

Gregor Heißl

Family Protection and Deportations or Removals

The Relevance of the Protection of Family Life
for the Assessment of Deportations or Removals in Australia

ABSTRACT

Deportations or removals of persons, who have spent a certain period in Australia have tremendous impacts and consequences on their lives and most likely on the ones of their families as well. Therefore it is worth assessing how significant family related aspects are taken in the administrative decision-making process concerning deportations or removals.

The essay starts with a description of the domestic legal framework, to evaluate conditions under which such measures are legitimate. An overview on family protection in Australia presents the different sources of human rights together with its content and scope. More specifically the notion of family life for the assessment of the legality of deportations or removals is scrutinised by examining the compliance with international treaty obligations as well as the significance of citizenship. Finally, two relevant Directions (D) of the Minister for Immigration and Citizenship are assessed in the context of sufficient safeguards for family life.

I. INTRODUCTION

Hardly any State measures or orders affect personal circumstances as intensively as removals or deportations, especially when individuals spent the best parts of their lives in Australia and have most likely established personal links (a precise distinction between 'deportation' and 'removal' is provided in chapter II). On average an overall number of around 10.000 'compliance related departures' are performed by Australian authorities each year.¹

Imprisonment is generally recognised as the most serious form of punishment in civilised countries, but 'losing the right to live in what one regards as one's

1 In 2007-08, there were 8404 compliance related departures, including 4055 monitored departures, 722 voluntary returns, two criminal deportations and 3625 removals from Australia. This is a decrease of 11 % from 2006-07 when there was a total of 9489 (4433 monitored departures, one criminal deportation and 5055 removals from Australia). A total of 65 people were removed after their visas were cancelled or refused under sec 501 of the *Migration Act 1958*, compared with 55 in 2006-07 and 44 in 2005-06 (Department of Immigration and Citizenship [2007-08] 122).

homeland can be seen as even more serious a deprivation than losing one's liberty' (Wood [1986] 288). Many cases indicate the hardship individuals face when being banned from their country they regarded as their home (for relevant cases refer to Nicholls [2007]).

Even if adult individuals are responsible for their actions and obliged to bear the consequences, family members might be affected as well. In Pochi (1979) 2 ALR 33 at 58, Brennan J expressed clearly:

[I]t is certain that deportation of the applicant would destroy or gravely damage a growing Australian family, and that would be a grave detriment not only to them but to Australia. His deportation, separating him from his Australian wife and children or requiring them to accompany him to a country that the children do not know, would be destructive of the prospects in life as well.

Due to the immense impact of deportations and removals on the private and family life of the persons concerned, it is worth assessing how much significance is given to family protection and interests of children when considering the legitimacy of such measures. This essay focuses on the legal framework and practical performance of family protection regarding deportations and removals, while several other fundamental rights and interests are affected intensively as well.

Therefore initially a brief overview on the legal framework is presented to assess conditions under which deportations and removals are legitimate and which aspects are taken into account.

Furthermore the notion of family protection is at stake. First it is assessed which human rights safeguards are provided by the Constitution as well as by common or international law, to proceed more specifically to the protection of family life in Australia.

Moving on to the question as to how these safeguards are applied in context of deportations or removals. Therefore the highly controversial issue of application of international law for the interpretation of domestic statutory law is discussed, as well as the notion and consequences of citizenship of the deportee and his or her children. Finally, two relevant Directions (Ds) given by the Minister for Immigration, concerning the consideration of child rights are discussed.

While the topic at stake is complex and affected by provisions from different legal levels the aim of the paper is to present it as plainly as possible. This approach undeniable bears the risk to be general and superficial. Especially an attempt to present the historically grown legal framework on immigration in a few paragraphs is deemed to fail. Merely a superficial overview can be provided, without any claim to be complete. Anyhow I run the risk to make the essay readable for interested lawyers as well who are no experts on immigration law.

II. LEGAL FRAMEWORK IN AUSTRALIA

The legislative power of the parliament to deal with deportation and removal of non-citizens can be found in different sources of Australia's Constitution: Primarily sec 51 (xix) 'naturalization and aliens' and sec 51 (xxvii) 'immigration and emigration' apply, but regarding the deportation of criminals, as well sec 51

(xxvii) 'influx of criminals' comes into consideration. Under these relevant powers Australia's immigration law is primarily regulated by the *Migration Act 1958* (Cth), the *Migration Regulations 1994* (Cth) and the *Australian Citizenship Act 2007* (Cth).

Australia's immigration system distinguishes generally between citizens and non-citizens, which is self-explanatory and needs no further elaboration. Any differentiation between 'immigrants' and 'aliens' (which refers to the terms used in sec 51 of the constitution) was abolished in 1983 and provisions in which 'immigrant' or 'alien' appeared were substituted for 'non-citizen'. Non-citizens holding effective visas are lawful (sec 13, statutory sections with no further indication refer to *Migration Act 1958*) and 'who is not a lawful non-citizen is an unlawful non-citizen' (sec 14).

The *Migration Act 1958* differs between the expressions 'deportation' and 'removal'. Thus Australia's immigration system established two different options to ban permanent residents or generally aliens remaining on its territory.

On the one hand unlawful non-citizens generally face removal under sec 198. There are three different ways to become unlawful. The first and most obvious option is illegal entry, whereas the second and most common way is to enter legally and overstay the visa. Thirdly there are a number of possibilities to cancel visas (see Vrachnas et al [2008] 163), most relevantly for the present survey is the power of 'refusal or cancellation of visa on character grounds' under sec 501. Once the visa is cancelled the person becomes unlawful and therefore subject to removal (sec 198).

The Minister may 'cancel a visa that has been granted to a person if he reasonably suspects that the person does not pass the character test; and the person does not satisfy him that the person passes the character test' (sec 501 para 2 [a] and [b]). The character test as main assessment criteria is among other options not satisfied when 'the person has a substantial criminal record'. A criminal record is substantial when a person has been sentenced to a term of imprisonment for minimum 12 months or acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution (sec 501 para 7).

The other option relevant to prohibit the abode in Australia is the power of deportation under ss 200-206. Thus the Minister may order deportation of non-citizens, once they are sentenced to a period of imprisonment of at least one year (sec 201). Further possibilities to deport apply in circumstances of security grounds (sec 202) and the conviction of certain serious crimes (sec 203). The performance of both powers is subject to Directions given by the Minister, the content of which will be scrutinised below (see chapter IV.C).

These two provisions appear similar at the first glance, they bear inherent differences though. The deportation power (sec 201) is a reviewable decision by the Minister itself. A removal is a mere performance by officers to execute 'as soon as reasonably practical' (sec 198) among others the reviewable decision of the Minister to cancel a visa (sec 501). Whereas deportation orders can be performed itself, visa-cancellation needs the removal power.

The scope of deportations is generally limited to permanent residents for a period less than ten years (ss 200-206), implying a notion of integration and

settlement after which deportation is unjustified. In cases of residents for longer periods these provisions are only to be applied in exceptional circumstances. The power to cancel visas (sec 501) applies to anybody. The minimum sentence of imprisonment for deportations (sec 201) and cancellation of visa (sec 501) is one year. Decisions under ss 201 and 501 are both reviewable by the Administrative Appeals Tribunal (AAT), but Kneebone highlights that sec 501 power is subject to personal intervention by the Minister (ss 501A-501C), whose exercise 'is unreviewable and not subject to rules of procedural fairness' (Kneebone [2005] 145).

Due to the likely Minister's motivation to exercise more power on removals and to limit the courts influence on their prevention (see Grewcock [2009]) together with the wider of scope of sec 501 to treat criminals, sec 201 is rarely used in practice any more. Most orders against criminals are based on visa cancellation.

Lastly, the Minister's wide discretion of intervention on humanitarian grounds is worth mentioning, as this constitutes safety net provisions aiming to fulfil international obligations. These powers are exercised by the Minister personally, either in its own motion or on applications, with hardly any possibilities of judicial review (eg ss 195A, 351, 417 or 501J).

III. THE PROTECTION OF FAMILY LIFE IN AUSTRALIA

A. Human Rights under Constitution and Common Law

Australia's legal system does not include a Bill of Rights. Thus fundamental guarantees of individuals are scattered in different legal sources. Due to the power of the Commonwealth dealing with matters regarding deportations, human rights in State Constitutions will not be considered (refer to Williams [2002] 8).

The Constitution contains only a limited number of human rights. The commonly recognised ones are (see Piotrowicz & Kaye [2000] 211-224 and Williams [2002] 96-128): Sec 41 (right to vote), sec 80 (trial by jury), sec 116 (freedom of religion) and sec 117 (freedom from discrimination based on interstate residence). Additionally a few more can be listed, focusing mainly on economic aspects such as sec 51 (xxxi) (acquisition of property on just terms), sec 92 (free trade, commerce and intercourse among the States) and sec 51 (ii) (no discrimination between states regarding taxation) Furthermore sec 99 of Australia's Constitution guarantees no preference relating to trade, commerce or revenue to one State or any part thereof over another State or any part thereof. As Williams (2002) 47 puts it, 'even when the lists are combined, the relevant provisions are indeed sparse and the protection offered apparently minimal'.

The role of common law regarding human rights protection is controversial. On the one hand common law can be seen as 'vibrant and rich source of human rights' (Williams [2002] 15). One example is the case of *Dietrich*, recognising the common law right to counsel, when being accused of serious crimes. In *Taylor v New Zealand Poultry Board* (1984) 1 NZLR 394 in the New Zealand Court of Appeal, Cooke J assured (at 398) the prohibition of torture under common law. On the other hand Piotrowicz & Kaye (2000) 279 highlighted that '[the common

law] has also functioned as a vehicle for the repression of such rights', presenting eg attempts of equal treatment of women.

This lack of human rights protection has been challenged repeatedly. The inadequacy of family protection was illustrated in *Kruger* ('*Stolen Generation*' case) (1997) 190 CLR 1, where a law enabling Aboriginal children to be forcibly removed from their families and communities was found to be legitimate under Australia's Constitution.

Furthermore the classic and famous case of *Victoria Park Racing* (1937) 58 CLR 479 confirmed the lack of privacy under Australia's (common) law system, ruling that there is no right or power to exclude others from observing happenings on one's own land. However, there is arguably evidence for a wider scope providing increasing privacy protection under common law. In *Australian Broadcasting Cooperation* (2001) 208 CLR 199, it was indicated that *Victoria Park Racing* was not regarded as precluding the possibility of the development of similar actions (Doyle & Bagaric [2005] 59).

Regarding immigration, *Lim* (1992) 176 CLR 1 at 32, initially required detention of 'boat people' to be 'reasonably necessary'. In *Al-Kateb* (2004) 219 CLR 562, the lack of an established right to freedom became strikingly obvious when it was ruled that even the indefinite detention of unlawful non-citizens would be in accordance with the Constitution.

With *Williams* (2002) 24 it can be agreed, that this provides a further argument in favour of the implementation of a statutory or constitutional Bill of Rights, which should be included in the legal system of every 'mature and civilised nation' (see Deane J in *Pochi* (1981) 34 ALR 639 at 647).

B. International Treaty Obligations

Australia is signatory to several major international human rights treaties (see Flynn [2004] 34-167), including the ICCPR stating in its Art 17 that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation' and furthermore that 'everyone has the right to the protection of the law against such interference or attacks'. Moreover the International Convention on the Rights of the Child (CRC) demands in Art 3 eg that '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'.

These sources enshrine precisely the protection of family life missing in the domestic legal system, leading to the controversial notion of using international law in the interpretation of statutes and the Constitution.

Australia's legal system (like the majority of countries) does not contain any provision expressly including international law in the interpretation methods. Such a provision is included eg in sec 39 para 1 of South Africa's Constitution: 'When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law'. The mainstream position was expressed in *Kioa* (1985) 159 CLR 550, by Gibbs J (at 570), according to which 'treaties do not have the force of laws unless they are given that effect by statute'. Mason and McHugh JJ

in *Dietrich* (1992) 177 CLR 292 at 305, developed the consequence out of it for the relevant treaties:

Ratification of the ICCPR as a executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision.

Even though up to the date of writing there is no direct implementation of neither the ICCPR nor the CRC, this view was challenged repeatedly particularly by Kirby J. He stated eg in *Newcrest* (1997) 147 ALR 42 at 148 that 'international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights'. This led to the famous decision in *Teoh* (1995) HCA 20, 128 ALR 353, concerning the pending deportation of a Malaysian citizen, convicted of drug related crimes. He was married to an Australian citizen, mother of seven children, three of which with the applicant. The whole family was heavily dependent on his support and would suffer hardship in case of his deportation.

The majority of the High Court appreciated the mere ratification of international treaties in contrary to the established position. Although Mason CJ and Deane J reiterated that 'a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law', that 'does not mean that its ratification holds no significance for Australian law'.

Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interest of the children as 'a primary consideration' (at 34).

The impact of *Teoh* caused much confusion and was widely discussed. It triggered a Joint Statement issued by the Minister for Foreign Affairs and the Attorney General on 10 May 1995 (cited in Allars [1995] 237), contradicting the High Court's view fundamentally. This joint statement expired by the end of the Howard government and was not reissued by its successor till the date of writing. Hence it remains to be seen how the following government will deal with this highly sensible and controversial issue. On the other hand D 9 was released establishing guidelines for the assessment of the legality of deportation especially regarding the interest of children (see chapter IV.C).

The later *Lam* (2003) 214 CLR 1 case, although not formally relying upon *Teoh*, suggests 'that the present High Court would overturn its ruling on legitimate expectations arising out of ratification of a treaty' (McAdam [2007] 191), based on strong criticism by the majority of the judges on the reasoning and decision in *Teoh*. Formally the doctrine of 'legitimate expectations' is still

value; its significance can be questioned though. Moreover *Al-Kateb*, affirming the legality of indefinite detention of unlawful non-citizens, indicated the disregard of international treaty obligations regarding human rights.

To summarise, Australia is signatory to several major human rights treaties, which are not implemented in the domestic legal system. Although some judicial developments indicated the applicability of international law standards the precedent is highly questionable and unlikely to be applied.

IV. PROTECTION OF FAMILY LIFE REGARDING DEPORTATIONS AND REMOVALS

After the general assessment of Australia's human rights protection regarding the protection of families indicated the lack of safeguards under the Constitution and common law, compliance of domestic practice with international treaty obligation will now be assessed. Furthermore the notion of citizenship of affected family members as well as the Ds concerning the consideration of child rights will be scrutinised.

A. Compliance with International Treaty Obligations regarding Deportations and Removals

As indicated above mainly international sources enshrine the protection of the family for Australia: Primarily Art 17 and 23 ICCPR prohibit any 'arbitrary or unlawful interference' with one's family, being 'the natural and fundamental group unit of society' enjoying 'the right to the protection of the law against such interference or attacks'. Regarding child rights, the CRC demands the consideration 'of the best interests of the child' in all actions performed by State agents.

Due to these international standards Australia's Human Rights Commission (1983) para 29 recognised the importance of the protection of the family by demanding 'to deport only when there is a greater interest at stake than that of protecting the family and, in particular, the children, irrespective of whether they were born in Australia'. Thus a balance of interest between the State seeking to deport for various reasons and the individual seeking to protect of his family life in Australia is demanded.

But Australia has not always been an implicit follower of international human rights protection principles, leading to a couple of condemnations by UN treaty monitoring bodies; many of these, but not exclusively (eg in *Toonen* [1994] CCPR/C/50/D/488/1992 relation to a conviction of a homosexual), concerned issues relating to immigration (Byrnes et al [2009] 38).

Especially regarding deportations the issue of family protection was raised repeatedly.² The prohibition of arbitrary interference with ones family was

2 In a number of cases as well immigration detention was criticised regarding its compliance with Art 9 ICCPR. Eg *A* (1997) CCPR/C/59/D/560/1993, *Baban* (2003) CCPR/C/78/D/1014/2001, *Bakhtiyari* (2003) CCPR/C/79/D/1069/2002, *Shams ea* (2007) CCPR/C/90/D/1255 ea/2004 and *Shaqif* (2006) CCPR/C/88/D/1324/2004.

challenges in *Winata* (2001) CCPR/C/72/D/930/2000, concerning the deportation of both parents of a 13-year-old Australian citizen. The parents have been in Australia for over fourteen years. Their son has grown up in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. It was found to be incumbent on the State to demonstrate and value additional factors, going beyond a simple enforcement of its immigration law, to justify the removal. Without such a balance of interest the interference with the family in the form of a deportation, would be arbitrary and therefore a violation of Art 17 in conjunction with Art 23 ICCPR.

By the same token but more specifically in *Madafferi* (2001) CCPR/C/81/D/1011/2001 p 21, a case concerning the deportation of a convicted criminal, father of four minor children, it was stated:

[I]n cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.

The response of Australia (mainly the Howard government) on the finding of the Human Rights Committee was less in the direction of accepting the criticism and adopting legislative amendments, but more towards a denial of responsibility, 'particularly in relation of decisions on matters of immigration law and policy' (Byrnes et al [2009] 38). Eg it was stated: 'Australia's obligation to protect the family under article 23 of the Covenant does not mean that Australia is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals' (Fifth periodic reports on Australia [2008] CCPR/C/AUS/5 p 12).

B. Citizenship

The issue of citizenship is highly important relating not only to the deportee him or herself but also to his or her family members. Therefore in the present chapter its definition as well as its consequences will be scrutinised.

While citizenship lacks a base in the Constitution, the power to naturalise is included in its sec 51 (xix). While there is no clear definition or a Constitutional concept of citizenship in the Constitution, it is worth noting that no comparative constitution established at the same time has one. One of the few exception is the 14th Amendment of the United States Constitution stating that 'all persons born or naturalized in the United States ... are citizens of the United States' (Irving [2008] 132). This has led to a long-lasting and heated dialogue between supporters of a constitutional or supporters of a statutory concept of citizenship.

Especially due to the late establishment of the *Australian Citizenship Act* in 1948 (initially named *Nationality and Citizenship Act 1948* [Cth]) it can be argued that there was already 'an Australian Community for which the Constitution existed', leading to a concept of membership of the Australian community (Ebbeck [2004] 140). Regarding this view the absorption into the community is of primary

importance, relying mainly on the period of permanent residence as well as the conduct of the person. This concept was sustained in *Patterson/Taylor* (2001) 207 CLR 391, concerning the deportation of a British citizen who lived the major parts of his life in Australia, where Kirby J (at 487) as part of the majority argued that persons comparable to the applicant have been treated 'as full and equal members of the Australian community and nation'. They therefore 'share rights and duties akin to those which, following the introduction of the concept of citizenship in 1948, Australia citizens enjoyed as such'. The High Court declared unanimously that his deportation would be illegitimate. The decision triggered plenty of responses arguing eg that it 'created a new class of non-removable non-citizens, recognising that British nationality until recent times had a status in Australia that was equated with Australian citizenship' (summarised by Crock [2003] 126).

In *Te and Dang* (2002) 212 CLR 162 Gleeson CJ concluded (at 176) that 'while absorption reflects the fact that an activity of immigration has come to an end, it may co-exist, and commonly co-exists, with a legal status of alienage. Resident aliens may be absorbed into the community, but they are still aliens.' This was already recognised as a small hint of the probably shift, due to the confirmation of the power to deport non-citizens, regardless of their age at arrival or the length of time they had lived in Australia (see Ebbeck [2004] 147).

The fundamental shift of opinion was performed in *Shaw* (2003) 203 ALR 143. With narrowest possible majority, the High Court ruled that a person who enters Australia as an alien in the constitutional sense remains an alien, unless a statutory citizenship is obtained. Hence it was stated (at 151): 'This case should be taken as determining that the alien power has reached all those persons who entered this country after the commencement of the Citizenship Act in 26 January 1949 and were born out of Australia of parents who were not Australian citizens and who had not been naturalised.'

Similarly in *Nolan* (1988) 165 CLR 178 it was stated (at 183-185) that an alien is person, who was born outside Australia of parents who were not Australian citizens and who had not been naturalised under Australian law or a person who had ceased to be an Australian by an act or process of denaturalisation.

Due to the predominant statutory concept of citizenship several differences remain between aliens (even if they are long term permanent residents) and citizens. Apart from a few guaranteed rights under the Constitution the main advantage of citizenship is the right to abode, ie the protection from deportation. Even though this issue can be questioned, the Australian government has no present ability to deport citizens (see Rubenstein [1995-1996] 513).

This prohibition is challenged especially when parents of Australian citizens face deportation. In cases where minor children are still unable to survive independently and therefore are dependent on the care of the deportee this can lead to the consequence that children subsequently have to leave as well. This constitutes a de-facto deportation of Australian citizens. Even though this does not lead to the presumption that any deportation of parents of Australian citizens is prohibited; this implies, in my view, an obligation to assess the impact on the children, when parents face deportation. Similarly Gaudron J expressed in *Teoh* (1995) 183 CLR 273 at 304:

In my view, it is arguable that citizenship carries with it a common law right on the part of children and their parents to have the child's best interest taken into account, at least as a primary consideration, in all discretionary decisions by governments and governments agencies which directly affect that child's welfare, particularly decisions which affect children as dramatically and a fundamentally as those involved in this case.

This results in the obligation to take into account several aspects of dependent children, who are Australian citizens, when assessing the appropriateness to deport the parent. These aspects primarily include age, length of stay, education, social environment, and the possibility of living in the destination country.

C. Directions (D) 9 and 41

The Minister, as long as he does not contravene the *Migration Act 1958*, is empowered to release any kind of guidelines (sec 499) and similarly revoke them at any time without parliamentary involvement. Department persons and bodies are obliged to comply with these directions.

Due to the two different sources concerning either deportation under sec 200 or cancellation of visa under sec 500 (and the subsequent removal based on sec 198) two different Ds have to be considered.

In the aftermath of *Teoh*, D 9, known as '(Australia's) Criminal Deportation Policy', was released on 21 December 1998 to provide guidance on deportation orders. On 15 June 2009 D 41 commenced (and substituted D 21) clarifying the visa refusal and cancellation power.

As indicated previously, in practice the visa cancellation power gained more importance than the deportation power. Therefore almost all orders concerning the removal of criminals are based on sec 501.

Once the content and scope of the both Ds are mainly congruent it will be assessed jointly. The purpose of deportations and cancellations of visa is 'to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the Australian community as a whole as to who should be allowed to enter or to remain in the community' (D 9 para 4 and comparably D 41 para 5.1 sub-para 2). Regarding the balance of important factors, hierarchies between primary and other considerations are established.

Primarily the protection of the Australian community and its members as well as their expectations, and the best interest of the child as well as the length of the deportees residence have to be balanced against each other. The Australian community expects non-citizens to obey domestic laws, and furthermore to be protected from and not put at any risk by non-citizens, especially regarding crimes and disorder in society. In the context of protection of the Australian community two aspects have to be taken into account before deportation orders or cancellations of visas are permitted: the seriousness and nature of the committed crime as well as the risk of recidivism (D 9 para 10 and D 41 para 10.1). The notion of general deterrence was excluded in D 41, but still has to be considering in D 9 (para 14; similarly to the former D 21 para 2.11).

The best interests of the child have to be considered in any (parental or other close) relationship with children under the age of 18. Interest of the children above 18 may be of relevance in the field of further considerations. Adoptive parents enjoy similar rights (Lacey [2001] 227). Before providing relevant

assessment criteria it is pointed out that more children do not automatically lead to the presumption of stronger links, because 'the best interest of one child may indicate that the potential deportee should not be deported, but that the best interest of another child may point towards deportation' (D 9 para 17 and comparably D 41 para 10.4.1 sub-para 3). Therefore the best interest of every child has to be assessed individually. In certain situations deportations and visa cancellations can serve the best interests of the child (D 41 para 10.4.1 sub-para 4 and D 9 para 18),³ although they are generally served by remaining with the parents. A number of criteria to be taken into account are pointed out, such as (D 41 para 10.4.1 sub-para 5 and G 9 para 19-20)

- nature and duration of the relationship between the child and the non-citizen,
- citizenship or permanent residency of the child,
- age of the child and time spent in Australia,
- extent to which the person is likely to play a full parental role together with the existence of others who already fulfil that
- the likely effect that any separation from the non-citizen would have on the child,
- any Court orders relating to parental access and care arrangements,
- any wishes expressed by the child,
- the likely effect on the child or children of leaving Australia together with the parents,⁴
- impact of the non-citizen's prior conduct on the child.

The only personal aspect of primary importance is the period of residence in Australia (D 41 para 10.3). Other considerations must also be taken into account, but are of 'less weight than the primary' (D 41 para 11 and D 9 para 21) ones, include family ties and personal aspects. The effect on any marital or de-facto partner and any other family member must be evaluated according to the nature and relationship between them, whether they are able to follow or to travel overseas to visit the non-citizen, as well as whether they are dependant on the support of the deportee which cannot be provided elsewhere. Social ties established after the liability for deportation or the knowledge of the character concerns are to be given less weight. Relevant personal aspects include the age, health, family links in the country of return as well as the level of education.

3 Such reasons are any evidence eg: that the potential person has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; or that the child has suffered or experienced any physical or emotional trauma arising from the person's unlawful conduct.

4 This assessment criteria is defined more specifically:

- the circumstances of the probable country of future residence, including the educational facilities and the standard of the health support system (if any) of the country should the non-citizen not be permitted to enter or remain in Australia, but taking into account that a higher standard of health, educational or other services in Australia does not of itself mean that a non-citizen child should not be removed to another country;
- any language barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children acquire new languages;
- any cultural barriers for the child in the probable country of future residence, but taking into account the relative ease with which younger children adapt to new circumstances.

Finally, international obligations are to be considered. While D 9 merely refers to the non-refoulement-provisions enshrined in the ICCPR and the Convention Against Torture as well the Geneva Refugee Convention, D 41 contains additional safeguards regarding child rights (CRC). A reference to the family-life-provisions of the ICCPR (Art 17 and 23) was included in the precedent D 21 but not reiterated in D 41. It is pointed out though, that 'notwithstanding the international obligations, the power (to deport or to refuse or cancel visa) must inherently remain a fundamental exercise of Australian sovereignty' (D 41 para 10.4 and D 9 para 21).

The importance of the Ds was pointed out by Drummond J in *Tien* (1998) 53 ALR 32 at 56, namely that due to the elaborate regime and specific regulation every deportation has to comply with its guidelines. Lacey (2001) 228 concludes that the Ds had effectively displaced the 'legitimate expectation' established in *Teoh*, by implementing detailed specific regulations on the content.

V. ASSESSMENT OF THE LEGAL FRAMEWORK

Due to the limited number of guaranteed fundamental rights the courts cannot determine whether 'the course taken by Parliament is unjust or contrary to basic human rights' (McHugh J in *Al-Kateb* [2004] 219 CLR 562 at 595). Additionally the Government's responses indicate a certain reluctance to integrate the balance of interest set out clearly by international treaties into the domestic legal system, seemingly through fear of sacrificing its power to remove or deport. This leads to repeated international condemnations of Australia, due to insufficient consideration of family life.

Hence the family protection is only granted to the extent set out in immigration laws. In this context the difference between alien and citizens becomes crucial importance regarding the unconditional right to abode. It can be agreed with Crock (2007) 1053 that 'at no time in Australia's history have such profound divisions opened up between the citizen and the non-citizen on the one hand, and between the economically powerful and Australia's battlers on the other'. While non-citizens can be deported or removed under outlined circumstances, this would be prohibited for citizens.

This fundamental right is especially challenged when children of deportees are Australian citizens. It can be argued that common law enshrines the obligation to take the best interests of the child into account when assessing the appropriateness of deportation of the parent. The 'best interests of the child' include age, length of stay, education, social environment, and the possibility of living in the destination country.

Moreover in my view the same consideration must apply to any other family member (who is Australian citizen) dependent on the deportee. Their situation is also required to be taken into account, due to the impact the deportation has on their living conditions.

This does not lead to a general prohibition of deportation or removal of persons having family members who are Australian citizens. Similarly prison terms, affecting the family of the criminal as well, are undeniably legitimate. It merely leads to the consequence that in cases of deportations and removals the

situation of family members has to be taken into account and has to be weighed on the side of the deportee with equal importance against the interests of the State to deport.

In relation to the two different ministerial Ds a few points must be highlighted. Due to findings that the Ds codify the extent of 'legitimate expectation' arising from Australia's ratification of the CRC combined with the lack of its reference, it appears that the consideration of family life should go that far but not further. These Ds 'cover the field' and do not open any backdoor for the implementation of further developments in international law.

As indicated above the visa cancellation power has mainly eclipsed the specific deportation power for dealing with criminals. Therefore D 41 is of chief importance. Personal relationships, strength of other ties as well as degree and extent of ties with the country of origin are given less weight than the seriousness and nature of the crime. It appears that non-citizens, no matter how long they have already been settled in Australia, forfeit their right to abode once they commit crimes.

Furthermore the impact of general deterrence needs to be discussed (see as well Grewcock M [2009]). While through the imposition of sentences the individual should be kept from committing similar offences again, criminal punishment deters third parties as well, who would not want similar penalties to be imposed on themselves. It is submitted that after the commencement of the sentence the criminal liability is fulfilled.

While the concepts of criminal penalties and of deportations and removals aim similarly at the prevention of crimes and the protection of the community there is a significant difference. The denial of the person's legality to remain in Australia and the subsequent removal to the country of origin aims to protect the community from that particular person. The sign is set out, that he or she must not live within Australia because he or she constitutes a threat to its security. As soon as the notion of general deterrence plays a significant role for deportations and removals (as it appears to be although the respective provision was not reiterated in D 41), a similar motivation as for criminal penalties applies. But criminal punishment was already imposed upon and fulfilled by the non-citizen after the commencement of his sentence. Therefore, the repeated motivation of general deterrence for imposing the deportation or the removal would constitute double punishment, which is prohibited. The European Court of Justice in *Bonsignore v Köln* (1975) C-67/74, likewise pointed out that in cases regarding residence bans imposed on EU citizens in different EU member States the notion of general deterrence must not be considered. Similarly the Human Rights Commission recommended the use of deportations after prison sentences 'only when there is fresh evidence available which makes it desirable to effect expulsion of the person, ... except either compelling reasons on national security otherwise require (Human Rights Commission [1983] para 48, rec 6).

Ds are issued by the Minister without any parliamentary involvement; hence they can be revoked through the similar process. Ministers are politicians and therefore dependent on the discretion of the electorate. Especially the field of immigration can be and is used and misused repeatedly to trigger emotions and movements in the society, especially in close temporal connection to elections. Crock (2007) 1069 highlights in this context that 'votes lie with parties that are

seen to be tough on crime, tough on security and tough on border control'. By the same token the Human Rights Commission (1983) para 40 points out that 'policies ... must conform with human rights, and not human rights that must conform with policies'.

As highlighted in the introduction, hardly any State measures affect (private and family) life as fundamentally as the obligation to leave one's country of residence, where a deportee most likely spent the best part of his or her life. It must be criticised that the only real statutory safeguard regarding family life is dependent on the discretion of one single Minister, without any involvement from Parliament.

Due to the Ds the AAT takes the required considerations into account, whereas no clear statement was offered by the High Court (in recent case law eg in *Nystrom* [2006] 230 ALR 370 or *Koroitamana* [2006] 227 ALR 406, neither the Ds nor the notion of family protection was touched). The lack of framework protection other than the Ds means that family aspects are only considered in the matters falling in their scope. But the majority of annual 'compliance related departures' are based on different provisions (see FN 1) under which the issue of family protection is not assessed at all. This results in an inadequate system of human rights protection, as articulated by Crock (2007) 1071:

What we need to do is go back to the basics and to reassert the primacy of the rule of law and of respect for basic human rights irrespective of colour, creed or nationality. Recent years have seen this country playing an extremely dangerous endgame with immigration and human rights. It is a game that ultimately puts us all at risk.

VI. SUMMARY

Australia's immigration system uses two different ways of banning criminals from its territory: deportation (sec 201) and visa cancellation (sec 501). Due to the Minister's wider freedom of scope the latter gained more practical importance, leading subsequently to immigration detention (sec 189) and removal (sec 198).

Under Constitution and common law only a limited number of fundamental rights are guaranteed. This leads to the desire of wider human rights protection, which provides a further argument in favour of the implementation of a statutory or constitutional Bill of Rights.

While international treaties to which Australia is signatory would provide general human rights protection, they are not implemented in the domestic legal system. Although some judicial developments indicated the applicability of international treaty standards as a consequence of ratification, the continuing applicability of this approach is highly questionably.

The balance of interests in cases of deportations is set out clearly by international treaty bodies. One side of the scales include the interests of the State in maintaining security and legal enforceable immigration regulations such as number and seriousness of crimes committed, length of prison term as well as probability of reoffending. The other side contains several aspects relating to the potential deportee's family life. This includes number of and relationship to children, their length of residence, combined with the degree of their education

and social integration, as well as living conditions in the deportation's destination country.

Anyhow since the power to deport, cancel visa and remove remain a fundamental exercise of Australian sovereignty merely the domestic immigration regulations are at stake. The family protection as an aspect to be considered while assessing the legality of deportations or removals is only stipulated in Directions. These are given by the Minister without any parliamentary involvement and can be revoked similarly. While it is set out that the interests of the child have to be considered primarily the major parts of personal and further family aspect are given less weight.

Hence family protection in the context of deportations or removals is not considered as importantly as it should be according to the significant impact on one's personal life and on his or her entire family.

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- *Gregor Heißl is postdoc researcher and lecturer at the University of Vienna, Department of Constitutional and Administrative Law. He was Visiting Research Fellow at the Australian Human Rights Centre (University of New South Wales, Sydney) in Spring 2009. E-Mail gregor.heissl@univie.ac.at*