was born in Australia and has lived his whole life here. I understand that he has never been to South Korea. The family has integrated into the Australian community. They operate a small business, have purchased a house and send their children to local schools and in the case of Miss [redacted] Pak to university.

49. Mr Pak's sister, Ms [redacted] Pak is a permanent resident of Australia. The complainants claim that she would be unable to care for Master Pak if the rest of the family were removed to South Korea as she operates a business and has a family to care for.

50. I find that a requirement that Master Pak's parents leave Australia, or any act of seeking to remove them from Australia would constitute an interference with this family.

(b) Arbitrary or unlawful

51. 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.

52. In its General Comment on article 17(1), the UNHRC confirmed that a lawful interference with a person's family may be arbitrary, unless it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.[17] In relation to the meaning of 'reasonableness', the UNHRC stated in *Toonen v Australia*:[18]

> 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.

53. In this case, the department has correctly noted that State parties to the ICCPR may require persons unlawfully within their territory to leave. However, there are limits on the exercise of this power. The UNHRC in *Winata* held that:[19]

> 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.

54. 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*.[20] In those circumstances, although removal was lawful, it would be arbitrary unless justified by additional factors.

55. Other cases have considered additional factors which may justify removal. In *Canepa v Canada*,[21] the author emigrated to Canada from Italy at the age of five along with his parents. A younger brother was born in Canada. Between the ages of 17 and 25 the author was convicted on 37 occasions, mostly related to breaking and entering, theft, or possession of narcotics. An order was made for his deportation. The UNHRC considered that the separation of the author from his family could be regarded as an arbitrary interference with the family if the circumstances of the separation and the effects on the author were disproportionate to the objectives of removal. However, in that case his removal from Canada was seen as necessary in the public interest and to protect public safety from further criminal activity by the author.[22]

56. In contrast, in *Nystrom v Australia*,[23] the UNHRC acknowledged that the author had a significant criminal record, but ultimately found that the Minister's decision to deport the author had irreparable consequences for him which were disproportionate to the legitimate aim of preventing the commission of further crimes, especially given the lapse of time between the commission of offences and the deportation.

57. Similarly, in *Madafferi v Australia*,[24] the UNHRC considered the additional factors put forward by Australia as justifying removal including the author's alleged dishonesty in relations with the department and his 'bad character' stemming from criminal acts committed in Italy 20 years earlier. The UNHRC held that these factors did not outweigh the hardship that would be imposed on the family in the author's particular circumstances.

58. In the present case, the only basis put forward as justifying the removal of Mr Pak and Ms [redacted] are the breaches of immigration law described earlier in this report. No additional factors have been suggested by the department, 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 proportional to the end sought and being necessary in the circumstances. 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 their removal from Australia.

8 Conclusion and recommendations

59. I find that the decision requiring that Master Pak's parents leave Australia did not treat the best interests of Master Pak as a primary consideration and a requirement that Master Pak's parents leave Australia, or any act of seeking to remove them from Australia, would not be in the best interests of Master Pak and would be inconsistent with the complainants' right not to be subject to arbitrary or unlawful interference with their family. Such a requirement or act would be inconsistent with or contrary to article 3 of the CRC and articles 17(1) and 23(1) of the ICCPR.

60. 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.[26]

61. When the Minister declined to use his public interest powers to grant a substantive visa to the complainants, this was in the context of advice to him that if Mr Pak and Ms [redacted] declined to depart Australia voluntarily with their children then the department would consider referring the matter back to the Minister for reconsideration (see paragraph 44 above).

62. The complainants have indicated that they do not wish to depart Australia with their children.

63. 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 public interest powers in certain circumstances, in particular, where a matter raises 'unique or exceptional' circumstances. Unique or exceptional circumstances are defined to include:[27]

    - circumstances that may bring Australia's obligations as a party to the ICCPR into consideration;
    - circumstances that may bring Australia's obligations as a party to the CRC into consideration; 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).

64. I recommend that the department refer the matter back to the 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.

9 Department's response to recommendations

65. On 17 January 2012 I provided a notice to the department under 29(2)(a) of the AHRC Act outlining my findings and recommendations in relation to the complaint made by Mr [redacted] Pak and Ms [redacted] on behalf of themselves and their children Master [redacted] Pak and Miss [redacted] Pak against the Commonwealth.

66. 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.

67. The department advised Commission staff on 1 February 2012 that, in accordance with my recommendation, they had referred the matter back to the Minister for further consideration. On that occasion and on several occasions since then, the department also advised the Commission that both the department and the Minister's office intended to provide a response to the notice, but that no estimate could be given of when a response might be expected.

68. By letter dated 16 May 2012 addressed to the Minister and copied to the department I indicated that I intended to finalise my report and I asked for any further response by the Minister or the department to be provided by 31 May 2012.

69. By letter dated 26 May 2012 the department provided the following response to my findings and recommendations:

> **Response to the Australian Human Rights Commission (AHRC) Notice of findings in relation to a complaint by Mr [redacted] Pak and Ms [redacted] on behalf of themselves and their children, Master [redacted] Pak and Miss [redacted] Pak**
>
> On 17 January 2012, you wrote to Mr Andrew Metcalfe regarding your Notice of findings in relation to the human rights complaint above.
>
> You advised that you had found that any requirement that Master Pak's parents leave Australia, or any act of seeking to remove them from Australia, would not be in the best interests of Master Pak and would be inconsistent with the complainants' right not to be subject to arbitrary or unlawful interference with their family.
>
> You recommended that the department refer the matter back to the Minister for further consideration of the use of his public interest powers and that the Minister consider exercising his powers in a manner consistent with the findings set out in your notice.
>
> In line with your recommendations, the department has been engaged with the Minister's office on whether the Minister would reconsider the clients' case for the possible exercise of his non-compellable public interest powers. Please accept our apologies for the delay in responding.
>
> The department was recently requested by the Minister's Office to present the case again to the Minister so that he can determine whether to reconsider the case under his public interest powers.
>
> We assure you that the family's circumstances are under active consideration by the Minister.

70. I report accordingly to the Attorney-General.

Catherine Branson
President
Australian Human Rights Commission
July 2012

1 Including by way of letter from the department to Mr Pak dated 6 January 2011, following the unsuccessful application for Ministerial intervention.
2 Submission from the department to the Minister CB2010/00265 dated 24 October 2010, pp 7-8.
3 Submission from the department to the Minister CB2010/00265 dated 24 October 2010, p 7.
4 Done at New York on 16 December 1966, [1980] ATS 23.
5 Done at New York on 20 November 1989, [1991] ATS 4.
6 *Human Rights and Equal Opportunity Commission Act 1986 - Declaration of the United Nations Convention on the Rights of the Child* dated 22 October 1992.
7 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
8 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [26] (the Court).
9 Submission from the department to the Minister CB2010/00265 dated 24 October 2010, p 8.
10 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [32] (the Court).
11 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133 at [33] (the Court).
12 Submission from the department to the Minister CB2010/00265 dated 24 October 2010, p 8.
13 Submission from the department to the Minister dated 20 August 2009, p 36 (Annexure E to the initial complaint).
14 Submission from the department to the Minister CB2010/00265 dated 24 October 2010, p 8.
15 *Winata v Australia* [2001] UNHRC 24; UN Doc CCPR/C/72/D/930/2000 at [7.2].
16 *Madafferi v Australia* [2004] UNHRC 24; UN Doc CCPR/C/81/D/1011/2001 at [9.8].
17 UNHRC, General Comment 16 (Twenty-third session, 1988), Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/Rev.6 (2003) 142 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) [4].
18 [1994] UNHRC 15; UN Doc CCPR/C/50/D/488/1992 at [8.3]. While this case concerned a breach of article 17(1) in relation to privacy, these comments would apply equally to an arbitrary interference with family.
19 *Winata v Australia* [2001] UNHRC 24; UN Doc CCPR/C/72/D/930/2000 at [7.3].
20 *Sahid v New Zealand* [2003] UNHRC 14; UN Doc CCPR/C/77/D/893/1999 at [8.2].
21 *Canepa v Canada* [1997] UNHRC 6; UN Doc CCPR/C/59/D/558/1993.
22 *Canepa v Canada* [1997] UNHRC 6; UN Doc CCPR/C/59/D/558/1993 at [11.4]-[11.5].
23 *Nystrom v Australia*; UN Doc CCPR/C/102/D/1557/2007 at [7.11].
24 *Madafferi v Australia* [2004] UNHRC 24; UN Doc CCPR/C/81/D/1011/2001 at [9.8].
25 AHRC Act s 29(2)(a).
26 AHRC Act s 29(2)(b).
27 PAM3: Act - Ministerial powers - Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J), sections 12 and 18.

Further Information

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