

REPORT NO. 8

**DEPORTATION AND THE FAMILY:
A REPORT ON THE COMPLAINTS OF MRS M ROTH AND MR C J BOOKER**

September 1984

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27 September 1984

Senator The Hon. Gareth Evans, Q.C.,
Attorney-General, Parliament
House, CANBERRA, A.C.T.
2600

Dear Attorney-General,

Pursuant to Section 9(1)(b)(ii) of the Human Rights Commission Act 1981 we present this Report to you following the Human Rights Commission's inquiry and endeavours to effect a settlement in the matter of complaints made by Mrs. M. Roth and Mr. C.J. Booker that the proposed deportation of Mr. Booker is inconsistent with and contrary to human rights.

Yours sincerely,



Chairman for and on behalf of
the Human Rights Commission

FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 reads:

9.(1) The functions of the Commission are -

- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
- (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -
 - (i) where the Commission considers it appropriate to do so - endeavour to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters - to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
- (c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
- (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
- (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
- (f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

(v)

(g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

(h) to perform -

(i) any functions conferred on the Commission by any other enactment;

(ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and

(iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not -

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.

1. INTRODUCTION

In March 1984, the Commission received a complaint in writing from Mr C J Booker to the effect that the proposed deportation of him to New Zealand would be inconsistent with or contrary to human rights. A similar complaint was received in the same month from Mrs M Roth, Mr Booker's de facto wife. The complaints were referred to the Department of Immigration and Ethnic Affairs but, despite the endeavours of the Commission and its staff, no settlement was attained.

2. Accordingly the Commission in performance of its functions under section 9(1)(b) and section 16 of the Human Rights Commission Act 1981 is now reporting the results of its inquiries and its recommendation.

2. THE FACTUAL BASIS OF THE COMPLAINT

(a) Mr Booker's Presence in Australia

3. It is understood that Mr Christopher Booker presently has the status in Australia of a "prohibited non citizen" who faces the prospect of deportation. He is a citizen of New Zealand who came to Australia in 1973. At that time New Zealanders were exempted from obtaining visas and were generally able to travel freely between Australia and New Zealand. However, the instrument of exemption in existence at that time provided that persons with criminal records were not automatically entitled to the exemption, and it is understood that they were required to declare any criminal convictions before making travel arrangements. There is no record of Mr Booker having declared convictions recorded against him in New Zealand.

4. Mr Booker maintains that he has been in Australia continuously since 1973, although there is some suggestion that he returned to New Zealand for a short time in March 1978 using a false name.

5. Since coming to Australia, Mr Booker has been convicted of offences of stealing, false pretences and possession of an unlicensed pistol. It was on the basis of offences committed in 1982 and 1983 (for which the sentences were respectively 2 years and 12 months) that Mr Booker was imprisoned for approximately nine months up to March 1984. On 27 February 1984 the delegate of the Minister for Immigration and Ethnic Affairs signed a deportation order against Mr Booker under section 16(1) of the Migration Act 1958.

6. Since March 1984 Mr Booker has remained in prison awaiting the outcome of his challenge to the deportation order issued by the Department of Immigration and Ethnic Affairs.

7. During Mr Booker's imprisonment he was contacted by his former employer, Mr Greg Ricardo, who offered him employment on his farm at the completion of his gaol sentence. This employment would possibly involve provision of live-in accommodation on the property.

8. A deportation order for Mr Booker's removal from Australia is currently in existence. The Department of Immigration and Ethnic Affairs has reconsidered the question of Mr Booker's deportation on three occasions and has each time re-affirmed the decision to deport.

(b) Relationships

9. In 1974 Mr Booker met Ms Penelope Sommerville and they had a de facto relationship lasting until 1981. One child, Nicole Booker, was born in 1977. The child now uses the name Sommerville.

10. In March 1982 Mr Booker commenced living with Mrs Margaret Roth who has three children of a previous marriage aged between 11 and 5 years. He did so continuously in a de facto relationship until May 1983 when Ms Sommerville called in to see Mrs Roth and advised her that Mr Booker was wanted by the police. Mrs Roth had known nothing about Mr Booker's record and was very upset. The two decided to part and Booker moved from their home in Narromine to Dubbo. He stayed in Dubbo for two weeks but returned to Narromine and lived in a caravan park a short distance from Mrs Roth's home. Mrs Roth and Mr Booker maintain that they saw each other regularly during this period. Mrs Roth has informed the Commission that the reason they parted at this time was to avoid an arrest at the home in the interests of the children.

11. At the end of May 1983 Mrs Roth received a visit from the police looking for Mr Booker and she advised them of his whereabouts. Mrs Roth and Mr Booker advise that this action had been a matter of agreement between them. Since his arrest Mr Booker has been in prison.

12. Mrs Roth continued to visit Mr Booker in prison to the extent that her pension and the visiting conditions at the prison allowed. Mrs Roth has been diligent in her efforts, since the custodial portion of Mr Booker's sentence was completed, to have the deportation decision reversed.

13. On Tuesday 28 August 1984 the Acting Head of the Commission's Inquiry and Conciliation Branch met Mr Booker and Mrs Roth in Sydney and formed the opinion that a strong relationship existed between them. Information received in the course of inquiry into Mrs Roth's complaint seems to suggest that there is a strong bond between Mrs Roth's children and Mr Booker - particularly the youngest who regards Booker as his father. The threat of deportation has had a significant effect on Mrs Roth's children, who have been found tearful and upset at school and have had to be consoled by teachers. The evidence obtained during the inquiry points to a continuity of the relationship between Roth and Booker since 1982 despite the setback caused by the announcement of Mr Booker's criminal record.

14. In November 1983 an officer of the Department telephoned Mr Booker, Mrs Roth and a former de facto, Ms Penelope Sommerville, the mother of Booker's Australian-born child, Nicole. Over the telephone, the Immigration officer asked questions about relationships with Booker and the answers were noted down. At the completion of the interview the answers were read back to the interviewee. During the Commission's inquiries into the complaints by Roth and Booker, information has been received which was not included in the Department's assessment of whether a family relationship existed. This information relates to the amount of contact between Roth and

Booker and the children during the period they lived separately in May 1983 and during Booker's imprisonment, and to the nature of the separation in May 1983 prior to Mr Booker's imprisonment. The information points much more favourably to the existence of a strong and continuous family relationship.

15. It is of interest that Mrs Roth went to great trouble and expense to visit Mr Booker in gaol. She lived at Dubbo, whilst he was incarcerated at Bathurst Gaol and at Kirkconnell forest station camp 40 km. from Bathurst. She paid three visits to him at Kirkconnell in August, September and December 1983, usually accompanied by the three children. She visited him at Bathurst Gaol twice in March and at the end of May 1984. Travelling from Dubbo to Bathurst was not only difficult but expensive to a person relying on a supporting parent's benefit.

16. The Commission also understands that during the period of Mr Booker's imprisonment he wrote some 157 letters to Mrs Roth and an additional 20 letters to the children. She wrote to him a similar number of times. Furthermore, she received a phone call once a week from Mr Booker. Prison policy did not normally allow him to receive personal calls in prison. In addition, he was given one day's leave during the period of his imprisonment and spent it with Mrs Roth, while at Christmas time he sent gifts to her and the children.

(c) Mr Booker's Australian-Born Child

17. It is also a part of the complaints of Mrs Roth and Mr Booker that deportation would be inconsistent with the rights of Booker's daughter, Nicole, an Australian citizen, aged 7 years.

18. Nicole resides with Mr Booker's former de facto wife, Ms P Sommerville. Nicole uses the surname, Sommerville, although her birth certificate names her as Nicole Booker.

19. Ms Sommerville has a defacto relationship with a further person and Nicole appears to be integrated into that family.

20. Mr Booker has contact from time to time with his daughter. It is apparent to Mrs Roth and Mr Booker that Ms Sommerville would prefer Nicole to identify with her present de facto husband rather than the natural father. Roth and Booker believe that there are elements of vexatiousness in Ms Sommerville's approach to the possibility of Booker being deported.

3. REASONS

(a) Are Mr Booker and Mrs Roth and Her Children a Family Protected by Article 23 of the International Covenant on Civil and Political Rights (ICCPR)?

21. Article 23 of the ICCPR provides that, amongst other things,

"The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

In the absence of direct Australian authority on Article 23, decisions of the European Commission and the European Court of Human Rights concerning a comparable provision, Article 8 of the European Convention, requiring respect for family life, are of persuasive authority. The trend of these decisions is to recognise de facto relationships and groupings other than the conventional nuclear family as covered by the concept of the family. Thus, in Agee v United Kingdom, Application No.7729/79, the European Commission held that the concept of the family in Article 8 of the European Convention extended to the relationship of a man and his common law wife. In Marckx v. Delgium, (1979) 2 EHRR 330, the European Court of Human Rights held that the protection of Article 8 extended to an unmarried mother and her daughter.

22. If anything, the scope of Article 23 of the ICCPR is greater than that of Article 8 of the European Convention, and there can be no basis for holding that a narrower interpretation of the concept of the family should be applied to Article 23 than is the case in Europe.

23. Accordingly, in the opinion of the Commission, Mr Booker and Mrs Roth and her children are a family entitled to the protection of Article 23 of the ICCPR. The Department has advised the Commission that it does not contest that a de facto relationship can be regarded as a family in terms of Article 23.

(b) The Effect of Article 23 in this Case

24. What is the effect of the application of Article 23 of the ICCPR to this case? In the first place, European authority indicates that one should have regard not solely to Mr Booker as an individual, but also to his membership of a family, and also to the rights of its other members. In the view of the Commission, a similar approach should be adopted to that of the European Commission in Uppal v. United Kingdom (1) (1979) 3 EHRR 391. In that case, it was held that a husband and wife, considered by themselves, were unlawful immigrants to the United Kingdom and lacked rights to remain there under United Kingdom law. However, the Commission did not confine itself to a narrow analysis of the lack of rights of the husband and wife as individuals or spouses. They looked also at the rights of the children and grandparents living in the extended family in question. Such an approach should be adopted here. The position of what has become a family should receive paramount consideration, rather than the rights of Mr Booker considered as an individual.

25. Article 23 requires the State to protect the family. This requirement is not made subject to any specific proviso analogous to those found in Articles 21 and 22 of the ICCPR, where the rights of peaceful assembly and freedom of association are made subject to the interests of national security and public safety. Nevertheless, it is not asserted that, in every case where Article 23 issues arise, deportation orders must be revoked. For example, although the issue does not arise in this case, it may be that a terrorist seeking to overthrow the State by force could not rely on Article 23, mainly because his activities would involve the destruction of the rights and freedoms of others. Article 5 of the ICCPR provides, amongst other things, that nobody has

"... any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised therein ••"

It is too far fetched to say that because he has committed certain crimes Mr Booker cannot rely on Article 23 and is caught by the provisions of Article 5. He has paid the penalty for his crimes by, amongst other things, imprisonment and to treat his deportation as a further punishment for these crimes would involve an infringement of Article 14(7) of the ICCPR which prohibits double punishment. Without commenting on the question of whether Mr Booker should have been permitted to enter Australia in the first place, the evidence now before the Commission has led it to conclude that his relationship with Mrs Roth and her children constitutes a family and that Article 23 of the ICCPR applies to it. The next question is whether the right of that family to protection by the State has been destroyed by some other factor, such as Mr Booker's crimes. The Commission has concluded that, on the evidence before it, the family has not lost the protection of Article 23. In the opinion of the Commission, such an analysis leads inescapably to the conclusion that the obligation under Article 23 of the ICCPR to protect this family cannot be met if Mr Booker is deported and the family is, in effect, destroyed.

26. It would seem that the view of the Department has been that it has considered all relevant material concerning the relationship of Mr Booker with Mrs Roth and her children, together with other material, such as his convictions, and, weighing all this relevant material together has come to the conclusion that he should be deported. Another way of characterising this approach is to say that what the Department has done is to balance the interests of the individuals in this case against the interests of the community as a whole, that is to say, the public interest.

27. In the view of the Commission, it is not enough merely to take human rights factors into consideration along with a whole host of other criteria in making deportation decisions. Human rights must invariably be observed in the making of decisions on deportation. Human rights cannot be surrendered in

favour of other criteria. In the final analysis, it is government policies and administrative decisions that must conform with human rights, and not human rights that must conform with policies and administrative decisions.

28. It is important to recall that the Parliament of the Commonwealth has already, in the Human Rights Commission Act itself, given a clear indication of the legislative policy it embodies. The preamble recites that

... it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms."

It follows from the preamble, and from the specific provisions of section 9, that human rights must be observed in the law and practice of the Commonwealth. Where human rights are not observed, it is the duty of the Commission to furnish a report to the Minister, recording its opinion that the act or practice in question is inconsistent with or contrary to any human rights (paragraph 9(1)(b) and section 16). It is a consequential obligation on each Minister, Department and agency that acts and practices under Commonwealth law should comply with human rights, and that any offending law or practice should be changed so that it is brought into conformity with the relevant human rights.

29. It is accordingly the view of the Commission that the Human Rights Commission Act envisages that decisions such as those relating to deportation should and must conform with human rights. Although the Parliament, at this stage, has not made the human rights embodied in the instruments administered by the Commission directly enforceable in domestic law, it clearly requires the Commission to report how domestic laws and

practices should be modified in order that human rights violations do not occur. The Parliament has been uncompromising in requiring conformity with human rights as defined in the relevant international instruments. It has not said that human rights considerations must give way to policy considerations or other matters. Indeed, the Commission has been set in place precisely to receive complaints that a policy or practice is not in conformity with human rights. And ultimately, if the Commission is of the opinion that any decision is inconsistent with or contrary to human rights, even if it is made in pursuance of a policy adopted by the Executive Government, it must report accordingly.

(c) Issues Arising Under the Declaration of the Rights of the Child

30. Although the rights of Mrs Roth's children as members of a family are protected by Article 23 of the ICCPR, this protection is supplemented by some of the principles found in the Declaration of the Rights of the Child, forming Schedule 2 of the Human Rights Commission Act 1981.

31. Principle 1 of the Declaration provides that, amongst other things,

"The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family."

The evidence before the Commission indicates that Mrs Roth's children now see Mr Booker in the role of father. If he is deported they will be discriminated against by losing that support and guidance which a father can offer. To treat the children as a mere appendage of Mrs Roth is to ignore their

rights and to infringe Principle 1, which emphasises their entitlement to the rights set out in the Declaration, without any discrimination.

32. Principle 6 of the Declaration is of fundamental importance in this case. It provides that each child,

"... shall, wherever possible, grow up in the care and under the responsibility of his parents and in any case in an atmosphere of affection and of moral and material security."

The evidence establishes that Mr Booker is now in the position of a parent to these children and is anxious for them to grow up in his care and under his responsibility, as well as their mother's. If he is deported, their rights to his care and guidance will be destroyed.

ENDEAVOURS TO EFFECT A SETTLEMENT

33. Officers of the Commission have made every endeavour to effect a settlement of the matters giving rise to these complaints. Full details of the complaints have been given to the Department in writing. In addition, discussions have taken place between officers, including at the level of Commissioner and Departmental Secretary. In addition, the applicable principles of human rights law have been put to the Department and it has responded, indicating that it is not persuaded by the material put to it. In a letter dated 11 September 1984 from the Secretary of the Department to the Deputy Chairman of the Human Rights Commission, it was said that

the departmental position is that, the human rights matters having been taken into consideration and the [deportation] order having been validly made, the Department should move to give effect to it ..."

The Department has also made it clear to the Commission that in its view, at the time the deportation order was made, no de facto relationship existed. The Commission has before it the deportation order and the material that was before the delegate of the Minister at the time he made the order. This material indicates the departmental view that no de facto relationship existed at the time the deportation order was made on 27 February 1984.

34. As the departmental view was that no de facto relationship existed at the time the deportation order was made, then it follows that no issues of human rights law under Article 23 were put to the delegate to consider. A perusal of the material that was before the delegate at that time is consistent with this view; there is no reference in it to Article 23, or indeed, to any other provision of human rights law. The Commission concludes therefore, that when the delegate was making his decision, he did not take any human rights issues into account at all because he and his advisers apparently considered that none were relevant, on the substantial grounds

that no de facto relationship, in their view, existed. The comment of the Secretary of the Department in his letter to the Deputy Chairman of 11 September 1984, that

"... human rights matters having been taken into consideration and the [deportation] order having been validly made ..."

should, in the opinion of the Commission, be read in this context. In the opinion of the Commission, the delegate failed to take the appropriate human rights principles into account in making the deportation order. He did not appreciate that a de facto relationship existed, and there was nothing before him to direct his attention to Article 23 of the ICCPR and its interpretation.

35. In the course of endeavouring to effect a settlement in this matter, it has been put to the Department that given its concern about the stability of the relationship between the complainants, one solution might be to defer deportation action for two years, in order to enable the stability of the relationship to be tested in practice. This approach has proved unattractive to the Department and, in the circumstances, was not therefore put to the complainants for their consideration. However, there is nothing to lead the Commission to believe that they would reject such a compromise.

36. Finally, in the same letter of 11 September 1984, the Secretary of the Department indicated the desire of the Department to bring the conciliation phase of the matter to a conclusion as quickly as possible. He indicated his refusal to revoke the deportation order and his wish to implement it. On 12 September 1984, the Deputy Chairman wrote to the Secretary informing him that the Commission was meeting in Canberra on that day and would be giving consideration to the issues raised by the complaints and requesting that he suspend action in the deportation of Mr Booker.

37. The Commission, at its meeting in Canberra on 12-13 September 1984, further considered the matter and authorised the Deputy Chairman to discuss the issues once more with the Secretary to the Department. In the light of that discussion, which was reported to it, the Commission concluded that its endeavours to effect a settlement of the matters giving rise to these complaints had not achieved success. As it was of the opinion that the deportation of Mr Booker was inconsistent with or contrary to human rights, it decided that it should report to the Attorney-General the results of its inquiry and of its endeavours to effect a settlement. In discharging its obligations under section 14 of the Human Rights Commission Act to give a reasonable opportunity to the Department to respond to its conclusions, a copy of this report in draft was made available by the Commission to the Secretary to the Department.

38. To the knowledge of the Commission, the Department, at the time of the making of this report, has not taken any action as a result of the findings and recommendations of the Commission to revoke the deportation order. However, the Commission understands that, at the date of writing of this report, further Ministerial consideration of the issues was contemplated and that, for the time being, deportation action was stayed.

39. In responding to a draft of this report, the Department has taken the view that, even if the relationship between Mrs Roth and Mr Booker is accepted as a genuine family relationship within the meaning of Article 23 of the ICCPR, the deportation of Mr Booker would not necessarily be a breach of that Article. The Department relied on two passages in decisions of the European Commission, interpreting Article 8 of the European Convention, requiring respect for family life, in deportation cases.

40. The first of these was X and Y v. United Kingdom (5269/71) CD 39, 104, where the European Commission said that

it is satisfied that there are no legal obstacles for the applicants effectively to establish their family life in Cyprus if the first applicant were to return to that country. A refusal by her to do this because she chooses to stay in the United Kingdom (as she is entitled to do) does not ... mean that there has been thereby an interference by the United Kingdom authorities with the applicant's family life within the meaning of Article 8(1) of the Convention."

The second European authority relied upon was Agee v. United Kingdom (7729/76) DR 7, 164, in which the European Commission said

"Where in such circumstances the wife has the possibility of following her husband out of the country, this does not in the Commission's opinion constitute an interference with family life contrary to Article 8(1)."

41. The Commission is of the opinion that these authorities are distinguishable on this point. In X and Y v. United Kingdom there were no children of the marriage, and both of the applicants were of Cypriot origin. The disruption to their family life would have been clearly much less substantial than in the case now under consideration, essentially because their origins both lay in the same country and the lives of young children were not being disrupted by deportation.

42. Agee's case is distinguishable because neither the husband nor his de facto wife were British subjects. Agee was an American, and his de facto wife was a Brazilian. Neither had any permanent rights of residence in the United Kingdom. It is true that Agee had two children, but, like him, they were of United States nationality. Furthermore, it is reasonable to infer from the facts of that case that they were accustomed to a somewhat nomadic life.

43. The Commission is not persuaded that Mrs Roth and her children would readily be able to take up a new life in New Zealand. Mr Booker's prospects of obtaining a job are much better in Australia than in his homeland, and the disruption to the life of Mrs Roth and her children by shifting to New Zealand would, in all the circumstances, be substantial.

5. FINDINGS AND RECOMMENDATIONS

44. Having conducted an inquiry into an act or practice complained of by Mrs M Roth and Mr C Booker, namely, the proposed deportation of Mr Booker, the Commission finds that in all the circumstances this act or practice is inconsistent with or contrary to human rights, in particular Article 23 of the ICCPR and the Declaration of the Rights of the Child. Its reasons for these findings are set out in the preceding pages of this report. Consequently, the Commission recommends that the deportation order against Mr Booker be revoked, or at the least be stood over for a period of say two years, and then revoked if the family situation of Mr Booker and Mrs Roth has remained stable.

45. The Commission requested the Department to refrain from deporting Mr Booker, pending the provision of this report to you and to avoid pre-empting Ministerial consideration of the issues. However, it understands that the Department is not, unless otherwise directed by Ministers, proposing to take any action to implement the recommendations contained in the previous paragraph.

