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

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

Gregor Heissl

Abstract

Obviously deportations or removals of persons, who have spent a certain period in Australia has 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 General Directions (GD), given by the Minister for Immigration and Citizenship and providing guidelines, 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 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 detailed descriptions of circumstances of 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. The Human Rights Commission (1983 para 12-37) named explicitly the prohibition of cruel, inhuman treatment or degrading treatment, the rights of aliens to reason, representation and review, as well as the prohibition of double punishment.

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

Furthermore the notion of family protection is primary 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

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]).

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 General Directions (GDs) given by the Minister for Immigration, concerning the consideration of child rights are discussed.

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 amended to substitute '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 permanent residents living in Australia less than ten years, 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 GD 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.

While the scope of deportations (sec 201) is limited to permanent residents for a period less than ten years, implying a notion of integration and settlement after which deportation is unjustified, cancellation of visa (sec 501) applies to anybody. The minimum sentence of imprisonment for both 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).

As indicated sec 501 offers a wider scope to treat criminals than sec 201, leading to the result that the latter provision is rarely used in practice any more, and 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 (for an extensive discussion 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 GD 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 in more detail. Furthermore the notion of citizenship of affected family members as well as the GDs 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 one's family was challenged in *Winata* (2001) CCPR/C/72/D/930/2000, concerning the deportation of both parents of a 13-year-old Australian citizen. 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 exceptions 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,

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.

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.

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.'

The fundamental shift of opinion was performed in *Shaw* (2003) 218 CLR 28. 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.

Due to this rejection of the constitutional in favour of the statutory concept of citizenship, it is worth reviewing briefly the different ways of becoming Australian citizen.

The most common way is to be born in Australian and having a parent who is Australian citizen or permanent resident at the time of birth of the child. Children of Australian citizens born overseas can apply for citizenship under sec 16 Australian Citizenship Act 2007. A person born of neither Australian citizens nor permanent residents becomes a citizen after being ordinarily resident throughout a period of ten years beginning with the day of birth (sec 12 *Australian Citizenship Act 2007*). The jus soli principle (nationality by birthplace) was abandoned in 1986 after *Kioa* (1985) 159 CLR 550, where it was claimed that the child of deportees was born in Australia and therefore citizen and entitled to natural justice; even though the High Court did not follow this view 'it was enough to encourage a change in legislation' (Rubenstein 1995-1996, 507). Further ways of becoming citizenship is by adoption (sec 13 *Australian Citizenship Act 2007*), incorporation of Territory (sec 15 *Australian Citizenship Act 2007*) or being found abandoned (sec 14 *Australian Citizenship Act 2007*).

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, hence 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 are therefore 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. General Directions 9 and 21

GD are written directions of the Minister to persons or bodies having functions or powers under the *Migration Act 1958* concerning the performance of those functions and the exercise of those powers (sec 499). The Minister, as long as he does not contravene the *Migration Act*, is empowered to release any kind of guidelines 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 GDs were released.

In the aftermath of *Teoh*, GD 9, known as '(Australia's) Criminal Deportation Policy', was released on 21 December 1998 to provide guidance on deportation orders. A few years later GD 21, issued on 23 August 2001, clarified the visa refusal and cancellation power.

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

Once the content and scope of the both GDs 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' (GD 9 para 4 and GD 21 para 2). Regarding the balance of important factors, a hierarchy between primary and other considerations is established.

Primarily the protection of the Australian community and its members as well as their expectations, and the best interest of the child 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 three aspects have to be taken into account before deportation orders or cancellations of visas are permitted: the seriousness and nature of the committed crime, the risk of recidivism, and the notion of general deterrence (GD 9 para 14 and GD 21 para 2.11).

The best interests of the child have to be considered in any (parental or other close, para 2.3 [c]) 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' (GD 9 para 17 and similarly GD 21 para 2.14). 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 (GD 9 para 18 and GD 21 para 2.15),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 (GD 9 para 19-20 and GD 21 para 2.16)

- the nature of the relationship between the child and the non-citizen,
- whether the child is an Australian citizen or permanent resident,
- the age of the child and time spent in Australia,
- the likely effect that any separation from the non-citizen would have on the child,
- the likely effect on the child or children of leaving Australia together with the parents,⁴
- the impact of the non-citizen's prior conduct on the child.

Other considerations must also be taken into account, but are of 'less weight than the primary' (GD 9 para 21 and GD 21 para 2.17) ones, include the degree of hardship to family members as well as to any other Australian citizen or permanent resident. 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.

While GD 9 (at para 22) demands the consideration of the hardship suffered by the deportee, regarding relationships, period of residence, ties with the country of return as well as in Australia, such a provision misses in GD 21.

Finally, international obligations are to be considered. While GD 9 merely refers to the non-refoulement-provisions enshrined in the ICCPR and the Convention Against Torture as well the Geneva Refugee Convention, GD 21 contains additional safeguards regarding family life in Art 17 and 23 ICCPR. It is pointed out though, that 'notwithstanding the international obligations, the power (to deport or to refuse or

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

⁴ This assessment criteria is defined more specifically:

- the circumstances of the probable receiving country, including the educational facilities and the standard of the health support system of the country to which the child may have to go, or return to, should the non-citizen not be permitted to enter or remain in the 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.

cancel visa) must inherently remain a fundamental exercise of Australian sovereignty' (GD 9 para 21 and GD 21 para 2.24). Although both GDs mainly concern the protection of the interests of children, what is strikingly missing is a reference to the CRC.

The importance of the GDs 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 GDs had effectively displaced the 'legitimate expectation' established in *Teoh*, by implementing detailed specific regulations on the content.

V. Conclusion

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

Under the Constitution as well as the common law only a limited number of fundamental rights are guaranteed. Therefore 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). 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 the s 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 (see eg *Bakhtiyari* [2003] CCPR/C/79/D/1069/2002 para 9.6).

Government's responses indicate a certain reluctance to integrate this balance 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.

The crucial difference between alien and citizens is 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.

Once again 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 against the interests of the State to deport.

Due to two different legal sources dealing with criminal non-citizens, two different ministerial GDs provide guidelines in regard of the protection of the child and the legitimacy of deportations or removals. In relation to both GDs a few points must be highlighted.

Due to findings that the GDs 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 GDs '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 GD 21 is of chief importance. In contrary to the other it does not contain any consideration of personal grounds weighing in favour of the non-citizen. While personal relationships, strength of other ties, period of residence as well as the degree and extent of ties with the country of origin are given no importance, a couple of provisions underline the significance of criminal charges. 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. At the least, the consideration of personal aspects must be expected from a country whose history and strength was built on and through immigration.

Furthermore the impact of general deterrence needs to be discussed. The primary aims of criminal punishment are the notions of personal and general deterrence. 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 does according to the GDs), 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 ECJ 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).

GDs 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 the life, privacy 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 GDs the AAT takes the required considerations into account, whereas no clear statement was offered by the High Court (eg in *Nystrom* [2006] 230 ALR 370 or *Koroitamana* [2006] 227 ALR 406 neither the GD nor the notion of family protection was touched). The lack of framework protection other than the GDs 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 8) 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.

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