



Australian
Human Rights
Commission

Mr BP, Ms BQ and Miss BR
v Commonwealth of
Australia (Department
of Home Affairs)

[2019] AusHRC 131

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

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Home Affairs)

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*Report into complaint of breach of
non-refoulement obligations, arbitrary
interference with family and failure to
consider the best interests of the child*

Australian Human Rights Commission 2019



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Commission**

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**Australian
Human Rights
Commission**

The Hon Christian Porter MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of Mr BP, Ms BQ and Miss BR alleging breach of non-refoulement obligations, arbitrary interference with the family and failure to consider the best interests of the child.

Mr BP, Ms BQ and Miss BR complain that the actions of the Department of Home Affairs (department) amounted to a breach of articles 7, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR), as well as a breach of Australia's obligations under the *Convention on the Rights of the Child* (CRC).

As a result of this inquiry, I have found that new protection claims raised by Mr BP should have been referred to the Minister in accordance with the relevant guidelines. An administrative error within the department resulted in pertinent information not being put before the relevant decision maker. Consequently, I am not satisfied that the department conducted an assessment of Mr BP's changed circumstances sufficient to properly assure itself that deportation or removal would not expose Mr BP to a 'real risk' of treatment prohibited by article 7 of the ICCPR upon his return to Sri Lanka. As a result, I considered that the department's decision to finalise Mr BP's request for ministerial intervention without referral to the Minister could be considered inconsistent with, or contrary to, his human rights.

With respect to articles 17 and 23 of the ICCPR and the CRC, I have found that the actions of the department and the Minister did not constitute a breach.

The department provided its response to my findings and recommendations on 17 April 2019. The department accepted my recommendation to review its systems to ensure that information received by the department is properly attached to departmental files and available to relevant decision makers. The department also accepted my recommendation to expedite Mr BP's visa application to facilitate his reunification with his family in Australia.

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
Telephone: 02 9284 9600
Facsimile: 02 9284 9611
Website: www.humanrights.gov.au

I note that Mr BP was granted a permanent Partner visa on 6 April 2019 and I commend the department on its constructive response to this issue.

I have set out the department's full response to my notice of findings in Part 17 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Rosalind Croucher". The signature is written in a cursive style with a large initial 'R'.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

May 2019

1 Introduction to this inquiry

1. This is a notice setting out the findings of the Australian Human Rights Commission (Commission) following an inquiry into a complaint made by Mr BP, his wife Ms BQ and their daughter Miss BR against the Commonwealth of Australia—specifically, against the former Department of Immigration and Border Protection, now the Department of Home Affairs (department) alleging breaches of their human rights.
2. This inquiry has been undertaken pursuant to s 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and this notice is issued pursuant to s 29(2) of the AHRC Act.

2 Background and findings

3. Mr BP, a Sri Lankan national, arrived in Australia by boat on 18 July 2012 and sought protection as a refugee. While living in the community on a bridging visa, he met and married Ms BQ who gave birth to their daughter, Miss BR, on 2 August 2015. As of 13 February 2019, Ms BQ is an Australian citizen, having been granted a protection visa in 2012 on the basis that she is at risk of persecution by the Sri Lankan government. Miss BR is also an Australian citizen.
4. On 9 August 2013, the department decided that it was not satisfied that Mr BP was at risk of persecution by the Sri Lankan government and refused his application for a protection visa. On 9 March 2015, the Refugee Review Tribunal (RRT) upheld this decision. On 13 May 2015, the Federal Circuit Court (FCC) dismissed Mr BP's application for judicial review.
5. On 3 March 2016, the Minister for Immigration and Border Protection (Minister) personally considered Mr BP's matter under ss 46A, 195A and 417 of the *Migration Act 1958* (Cth) (Migration Act) and declined to intervene. On 12 April 2016, the department declined to refer a second request to the Minister for intervention under ss 46A and 417 of the Migration Act. On 22 April 2016, the department declined to refer a request to the Minister under s 48B of the Act. This s 48B request was based on a change in Mr BP's circumstances that was said to give rise to new protection claims. Following these decisions, Mr BP's legal avenues of appeal were exhausted and he was told by the department that he was expected to leave Australia as soon as practicable.
6. Mr BP departed Australia for Sri Lanka on 29 August 2016. Mr BP has an offshore pathway to Australian residency available to him by way of an application for a partner visa based on his marriage to Ms BQ. Mr BP lodged this partner visa application on 30 August 2017 and, at the time, it was estimated that the processing time in Colombo would be approximately 12 months—although it was contemplated that it might be longer given Direction 72. Direction 72 provides that applications sponsored by former unauthorised maritime arrivals, such as Ms BQ, are to be given the lowest processing priority unless there are compassionate and compelling circumstances.

7. Ms BQ is unable to accompany Mr BP to Sri Lanka during this processing time because of her fear of persecution by the Sri Lankan government. This necessitates a period of family separation. I understand that Mr BP has been waiting in Sri Lanka for his partner visa to be processed for over 18 months now.
8. On 26 April 2016, Mr BP made a written complaint to the Commission claiming that the actions of the department amounted to a breach of articles 7, 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR), as well as a breach of Australia's obligations under the *Convention on the Rights of the Child* (CRC).
9. As a result of this inquiry, I find the following:
 - (a) Mr BP raised new protection claims that should have been referred to the Minister in accordance with the relevant guidelines. It appears that an administrative error within the department resulted in pertinent information not being put before the relevant decision maker. On the material before me, I cannot be satisfied that the department conducted an assessment of Mr BP's changed circumstances sufficient to properly assure itself that deportation or removal would not expose Mr BP to a 'real risk' of treatment prohibited by article 7 of the ICCPR upon his return to Sri Lanka. As a result, I consider that the department's decision to finalise Mr BP's request for ministerial intervention without referral to the Minister can be considered as inconsistent with, or contrary to, his human rights.
 - (b) While acknowledging the difficult circumstances of the BP family, the actions of the department and the Minister do not presently constitute a breach of either article 17 or 23 of the ICCPR or the CRC. My view of this matter may change, however, if the processing of Mr BP's application for a partner visa is delayed unreasonably or if it is denied. If this were to occur, the BP family would likely have a stronger claim of arbitrary interference with family rights. This is because the family cannot live together in Sri Lanka due to Ms BQ's concerns regarding persecution and I am not aware of any third party state where they can live securely as a family.
10. Mr BP and Ms BQ have requested that their names, and the name of their daughter, not be published in connection with this inquiry. I consider that the preservation of their anonymity is necessary to protect their human rights. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to them by the pseudonyms 'Mr BP', 'Ms BQ' and 'Miss BR' in this document.

3 Migration history of the family

11. Mr BP and Ms BQ are both Sri Lankan citizens of Tamil ethnicity. They are from the same area in Sri Lanka but did not know each other until they met in Australia in 2013.
12. On 7 November 2010, Ms BQ arrived in Australia from Sri Lanka as an undocumented maritime arrival.

13. On 18 July 2012, Mr BP arrived in Australia as an undocumented maritime arrival. He was detained pursuant to s 189(3) of the Migration Act and placed at Phosphate Hill Alternative Place of Detention.
14. On 13 August 2012, Mr BP was transferred to Wickham Point Immigration Detention Centre and his detention was authorised under s 189(1) of the Migration Act.
15. On 11 September 2012, Ms BQ was granted a protection visa on the basis that she is unable to return to Sri Lanka because she is at risk of persecution by the Sri Lankan government.
16. On 11 October 2012, Mr BP was granted a Bridging Visa E (BVE) under s 195A of the Migration Act, in effect until 22 November 2012, and released into the community.
17. On 14 November 2012, Mr BP applied for a protection visa. This application was based on his fear of persecution in Sri Lanka by the Criminal Investigation Division (CID) police force because of his Tamil ethnicity, imputed political opinion and possible return to Sri Lanka as a person who had departed illegally and who would be considered a 'failed' asylum seeker from Australia.
18. On 16 November 2012, Mr BP was granted a further BVE in effect until 7 April 2015 while his protection visa application was being considered.
19. On 9 August 2013, Mr BP's application for a protection visa was declined by the department.
20. In September 2013, Ms BQ and Mr BP met and began their relationship.
21. In October 2013, Mr BP proposed marriage to Ms BQ and the couple became engaged.
22. On 16 November 2013, Mr BP and Ms BQ were married in Sydney and began living together as husband and wife.
23. On 9 March 2015, the RRT upheld the department's decision to refuse Mr BP a protection visa.
24. On 30 March 2015, Mr BP appealed the RRT's decision to the FCC.
25. On 31 March 2015, Mr BP applied for a further BVE.
26. On 2 April 2015, Mr BP's BVE application was found to be invalid.
27. On 7 April 2015, Mr BP's BVE ceased and he began residing in the community without a visa.
28. On 11 April 2015, Mr BP made an onshore application for a partner visa based on his marriage to Ms BQ. This application was initially received as valid.
29. On 21 April 2015, based on advice from his then legal representative, Mr BP withdrew his application for judicial review at the FCC because of his pending partner visa application.
30. On 5 May 2015, Mr BP was informed by the department that his partner visa application was invalid because he had arrived in Australia as an unauthorised maritime arrival. Pursuant to s 46A of the Migration Act, an unauthorised maritime arrival is barred from making an onshore visa application. This bar may be lifted if the Minister exercises his non-compellable powers under s 46A(2) of the Migration Act.

31. On 11 May 2015, Mr BP attempted to resume his judicial review application before the FCC.
32. On 13 May 2015, the FCC dismissed Mr BP's application to resume his application for judicial review. I am not aware if this application was dismissed on substantive grounds or because of the procedural irregularity of trying to reinstate a previously withdrawn application.
33. On 16 July 2015, Mr BP requested that the Minister exercise his discretionary powers under the Migration Act to allow him to stay in Australia with his wife and (then) unborn child while his application for a partner visa was processed. This request referred solely to Mr BP's relationship with Ms BQ and her pregnancy by him.
34. On 2 August 2015, Mr BP and Ms BQ's daughter, Miss BR, was born.
35. On 3 March 2016, the Minister personally considered Mr BP's circumstances and declined to intervene.
36. On 24 March 2016, Mr BP, now represented by Kah Lawyers, made a second request to the Minister under ss 46A, 417 or 195A of the Migration Act stating that important issues had not been considered by the Minister in his first request. These included his recently diagnosed mental health issues, details of his family situation with Ms BQ and Miss BR, the impact of his forced departure on the family unit and evidence of his integration into the Australian community. The request also set out newly arisen circumstances in Sri Lanka that were said to give rise to further protection claims for Mr BP. This second submission requested that the Minister also consider exercising his powers under s 48B of the Migration Act to allow Mr BP to lodge a second protection visa application.
37. On 12 April 2016, the department decided that Mr BP's matter did not meet the guidelines for a 'repeat request' referral to the Minister under s 417 of the Migration Act and declined to forward the matter for ministerial consideration. Mr BP was told by the department that, as his request had been finalised, he was expected to leave Australia if he did not have any other outstanding immigration matters.
38. On 22 April 2016, in a separate decision, the department stated that Mr BP's submission regarding a new application for a protection visa did not meet the guidelines for referral to the Minister under s 48B of the Migration Act and declined to forward it for ministerial consideration.
39. With all of his outstanding immigration matters finalised, Mr BP departed Australia for Sri Lanka on 29 August 2016. Upon his arrival in Sri Lanka on 30 August 2016, he was arrested, charged with illegal departure and released on bail on 31 August 2016.

4 Conciliation

40. The Commonwealth indicated that it did not want to participate in conciliation of the matter.

5 Procedural history of this inquiry

41. On 2 February 2018, I issued a preliminary view in this matter and gave both the complainants and the department the opportunity to respond to my preliminary findings.
42. On 17 April 2018, the department responded to my preliminary view and provided further documentation. Given the issues raised in the departmental response, the Commission considered that the principles of natural justice required that the complainants be given the opportunity to review and respond to it, which they did on 25 October 2018.
43. On 24 January 2019, the department responded to a further request for information from the Commission.

6 Relevant legal framework

6.1 Functions of the Commission

44. Section 11(1)(f) of the AHRC Act provides that the Commission has the function to inquire into any act or practice that may be inconsistent with, or contrary to, any human right.
45. Section 20(1)(b) of the AHRC Act requires the Commission to perform this function when a complaint is made to it in writing alleging that an act is inconsistent with, or contrary to, any human right.
46. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

6.2 What is a 'human right'?

47. The rights and freedoms recognised by the ICCPR and the CRC are 'human rights' within the meaning of the AHRC Act.¹ The following articles of these treaties are relevant to the acts and practices which form the subject of the present inquiry:
48. Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
49. Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

50. Article 23(1) of the ICCPR provides:

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

51. Article 3(1) of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

52. Article 9(1) of the CRC provides:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

53. Article 10(1) of the CRC states that:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

54. Article 10(2) of the CRC states that:

A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

6.3 What is an 'act' or 'practice'?

55. The terms 'act' and 'practice' are defined in s 3(1) of the AHRC Act to include an act done or a practice engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth or under an enactment.

56. Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.

57. The functions of the Commission identified in s 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken; that is, where the relevant act or practice is within the discretion of the Commonwealth.² Therefore, if a law requires that the act or practice be done by or on behalf of the Commonwealth, and there is no discretion involved, the act or practice done pursuant to that statutory provision will be outside the scope of the Commission's human rights inquiry jurisdiction.
58. Section 417 of the Migration Act allows the Minister to substitute a more favourable decision for the applicant than a decision by a tribunal. It was open to the Minister to intervene in Mr BP's case by exercising this discretionary power. Consistent with what was said in *Secretary, Department of Defence v HREOC, Burgess & Ors*, such an exercise of discretionary power may be the subject of an inquiry under s 11(1)(f).³
59. On 3 March 2016, the Minister personally considered Mr BP's circumstances and elected not to intervene in his matter under ss 46A, 417 or 195A of the Migration Act.
60. On 24 March 2016, Mr BP made a second request for ministerial intervention asking, among other things, that the Minister consider exercising his powers under s 48B of the Migration Act to allow Mr BP to lodge a second protection visa application. On 22 April 2016, the department declined to refer Mr BP's request for intervention under s 48B of the Migration Act for ministerial consideration.
61. Both the decision of the Minister not to exercise his discretionary powers under the Migration Act and the department's refusal to refer Mr BP's matter to the Minister for further attention under s 48B of the Migration Act constitute the relevant acts of the Commonwealth to which I have given consideration.

7 The 2015 request for ministerial intervention

62. On 15 July 2015, Mr BP's then legal representative wrote a letter to the Minister on his behalf requesting intervention under s 417 of the Migration Act.
63. This intervention request is relatively brief and advanced primarily on the basis of Mr BP's relationship with Ms BQ and the disruption to the family that would occur if Mr BP was required to return to Sri Lanka.
64. The letter explains that Ms BQ cannot return to Sri Lanka to live with her husband because she 'was found to be a Convention Refugee in Australia'.
65. It also references the likely hardship experienced by their (then) unborn daughter if she was to be separated from her father and submits that it is not in the child's best interests for this to occur. It submits that, under the CRC, Miss BR's best interests should be 'the primary consideration in this request'.

66. The letter also states that the:

Mental health of Mr BP is likely to deteriorate if Mr BP were asked to leave Australia and is likely to cause hardship to be [sic] Australian born Australian child's family unit.

67. The intervention request does not appear to be accompanied by any supporting documentation or attachments.

8 The decision of the Minister

68. In response to this intervention request, the department prepared a submission for the Minister about Mr BP's circumstances. This was received by the Minister's office on 20 November 2015. In addition to action under s 417 of the Migration Act, the department also identified possible options for the Minister under s 46A and s 195A for his consideration.

69. Attached to the substantive submission of the department were four attachments labelled A-D. Attachment A is a summary of the case details; Attachment B is a document for signature if the Minister decided to exercise his power under s 46A of the Migration Act; Attachment C is a copy of Mr BP's intervention request and Attachment D is a document about Australia's international obligations under the ICCPR and CRC.

70. The submission identified four possible options for the Minister to consider:

- lifting the application bar under s 46A of the Migration Act to allow Mr BP to make his partner visa application onshore and authorising an associated BVE
- considering the exercise of his power under s 417 of the Migration Act to grant Mr BP a former resident visa subject to health and character checks and the provision of a signed Australian Values statement
- intervening under s 195A of the Migration Act to grant Mr BP a further BVE for 12 months, or
- not intervening.

71. It also addressed Australia's obligations under the ICCPR and the CRC.

72. In the ICCPR section, the department acknowledges the applicability of articles 17 and 23 to the circumstances of Mr BP's case. It states:

Given Mr BP's family circumstances, Article 17 and 23 are relevant in his case. His departure and separation from the family may cause emotional and financial hardship. His spouse holds a Protection visa and is not able to travel to Sri Lanka on that basis.

The Department notes that should he voluntarily depart Australia, he has a viable offshore Partner (Subclass 309/100) visa pathway. As he is sponsored by his permanent Protection visa holder spouse, who entered Australia as an IMA, processing of an offshore Partner application will be given a lower priority and separation may be longer than 12 months ...

If you decide not to intervene, Mr BP is required to depart and separation, temporary or permanent, will be the lawful and predictable outcome of Australian law.

73. In its consideration of the offshore visa options available to Mr BP, the department states:

On the basis of the available information, he can depart and apply for a Partner visa offshore.

The approximate processing for this type of visa in Colombo is 12 months. As stated above, his Australian permanent resident partner sponsor is an IMA and the Partner visa application will be given a lower priority.

74. The Minister decided not to intervene in Mr BP's matter.

75. The Minister is not required to provide written reasons for his decision not to intervene in Mr BP's matter and, in this case, he did not. Therefore, it is difficult to know exactly what factors he took into account in reaching his decision.

9 The 2016 request for ministerial intervention

76. On 24 March 2016, Mr BP—now represented by Kah Lawyers—made a comprehensive second request to the Minister under ss 46A, 417 or 195A of the Migration Act submitting that key issues had not been considered by the Minister in his first request.

77. These included Mr BP's recently diagnosed mental health issues, details of his family situation with Ms BQ and Miss BR, the likely impact of his forced departure on the family unit and evidence of his integration into the Australian community.

78. The request also set out newly arisen circumstances in Sri Lanka that were said to give rise to further protection claims for Mr BP. This second submission requested that the Minister also consider exercising his powers under s 48B of the Migration Act to allow Mr BP to lodge a second protection visa application.

79. On 12 April 2016, the department assessed the repeat s 417 request against the *Minister's guidelines on ministerial powers (s 351, s 417, s 501)* and determined that it did not meet the guidelines for referral to the Minister.

80. On 22 April 2016, in a separate decision, the department stated that Mr BP's submission was assessed against the *Minister's guidelines—s48A cases and requests for s48B Ministerial intervention* and that it did not meet the guidelines for referral to the Minister under s 48B of the Migration Act.

81. The new protection claims, discussed further below, centred on information provided by Ms BQ's sister that she had recently told the Sri Lankan CID information about Ms BQ and Mr BP's marriage, believing incorrectly that they were both legally settled in Australia.

10 Non-refoulement

82. The primary non-refoulement obligation considered by Australia in assessing claims by asylum seekers is that found in article 33(1) of the Refugee Convention, which provides:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.⁴

83. Australia has similar obligations under the ICCPR, which are often referred to as ‘complementary’ to the protection obligations under the Refugee Convention.⁵ The rights contained in the ICCPR are ‘human rights’ for the purposes of the Commission’s inquiry function. This report focuses on whether there has been a breach of the ICCPR.

84. Article 7 of the ICCPR relevantly provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

85. In a series of cases, the United Nations Human Rights Committee (UN HR Committee) has found that signatories to the ICCPR are subject to a non-refoulement obligation in cases involving potential breaches of articles 6 and 7 of that Convention.⁶

86. In *Nakrash and Qifen v Sweden*, the UN HR Committee said that in order to determine whether there had been a breach of the non-refoulement obligation in respect of article 7 of the ICCPR there needed to be an assessment of:

whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Syria, there is a real risk that the author would be subjected to treatment prohibited by article 7.⁷

87. In *Pillai v Canada*, in a concurring decision, several UN HR Committee members emphasised that the proper test in relation to article 7 is to ask whether deportation or removal would necessarily and foreseeably expose a person to a ‘real risk’ of being killed or tortured.⁸ This is a broader test than that articulated in previous cases and focuses the inquiry on whether there is a ‘real risk’ to the deportee of torture or killing, not whether deportation would necessarily and foreseeably lead to such events occurring.

88. General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant summarised the position in the following way:

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁹

89. Both the non-refoulement obligation under the Refugee Convention and the equivalent obligation under the ICCPR are reflected in the terms of the Migration Act. Section 36 of the Migration Act provides that a criterion for a protection visa is that a person is either:
- a person in respect of whom Australia has protection obligations because the person is a refugee, or
 - a person in respect of whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.
90. 'Significant harm' is defined to include torture and cruel, inhuman or degrading treatment or punishment.¹⁰
91. Torture is the most reprehensible of the standards of treatment described in article 7 of the ICCPR. It involves the intentional infliction by a public official of severe pain and suffering, whether physical or mental, on another person for the purposes of obtaining information or a confession, punishing, intimidating or coercing the person, or for any other reason based on discrimination of any kind.¹¹
92. Cruel, inhuman or degrading treatment or punishment is a lesser standard than 'torture' but still is of a level of severity that could be described as 'heinous'.¹² The UN HR Committee notes that it is not necessary to draw sharp distinctions between whether treatment or punishment is cruel, inhuman or degrading with respect to whether article 7 has been breached.¹³ Some commentary suggests that these terms are arranged in descending order of severity.¹⁴
93. The kinds of cases in which findings of a breach of the prohibitions on cruel, inhuman or degrading treatment or punishment have been found by the UN HR Committee are summarised in the Commission's report into the complaint of *Nguyen and Okoye v Commonwealth* [2008] AusHRC 39 at [227]-[232].
94. For the purpose of this inquiry, the relevant question before me is whether, by its actions, the department exposed Mr BP to a real risk of torture or to cruel, inhuman or degrading treatment or punishment in contravention of article 7 of the ICCPR.

11 Claims for protection

95. In considering Mr BP's claims for protection, I have had access to the department's initial decision of 9 August 2013 regarding Mr BP's protection visa application, the decision of the RRT dated 9 March 2015 and the second request for ministerial intervention dated 24 March 2016.

11.1 The decision of the department

96. On 16 November 2012, Mr BP made an application for a protection visa claiming that he was a person to whom Australia owed protection obligations. Mr BP claimed protection on the basis of his fears of being killed or otherwise seriously injured by Sri Lankan authorities, in particular the CID, because of his race and imputed political opinion as a Tamil, as well as his dealings with the CID in 2006. He also claimed that he would face harm if he were returned to Sri Lanka as a 'failed' asylum seeker.
97. Mr BP claimed that, in April 2006, he was approached by a CID District Head about becoming an informant against the Liberation Tigers of Tamil Eelam (LTTE). Despite not being a member of the LTTE, he was expected to have knowledge of LTTE activities and members because he had lived in the Vanni region. He agreed to become an informant to avoid being jailed or physically harmed by the CID. However, after he failed to attend a number of arranged meetings, Mr BP claimed that he was apprehended, stripped naked and tortured by the CID. He also said that he was interrogated about his personal involvement with LTTE.
98. Following his interrogation, Mr BP claimed that he was pressured by the CID into signing a document in Sinhalese that implied that he was connected to the LTTE. After signing the document, he said that he was taken to court and then spent 14 days in jail before eventually being released on bail. While on bail, the CID offered to drop all charges in return for him becoming an active informant.
99. Mr BP agreed to this request but then left for Qatar approximately ten days later. He remained in Qatar for five and a half years until, in 2012, he returned to Sri Lanka following the end of the civil war. He claimed that the CID continued to look for him at his sister's house during his time in Qatar and also asked his neighbours of his whereabouts.
100. After returning to Sri Lanka from Qatar, he decided to leave again following a news report and general discussion in the Tamil community that people in his area had been abducted by the Sri Lankan authorities on suspicion of being connected to the LTTE and/or recently returning from overseas.
101. The delegate of the Minister did not have any concerns about Mr BP's credibility and accepted that his claims were true as far as he knew and believed. She also accepted that it was plausible that Mr BP was abducted, tortured and jailed by the CID in 2006 under suspicion of being associated with the LTTE.

102. While the delegate accepted that Mr BP had a genuine subjective fear of persecution from Sri Lankan authorities relating to his contact with the CID in 2006 and the reports of Tamils with suspected LTTE links being arrested, she was not satisfied that an objective risk of persecution in Sri Lanka still existed.
103. In her decision, the delegate stated that available country information indicated that Tamils were not presently subject to a real chance of persecutory conduct by the Sri Lankan authorities purely on account of being Tamil.
104. The delegate was also not satisfied that, because of the events in 2006, Mr BP had a criminal record that would attract the interest of authorities. In reaching this conclusion, she placed reliance on the fact that, since 2006, Mr BP had indicated that he had been able to travel within, and outside, Sri Lanka through government checkpoints without experiencing any problems from the authorities.
105. The delegate also dismissed Mr BP's claims of being at risk of torture as a 'failed' asylum seeker by stating that he did not have a sufficiently high profile as political activist or someone known or imputed to be associated with the LTTE to fall into the category of individuals who might be at risk. She stated:
- I accept the information that Tamils who were activists whilst living abroad or who were linked to the LTTE may face a risk of being detained and tortured if returned to Sri Lanka. However the applicant displays neither of these traits as discussed in the previous section.
- As stated above, I am not satisfied the applicant has a criminal profile on the basis of his imputed political opinion. Similarly, I do not accept the applicant fits the profile of a political activist given he has never expressed any actual or intended involvement with political groups or activities within or outside of Sri Lanka.
106. Consequently, the delegate decided that she was not satisfied that Mr BP was a person to whom Australia owed protection obligations and refused to grant him a protection visa.
107. On 20 August 2013, Mr BP applied to the RRT for review of the decision.

11.2 The decision of the Refugee Review Tribunal

108. On 9 March 2015, the Tribunal upheld the decision of the delegate.
109. Unlike the delegate, the Tribunal had concerns about Mr BP's credibility stating that his evidence about material parts of his story was 'confused, vague and inconsistent with other claims that he has previously advanced'.
110. Consistent with the delegate, the Tribunal was not satisfied that—given available country information—Mr BP was at risk of suspicion of holding pro-LTTE or anti-governmental political opinions or persecution merely because he was a young Tamil male who had lived in areas once under LTTE control.
111. The Tribunal stated that, almost six years after the defeat of the LTTE and the end of the fighting, the security situation in Sri Lanka had stabilized and the risks posed to Sri Lankan citizens on the basis of only their Tamil ethnicity had been substantially reduced.

112. In reaching this conclusion, the Tribunal made reference to the 2012 United Nations High Commissioner for Refugees (UNHCR) 'Eligibility Guidelines' which, in contrast to the 2009 version, no longer referred to a presumption of eligibility for protection for Sri Lankans simply on the grounds that they were Tamil and originating from the North of the country. The Tribunal acknowledged, however, that the Eligibility Guidelines still recommended a merit-based assessment based on individual circumstances as Tamil ethnicity could increase the vulnerability of people within other 'risk profiles' whose protection claims warranted particularly close attention.
113. The Eligibility Guidelines listed these 'risk profiles' as:
- ...persons suspected of certain links with the Liberation Tigers of Tamil Eelam (LTTE); (ii) certain opposition politicians and political activists; (iii) certain journalists and other media professionals; (iv) certain human rights activists; certain witnesses of human rights violations and victims of human rights violations seeking justice; (vi) women in certain circumstances; (vii) children in certain circumstances; and (viii) lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals in certain circumstances.
114. In dismissing Mr BP's claims that he would be at risk of harm on return to Sri Lanka because he had left his country unlawfully and sought asylum in Australia, the Tribunal also referenced a report prepared by the United Kingdom's Upper Chamber. This report was prepared in the context of appeals against the planned forced return of a group of Tamils from the United Kingdom and identified the categories of persons currently 'at real risk of persecution or serious harm on return to Sri Lanka' as:
- (a) Individuals who are, or are perceived to be, a threat to the integrity of Sri Lanka as a single state because they are, or are perceived to have a significant role in relation to post-conflict Tamil separatism within the diaspora and/or a renewal of hostilities within Sri Lanka; (b) Journalists (whether in print or other media) or human rights activists who, in either case, have criticised the Sri Lankan government, in particular its human rights record, or who are associated with publications ...
115. It was accepted by both the delegate and the Tribunal that individuals who fell into certain 'categories of persons' might still be at risk of persecution or serious harm upon return to Sri Lanka. However, both rejected the notion that Mr BP fell into one of these categories.

12 New circumstances relating to further protection claims

116. On 26 March 2016, Mr BP submitted a second request for ministerial intervention and made claims for protection not previously considered by the department or the Minister. These claims were based on Mr BP's relationship with Ms BQ becoming recently known to Sri Lankan authorities in February 2016.
117. Mr BP requested that the Minister exercise his power under s 48B of the Migration Act to lift the bar preventing him from making a second protection visa application so that his changed circumstances and new information could be properly considered.

118. Attached to Mr BP's second request for ministerial invention was a statutory declaration by Ms BQ, dated 28 January 2011, that accompanied her successful application for a protection visa in 2011 and a more recent statement by Ms BQ dated 23 March 2016 setting out her family's recent interactions with the CID.
119. These documents outline how, after being displaced by the civil war, Ms BQ and her family lived in the Chettikulam refugee camp. This was necessary because her family home had been destroyed during bombings that also killed members of her family. Following interrogation and mistreatment by a CID guard, Ms BQ escaped the camp and eventually left Sri Lanka for Singapore and then Malaysia.
120. In Malaysia, Ms BQ boarded a boat bound for Australia but it soon began to sink and Malaysian authorities intercepted it. This precipitated a diplomatic incident whereby the Sri Lankan government requested that the Malaysian government return the 75 people on the boat who it said were LTTE members.
121. This incident attracted significant media attention from international news outlets and the group remained on the boat for three to four days. Because Ms BQ could speak English, she became the spokeswoman for the group and described the suffering that she had experienced in Sri Lanka under the regime. As a result, friends in Sri Lanka and London reported seeing her photo on television, in newspapers and on the internet. After a number of interviews, the Malaysian government decided that the group were genuine refugees and should not be returned to Sri Lanka and released them into the care of the United Nations. This decision attracted significant media attention and Ms BQ told further news outlets about her experiences in Sri Lanka.
122. In her statutory declaration, Ms BQ stated that two of her brothers had been severely tortured by the Sri Lankan authorities and she feared that she would also be killed or tortured if returned to Sri Lanka because of her heightened profile and her public statements criticising the Sri Lankan regime.
123. On 11 September 2012, Ms BQ was granted a protection visa following a decision by the department that it was satisfied that she was a person to whom Australia owed protection obligations.
124. In her statement dated 23 March 2016, Ms BQ claimed that the CID has continued to show interest in her over the years and has repeatedly asked her family about her. She was unable to go to her mother's funeral in 2014 because she suspected that the CID would be there looking for her and she was told that CID officers did indeed attend.
125. Ms BQ also stated that the CID visited her sister's house in February 2016 asking questions about her. Believing incorrectly that both Ms BQ and Mr BP were secure in Australia, her sister told the CID about her marriage to Mr BP.
126. This appears to be confirmed by Ms BQ's sister where she says in a translated statement dated 4 April 2016 that 'I gave their details to Investigation Division with the hope that they are living safely in Australia'.

127. In his second request for ministerial intervention, Mr BP claimed that given this recent change in circumstances, he now feared being subject to persecution by the CID on the basis of his relationship to his wife, or that the CID would attempt to use him as leverage to get to Ms BQ. He claimed that he feared being arrested, abducted, tortured and killed by the CID as a result of this association.
128. On 22 April 2016, the department declined to refer Mr BP's request to the Minister for his consideration. The letter stated:

Your case was assessed against the Minister's *Guidelines – s48A cases and requests for s48B Ministerial intervention*, however it did not meet those Guidelines, and therefore was not referred to the Minister for consideration under section 48B.

Your request has now been finalised.

12.1 The Minister's Guidelines for s 48A cases and requests

129. In conducting this inquiry, I have had access to a copy of the relevant Minister's Guidelines (Guidelines) that applied at the time the decision was made not to refer Mr BP's matter to the Minister.
130. The stated purpose of the Guidelines, which came into effect on 19 April 2016, is to guide assessing officers in considering whether to refer requests for ministerial intervention under s 48B of the Migration Act—such as the one made by Mr BP—to the Minister for consideration.
131. The Guidelines make clear that an assessing officer should not engage in a complete assessment of whether the person is owed protection obligations under s 36(2) of the Migration Act. An assessing officer's responsibility is to consider whether the information provided in the request *may* engage Australia's protection obligations and consequently be assessed fully by a protection visa assessing officer through a new protection visa application.
132. Under the heading 'When to refer requests to the Minister' it states:
- A s48B request should be referred to the Minister for consideration if it contains additional information which is likely to enhance the person's chances of making a successful claim for protection under s36(2) of the [Migration] Act.
133. It then instructs that a person's chance of making a successful claim for protection is likely to be enhanced if the additional information provided:
- has not already been assessed by the department or a review body
 - appears to be credible, and
 - is related to protection obligations under s 36(2) of the Act.
134. If the assessing officer considers that the request meets the Guidelines, a submission should be prepared for the Minister asking for a decision on the request.

135. Pursuant to the Guidelines, additional information should be divided into two categories:
- claims arising as a result of changed conditions or circumstances since the original protection visa application, or
 - other claims raised by the person (which may or may not have been known to the person during the original protection visa process).
136. Part 33 of the Guidelines explicitly recognises that protection claims may arise as a result of a change in a person's circumstances that has occurred in Australia. It provides relevant examples such as:
- a change in family composition or a family breakdown
 - family members expressing views or beliefs, or being involved in activities, or
 - the person or their family has been the subject of media attention.
137. Part 33 also provides that, in order to determine whether the person has an enhanced chance of making a successful claim for protection, the assessing officer will need to consider:
- whether the changed circumstances are likely to have come to the attention of the authorities in the person's country of origin, and
 - how the changed circumstances are likely to be viewed by those authorities.
138. Part 36 allows assessing officers to undertake investigations to satisfy themselves of the veracity of the claims made in the additional information.
139. Part 37 states that, while assessing officers are required to assess whether the information presented by the person is credible, this does not involve the same level of testing that is required in a protection visa assessment.
140. Part 39 of the Guidelines states that, while officers should not uncritically accept all unsubstantiated claims, the person should generally be given the benefit of the doubt if:
- the new information is generally consistent with country information
 - there is no other objective evidence to discount the claims, and
 - there is no reasonable prospects of obtaining further information.

12.2 Consideration

141. The department initially provided no reasons for why Mr BP's request for ministerial intervention was considered as not meeting the Guidelines. The relevant letter simply asserted that his circumstances did not and that, consequently, his request had been finalised without referral to the Minister.

142. When asked by the Commission to respond to Mr BP's claim that the decision to require him to leave Australia for Sri Lanka would amount to cruel, inhuman or degrading treatment or punishment under article 7, the department stated that it would prefer to rely on established factual information and would not be responding to questions of the alleged breach at this stage.
143. Following the issuing of my preliminary view on 2 February 2018, the department provided the Commission with a copy of the s 48 Guideline assessment decision relating to Mr BP.
144. Relevant to Mr BP's new claims of an increased risk of harm due to his association with his wife, the decision said:
- In relation to his new claims that he is at risk of harm in Sri Lanka due to his association with his wife the department has concerns that Mr BP has not provided a plausible explanation as to why he delayed to present these claims until now, when he married Ms BQ in November 2013 and had the opportunity to present these claims during the Tribunal hearing in January 2015.
 - The Tribunal found that he did not have an adverse profile in Sri Lanka. He has not explained why his relationship with his wife is a mitigating factor or exposes him to risk of harm now or in the future such as to enhance his chances of applying for a Protection visa in Australia. Similarly, his claims that CID officers are aware of his connection to his wife and have recently visited his wife's family in Sri Lanka remain unsubstantiated.
 - In light of the very serious credibility concerns highlighted by the Tribunal and the delay in raising such claims the department has assessed that his claimed connection to his wife or any harm arising out of his relationship has not increased his profile such that he would suffer serious or significant harm on his return to Sri Lanka. Accordingly, this request is not considered to meet the Minister's guidelines for referral.
 - There is no credible new information that would enhance Mr BP's chances of making a successful Protection (Subclass 866) visa application.
145. Regarding the first point, Mr BP's new claims for protection, as I understand them, only arose in February 2016 when his sister-in-law allegedly told the Sri Lankan CID that he had married Ms BQ and that they were living together in Australia. This linked Mr BP and Ms BQ in the eyes of the Sri Lankan authorities and occurred after the delegate's decision regarding his protection visa, after the decision of the RRT and after his first request for ministerial intervention.
146. With reference to the second point, in my view, it is not accurate to say that Mr BP did not explain why his relationship with his wife exposed him to a risk of harm.

147. In submissions to the Minister dated 24 March 2016, which prompted the s 48B Guideline assessment, Mr BP's representatives stated:

Ms BQ's attached statement outlines that that her sister gave the CID full information about Mr BP and Ms BQ's relationship with him. This has placed Mr BP in a situation of grave danger if he were to return to Sri Lanka now, in addition to his previously expressed fears of persecution on the basis of his Tamil ethnicity and imputed political opinion, he fears being subject to persecution by CID on the basis of his relationship to his wife Ms BQ, both because he will fall under the same umbrella of suspicion as Ms BQ, and because the CID will attempt to use him as leverage to get to Ms BQ. Mr BP fears being arrested, abducted, tortured and killed by the CID as a result of this association.

148. This directly addressed why his relationship with his wife placed him at increased risk of harm.

(a) Administrative error by the department

149. As is evident in the s 48B Guideline assessment, the decision maker placed weight on the fact that Mr BP's new claims for protection were 'unsubstantiated'.

150. In response to issues raised in my preliminary view, the department alerted the Commission to an apparent irregularity with the material before it, stating:

To the extent that the AHRC's preliminary view relies upon a translated statement from Mr BP's sister-in-law in support of new claims having been provided to the assessor, there is no information on departmental systems to indicate that such a statement was included with Mr BP's s 48B request. Nor is there information to indicate that the statement was subsequently received after the request was made prior to the finalisation of the s 48B request.

151. This was a reference to a translated statement by Ms BQ's sister which, alongside statements from Mr BP's brother-in-law and Mr BP's sister, had been provided to the Commission by Mr BP's legal representatives and supported Mr BP's claims that the Sri Lankan authorities had recently been alerted to Mr BP's relationship with Ms BQ.
152. These three statements—translated by an NAATI-accredited translator—were attached to a letter addressed to the Minister dated 6 April 2016 and said to underline and provide corroboration for the ongoing attention being paid to Mr BP by the CID and its renewed interest in his whereabouts following its discovery of his relationship with Ms BQ. The letter also included submissions from Mr BP's legal representative about the relevance of these documents to the law.
153. On 24 March 2016, Mr BP's legal representatives, Kah Lawyers, made a comprehensive request for ministerial intervention for Mr BP. In the request, Kah Lawyers foreshadowed its intention to provide corroborating evidence from Mr BP and Ms BQ's relatives in Sri Lanka. The letter stated:

We note that there are several further documents that we intend to provide in relation to this request, including further corroborating evidence from Mr BP and Ms BQ's relatives in Sri Lanka [which must not only be obtained but translated], further evidence for Mr BP's treatment history and other documentation. As a result, we advise that we will be providing further evidence, and request that no decision be made on this request without first consulting our office in relation to whether we will be providing further documents.

154. On 6 April 2016, Kah Lawyers emailed the second letter and the translated statements (eight pages in total) to the same email address that it sent its initial request for ministerial intervention. I understand that this is the correct email address for correspondence of this nature.
155. Despite being provided to the department nine days prior to the initial decision, and 16 days prior to the decision's confirmation by a supervisor, this letter, and its relevant attachments, were never provided to the relevant decision makers involved in Mr BP's s 48B Guideline assessment. This means that a decision was made without the benefit of relevant information.
156. This was confirmed by the department on 24 January 2019 when it responded to a request for further information from the Commission as follows:
- A further check of departmental systems has found that an email was received in the NSW Ministerial Intervention team mailbox on 6 April 2016 from Kah Lawyers. However, this additional information was not attached to Mr BP's departmental file, and as such, was not available to the department officer making the section 48B assessment.
- The Department can therefore confirm that the request for Ministerial Intervention under section 48B was decided by the departmental officer without reference to this information provided by Kah Lawyers on 6 April 2016.
157. No explanation has been provided to the Commission about why this additional information was not attached to Mr BP's departmental file. It appears that it might have been administrative oversight or error.
158. The department is frequently called upon to make difficult decisions in the context of protection visa applications, particularly when applicants claim that they face the risk of torture or death if they are returned to their home countries. Incorrect decisions can have grave consequences. Given this, in the context of protection applications, it is absolutely critical that the department has robust systems in place to ensure that received information is properly placed before relevant decision makers.
159. In considering Mr BP's protection visa application, both the delegate and the RRT accepted that Sri Lanka remained a place of risk of torture for individuals who fell into particular categories of individuals—including people who had spoken out in the media against the Sri Lankan regime. However neither was satisfied that Mr BP fell into one of these categories, or that he otherwise had a sufficiently high 'risk profile' to attract the attention of the Sri Lankan authorities.
160. Given the significance of Mr BP's 'risk profile' to the delegate's decision and the decision of the RRT, in my view, it is clearly relevant to an assessment of whether his circumstances engaged Australia's non-refoulement obligations if his 'risk profile' increased subsequent to these decisions.
161. Ms BQ's public statements about her experiences under the Sri Lankan regime, broadcast around the world, appear to place her within the category of individuals that available country information suggested face a real risk of torture upon return to Sri Lanka at the time. If accepted, the information provided by Ms BQ suggests that the CID continued to enquire actively after her years after her departure from the country.

162. In his second request for ministerial intervention, Mr BP referenced two reports suggesting that Sri Lankan authorities have been known to target the family members of Tamils considered suspicious by the Sri Lankan government.¹⁵
163. The most recent 'UNHCR Eligibility Guidelines for Sri Lanka', issued in December 2012, note that a person's real or perceived links with the LTTE may give rise to a need for international refugee protection, including persons with family links or otherwise closely related to persons with particular profiles.¹⁶
164. In a country information report prepared by the Commonwealth Department of Foreign Affairs and Trade (DFAT) dated 24 January 2017, it states: 'DFAT is aware of but cannot verify reports where close relatives claim to have been arrested and detained because of their family connections with former LTTE members'.¹⁷
165. Recalling that the s 48B Guidelines provide that the role of the assessing officer is simply to ascertain whether the new information *may* engage Australia's protection obligations, it is my view that Mr BP's request should have been referred to the Minister for consideration under the Guidelines.
166. The Guidelines clearly contemplate situations such as Mr BP's where the actions of family members might affect the nature of a person's 'risk profile'. I am satisfied that, as per part 24 of the Guidelines, the change in Mr BP's personal circumstances occurred after the previous application was decided, appeared to be credible and potentially changed Mr BP's risk profile in a way that *may* have engaged Australia's protection obligations. Furthermore, this conclusion appears compatible with the direction in the Guidelines to give people the benefit of the doubt if the new information is generally consistent with available country information.
167. Furthermore, while it is impossible to know whether the further information provided to the department on 6 April 2016 would have ultimately changed the decision, given the decision's focus on credibility—and recognising that the missing information was corroborative in nature—it is reasonable to consider that it could have had that effect.
168. It is my view that Mr BP raised new protection claims that the Minister should have been given the opportunity to consider. On the material before me, I am unable to be satisfied that the department conducted an assessment of Mr BP's changed 'risk profile' sufficient to properly assure itself that deportation or removal would not expose Mr BP to a 'real risk' of being killed or tortured.
169. I consider that the decision of the department to finalise Mr BP's s 48B request, without referring it to the Minister for consideration, appears to be inconsistent with the Guidelines and raised a real risk that he would be subject to treatment prohibited by article 7 of the ICCPR. As a result, the decision was inconsistent with, or contrary to, Mr BP's human rights.

12.3 Removal vs 'voluntary' departure

170. Given my view above, I must now consider the effect of Mr BP's 'voluntary' departure from Australia in relation to his complaint under article 7 of the ICCPR.
171. On 24 July 2017, the Commission asked Mr BP's legal representatives if he still wanted to press his complaint under article 7, given his voluntary departure for Sri Lanka.
172. On 16 August 2017, Mr BP's legal representatives stated:
- It is correct that Mr BP voluntarily departed Australia in August 2016 rather than waiting to be removed. We are instructed that this was not because he was not at risk of torture or cruel, inhumane or degrading treatment or punishment in Sri Lanka, but rather because he did not have any other choice. He realized that he had exhausted his legal options to remain in Australia and if he did not voluntarily depart, he would be detained and removed. Given his desire to respect Australian law and return to Australia on a partner visa, voluntarily departing was the lesser of two evils.
173. As discussed above, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on State Parties to the Covenant states:
- ... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.¹⁸
174. On 29 August 2016, Mr BP departed Australia for Sri Lanka following the refusal of his second request for ministerial intervention.
175. Accepting the conventional meaning of the words 'extradite', 'deport' and 'expel', I am satisfied that the department cannot be said to have undertaken any of these three actions.
176. However, Australia's obligations under article 7 also extends to it not 'otherwise removing' a person from its territory in circumstances where there are substantial grounds for believing that it would expose the person to a 'real risk' of being killed or tortured. Consequently, I must consider whether, in the circumstances, the actions of the department can be said to have 'otherwise removed' Mr BP from Australia.
177. By letter dated 12 April 2016, the department told Mr BP that his repeat request for ministerial intervention under s 417 had been finalised and that 'the Minister expects a person whose request is finalised to leave Australia unless there are other immigration matters ongoing'.
178. By letter dated 22 April 2016, the department informed Mr BP that his request for ministerial intervention under s 48B had been finalised without referral to the Minister. This was his last ongoing immigration matter.

179. On 17 June 2016, in response to inquiries from the Commission, the department stated that:
- There are no current active removal plans for Mr BP at the moment. Mr BP is subject to detention and removal if he does not voluntarily depart Australia. As at today's date, Mr BP is unlawful in the community.
180. The department clearly has the power under the Migration Act to remove unlawful non-citizens from Australia and it is a power that it frequently exercises.
181. Pursuant to s 189(1) of the Migration Act, an officer *must* detain a person whom they know, or reasonably suspect, to be an unlawful non-citizen. In addition, under s 198 of the Migration Act, officers of the department *must* remove detained asylum seekers whose protection visa applications have been finally refused 'as soon as reasonably practicable'.
182. In considering the phrase 'or otherwise remove', it is illustrative to recall that Australia's primary non-refoulement obligation in assessing claims by asylum seekers is that found in article 33(1) of the Refugee Convention.
183. The point was made by the American representative during the drafting of the Refugee Convention that '[article 33's] sole purpose was to preclude the forcible return of a refugee to a country in which he feared both the persecution from which he had fled and reprisals for his attempted escape.'¹⁹ Hathaway states that 'this makes clear that the duty under article 33 is to avoid certain *consequences* (namely, return to the risk of being persecuted) whatever the nature of the actions which lead to that result' [emphasis in original].²⁰
184. Goodwin-Gill indicates that article 33 might be breached by 'any measure, whether judicial or administrative, which secures the departure of an alien'.²¹
185. Hathaway also recognises that:
- refoulement in practice frequently arises when refugees are coerced to accept 'voluntary' repatriation. At least where refugees are left with no real option but to leave, defacto enforced departure is a form of refoulement.²²
186. In its response to my preliminary view, the department pointed to Mr BP's engagement with the assisted voluntary return (AVR) program through the International Organisation for Migration (IOM) as evidence that his departure was 'voluntary' in the necessary sense. This is because the IOM does not assist with forced departures. The AVR program is funded by the government and facilitates the removal of eligible applicants who have decided to return home. The department also indicated that Mr BP had received money and in-kind assistance as part of his reintegration package.
187. Mr BP's representatives submitted that 'we do not accept that a departure that is voluntary in name is therefore voluntary in nature' for the purposes of article 7. I am inclined to agree.
188. At the time of his departure for Sri Lanka, Mr BP had exhausted all of his legal avenues of appeal in Australia. He was living as an unlawful non-citizen in the community and officers of the department were subject to a statutory duty to take him into immigration detention and remove him 'as soon as reasonably practical'. Mr BP has a wife and child in Australia and he wanted to return on a partner visa, a course of action that required further engagement and cooperation with the department.

189. The department had explicitly told Mr BP that he was expected to leave. In my view, Mr BP's decision to depart—on pain of detention and removal—in circumstances where the department not only had the power, but also the statutory obligation to remove him, cannot properly be considered an act of free will or real choice. Furthermore, his removal from Australia was facilitated by a government-funded program. Given these circumstances, in my view, Australia can be said to have 'otherwise removed' Mr BP from its territory for the purposes of article 7 of the ICCPR.

13 Arbitrary interference with the family

13.1 Article 17 of the ICCPR

190. Article 17 of the ICCPR provides:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.

13.2 Family

191. To make out a breach of article 17 of the ICCPR, complainants must be identifiable as a 'family'.
192. In its General Comment 16, the UN HR Committee states:
- Regarding the term 'family', the objectives of the Covenant require that for the purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.²³
193. The UN HR Committee has confirmed that, while the term 'family' is to be interpreted broadly,²⁴ an effective family life or family connection must still be shown to exist.²⁵
194. Mr BP and Ms BQ lived together as husband and wife from November 2013, when they married, until Mr BP departed for Sri Lanka on 29 August 2016. Miss BR is their biological daughter. There is clear evidence of an effective family life as they shared their lives together while in Australia, have economic ties, mutual friends and a commitment to being together in the future. This is evidenced by the numerous documents submitted in support of their ministerial intervention requests.
195. As a nuclear family consisting of married parents and a child, I am satisfied that Mr BP, Ms BQ and Miss BR are a 'family' for the purposes of article 17 of the ICCPR.

13.3 Interference

196. In *Aumeeruddy-Cziffra et al v Mauritius*, the UN HR Committee states:

The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17(1) applies also when one of the spouses is an alien.²⁶

197. Following the decision of the Minister not to intervene in Mr BP's matter on 3 March 2016—and the failure of his subsequent requests for ministerial intervention—Mr BP was obliged by domestic law to leave Australia and make his partner visa application offshore in Sri Lanka.
198. Ms BQ and Miss BR are unable to accompany Mr BP to Sri Lanka—or visit him while he is there—because Ms BQ fears for her safety in Sri Lanka. This means that it is not open to Mr BP, Ms BQ and their daughter to share a common residence and live together as a family in Sri Lanka.
199. I am satisfied that the requirement that Mr BP lodge his partner visa application offshore, and remain outside of Australia while it is being processed, constitutes a relevant 'interference' with his family life.
200. The more significant examination is whether this interference is 'arbitrary' under article 17 of the ICCPR.

13.4 Arbitrary

201. It is significant to note that the BP family complain of a period of temporary separation while Mr BP's partner visa is processed in Sri Lanka. There are limited cases that directly address temporary separation and the rights of the family. Discussion of family life in article 17 of the ICCPR has typically arisen in cases where States have made final decisions to permanently deport long-term residents on character grounds or because they have been found to be living unlawfully in the State.²⁷
202. The family separation jurisprudence of both the UN HR Committee and the European Court of Human Rights (ECtHR) begins from the principle that, as a matter of well-established international law and subject to their treaty obligations, States enjoy the right to control the entry, residence and expulsion of non-citizens.²⁸ Both the UN HR Committee and the ECtHR have stated that it is likely only in 'extraordinary'²⁹ or 'exceptional'³⁰ circumstances that the removal of a non-national family member will constitute arbitrary interference with the rights of the family.
203. This grants States a wide margin of discretion in which to regulate their migration system and control the entry and deportation of foreigners.

13.5 The UN HR Committee and the ICCPR

204. In its General Comment on article 17, the UN HR Committee confirmed that a lawful interference with a person's family may nevertheless be arbitrary, unless it is in accordance with the provisions, aims and objectives of the Covenant and is reasonable in the particular circumstances.³¹

205. In *Canepa v Canada*, the UN HR Committee discussed what could be seen to constitute 'arbitrary' interference:

The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.³²

206. It follows that the prohibition against arbitrary interference with family incorporates notions of reasonableness. In relation to the meaning of reasonableness, the UN HR Committee stated in *Toonen v Australia*:

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.³³

207. Whilst the *Toonen* case concerned a breach of article 17(1) in relation to the right to privacy, these comments apply analogously to an arbitrary interference with the family.

208. In *Winata v Australia*,³⁴ the UN HR Committee made findings that Australia would breach article 17 of the ICCPR if it deported two parents who had been living unlawfully in Australia because it would involve substantial changes to their long-settled family life.³⁵ In this matter, the applicants' 13 year-old Australian-born son, Barry, was an Australian citizen who did not speak Indonesian and had never visited Indonesia. The crucial factor for the majority in *Winata* was the 13-year length of Barry's lifelong, and subsequently lawful, residence in Australia and the detrimental effects of either having to leave the only State that he had ties with or remain in Australia without his parents.

209. Significantly, the majority in *Winata* also affirmed that:

It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances.³⁶

210. The exceptional nature of the circumstances in *Winata* was further confirmed by the UN HR Committee in its subsequent decision of *Sahid v New Zealand*. In *Sahid*, the complainant had been living in New Zealand for 11 years with his adult daughter and grandson and the State refused to grant him a residence permit. The UN HR Committee stated:

... the Committee notes its earlier decision in *Winata v Australia* that, in extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness ... in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of the author was not contrary to his rights ...³⁷

211. Joseph and Castan state that it is 'clear' that parents do not have a right to be free from deportation from a State simply because their minor children are citizens of that State.³⁸

212. In the case of *Gonzalez v Guyana*, the UN HR Committee found that Guyana had breached Ms Gonzalez's family rights under article 17 of the ICCPR by refusing to grant her husband citizenship or a work permit.³⁹ As Ms Gonzalez's husband was a Cuban exile, they were not able to live in his country of citizenship and he was not able to legally live or work in Guyana. A final decision on his residency had technically not been made in his matter because he had a right of appeal to the Court of Appeal of Guyana, as well as to the East Caribbean Court of Justice. However the UN HR Committee made a decision that Ms Gonzalez had effectively exhausted her remedies at domestic law because the matter had been ongoing for at least seven years and, despite prompting by Ms Gonzalez, the relevant court had failed to write up its reasons for two years. These written reasons were necessary for any further appeal.

213. *Gonzalez v Guyana* bears some similarities to the present complaint. It involves an application by a spouse for residence that has not been finally determined, a physical separation of husband and wife during the processing, and an accepted reason why the family cannot live together in the non-resident's country of citizenship.

214. In my view, however, *Gonzalez v Guyana* can still be clearly distinguished on its facts. An affirmative decision was made by the relevant Minister in Guyana to deny Ms Gonzalez's husband a residence permit and the appeal process had taken at least seven years by the time it was considered by the UN HR Committee. The reasons given by the Minister for denying the husband a residence permit had been found by the High Court of Guyana to be 'unreasonable, arbitrary, in breach of principles of natural justice, and based on irrelevant considerations'.⁴⁰ The High Court remitted the decision back to the Minister for consideration. However, the Minister ignored the court's directions for many months before eventually making the same decision on similar grounds. After the complainant initiated a further court challenge to the second decision of the Minister, the matter was inexplicably delayed in the courts for many years.

215. In her individual concurring opinion, UN HR Committee member Ruth Wedgwood identified that:

... the Committee has not had occasion to address the broader substantive question whether the Covenant creates an unvarying obligation, as such, for a State Party to allow residence and naturalisation to any recognised spouse of a citizen, when there is no other apparent place where they may reside together.⁴¹

216. This open legal question might become more relevant to the BP family's circumstances over time, if a final decision is made about Mr BP's residency application that prevents them from living together as a family in Australia.

13.6 Article 8 and the European Court of Human Rights

217. Article 8 of the European Convention on Human Rights provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴²

218. While article 8 of the European Convention on Human Rights is drafted in different terms from article 17 of the ICCPR, the jurisprudence of the ECtHR is helpful in considering how the human rights of the family are to be balanced against a State's prerogative to regulate its immigration system.

219. The ECtHR has frequently held that it is important to consider 'whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life within the host state would be precarious'.⁴³ In such circumstances 'it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8'.⁴⁴

220. The ECtHR has also held recently in *Jeunesse v The Netherlands* that:

... in principle, Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.⁴⁵

13.7 Decision of the Minister

221. On 3 March 2016, the Minister personally considered Mr BP's circumstances and declined to intervene in his matter. In the referral submission from the department to the Minister, the following relevant information was included, and presumably considered, by the Minister:

- a) Mr BP was barred from making a valid onshore visa application unless the Minister intervened.
- b) Mr BP is married to Ms BQ, who is a permanent resident of Australia.
- c) Mr BP and Ms BQ have a daughter, Miss BR, who was born in Australia in 2015 and is an Australian citizen.
- d) Ms BQ holds a protection visa and is not able to travel to Sri Lanka out of fear for her safety.

- e) Mr BP has a viable offshore Partner (Subclass 309/100) visa pathway to residency.
 - f) As Mr BP will be sponsored by Ms BQ, who herself entered Australia as an irregular maritime arrival, processing of his application will be given a lower priority and separation may be longer than 12 months.
 - g) The department acknowledged that articles 17 and 23 of the ICCPR were applicable and accepted that Mr BP's departure and separation from the family may cause emotional and financial hardship to the family.
222. In making his decision, it appears that the Minister had all the relevant information before him to give due consideration to Mr BP's family connections and still elected not to intervene.

13.8 Consideration

223. It is a difficult reality for many mixed-citizenship couples that, if the non-Australian member is unable to secure a valid visa to live in Australia during the processing of the partner visa application, the couple may be required to live in different countries or face a temporary period of separation. This is not an unusual or exceptional occurrence.
224. Following the refusal of his protection visa and the lapse of his last bridging visa in 2015, Mr BP had been living in Australia as an unlawful non-citizen until his departure in August 2016. It is apparent from the referral submission to the Minister that the department would likely justify the requirement that Mr BP make his partner visa application offshore as necessary for maintaining the integrity of Australia's migration system and reflecting Australia's sovereign right to enforce its ordinary migration laws against unlawful non-citizens.
225. Recalling *Winata v Australia*, in order to avoid a characterisation of arbitrariness, a State may be required to provide justification beyond the mere enforcement of its immigration law if there are exceptional circumstances, such as substantial changes to long-settled family life. Miss BR is three years old and was conceived using in vitro fertilisation (IVF) at a time when both parents knew that Mr BP's immigration status within Australia was precarious.
226. On 31 October 2017, Mr BP's legal representative provided me with a copy of a counselling report indicating that Ms BQ is suffering from acute and severe symptoms of depression because of Mr BP's absence. It is unquestionably a very difficult time for Ms BQ and I am sympathetic to the problems that she is facing raising Miss BR without Mr BP's presence. I also recognise that, unlike with most couples, it is not an option for Ms BQ to return to Sri Lanka to live with, or visit, Mr BP during the visa processing time. However, I am not satisfied that either of these issues amounts to an 'extraordinary' circumstance sufficient to render the requirement that Mr BP make his partner visa application offshore 'arbitrary' under article 17 of the ICCPR.
227. In my view, cases concerning the temporary separation of a family member for the purposes of regularising his or her immigration status are of a different kind from ones involving the permanent deportation of long-settled families with deeply integrated Australian citizen children.

228. However, following the authority of *Gonzalez v Guyana*, the fact that Ms BQ is unable to return to Sri Lanka might arguably become an exceptional circumstance over time if Mr BP is denied permanent residency in Australia, or if the processing of his application is unreasonably delayed. This is because I am not aware of any third party state where Mr BP, Ms BQ and Miss BR can live together securely as a family. However, there is nothing in the material before me to suggest that Mr BP will not be granted a partner visa on the basis of his marriage to Ms BQ.
229. That said, I have been advised by Mr BP's representatives that, to their knowledge, Mr BP's partner visa application was 'decision-ready' on 6 December 2018 and that, given that it was lodged on 30 August 2017, as at April this year, it will exceed the Department's processing times for 90% of Partner visa applications. This suggests that, while still within the reasonable range, it appears to be reaching the outer limit of typical processing times for a visa of this kind.

14 Article 23 of the ICCPR

230. Article 23 of the ICCPR provides that the family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State'.
231. While article 17(1) of the ICCPR guarantees a right to be free from arbitrary interference with one's family, article 23 imposes a positive obligation on State parties in guaranteeing families positive rights of protection, such as the provision of appropriate financial assistance or tax concessions.⁴⁶
232. Joseph and Castan describe the obligation of the State party under article 23 as positive yet derogable, explaining that 'despite the exalted position it confers on "the family" as a fundamental societal institution, article 23 does not act as a barrier to protect "the family" from legitimate interference ...'.⁴⁷
233. Joseph and Castan also recognise that, 'despite an apparent qualitative difference between the article 17 and 23 guarantees, most cases regarding family rights have concerned violations, or exonerations, of States under both articles'.⁴⁸
234. Given my above conclusion that, at the present time, the interference with Mr BP, Ms BQ and Miss BR's family rights is legitimate and non-arbitrary, my view is that there has also not been a breach of article 23 of the ICCPR in this matter.

15 Convention on the Rights of the Child

15.1 Article 3

235. Article 3 of the CRC requires that in all actions concerning children, their best interests must **be a primary consideration** of the decision maker.
236. The United Nations Children's Fund (UNICEF) Implementation Handbook for the CRC provides the following guidance on article 3:
- The wording of article 3 indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests ...
- The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration.⁴⁹
237. Article 45 of the CRC recognises the special competence of UNICEF and other United Nations organs to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.
238. Miss BR engages article 3 of the CRC as she is under 18.⁵⁰ Consequently, her best interests must be the subject of active consideration by the department in making a relevant decision. However, her best interests may be balanced with other considerations, such as the need to uphold the integrity of Australia's migration system.
239. The starting point is to identify what the best interests of the child indicate that the decision maker should decide.⁵¹ This requires an examination of each child's best interests, bearing in mind their individual circumstances.⁵²
240. It is significant to note that, at the time of the Minister's decision, Miss BR was only seven months old. At this age, infants are entirely dependent on their parents or guardians for their physical, developmental, financial and emotional needs. Given the circumstances, I consider it reasonable that the department adopted a different approach to the question of Miss BR's best interests than it usually does in matters concerning older children—which typically involves considerations of the child's educational history, extracurricular activities and social network.
241. In its submission to the Minister, the department considers the applicability of the CRC to the BP family stating:
31. While Mr BP has no ongoing matters preventing his departure from Australia, he has an Australian citizen minor child.

32. Article 3 of the CRC requires that in all actions concerning children under the age of 18 in Australia's jurisdiction, the best interests of the child shall be a primary consideration (note that it need only be *a*, rather than *the*, primary consideration and that it may be balanced by other, countervailing considerations). The maintenance of the integrity of Australia's migration system, which reflects Australia's sovereign right to enforce its migration laws against unlawful non-citizens, may be such a countervailing consideration.

34. While consideration of the best interests of a child does not automatically lead to a decision to allow the child's parent to remain in Australia, the Department acknowledges that it may be in the best interests of the child for her father to remain in Australia.

242. Attached to the second request for intervention by the Minister are statements made by Mr BP and Ms BQ that include, *inter alia*, information about the anticipated effect of Mr BP's departure on the family. Mr BP states:

I do not want to be away for my daughter's growing up. She is so little, and it so important that she has a father around to help raise her and give her a full home.

243. Ms BQ's statement outlines the emotional and practical support that Mr BP has provided to her as a new mother and the difficulties that she would face in raising Miss BR alone, even for a temporary period of time. She states:

Things are already hard with me having to work and support us, but if Mr BP had to leave and I had to take care of Miss BR on my own things would be so hard.

Miss BR loves Mr BP very much, as any child would love her dad. She always wants to spend time with him and cuddle with him. I am so scared that she will not have the opportunity to grow up with him there.

244. Consistent with the submissions of the department, my view is that it would have been in Miss BR's best interests to allow her father to remain with her in Australia and continue to support Ms BQ and his daughter.
245. However, it is legally open to a decision maker to depart from the best interests of the child. In doing so, the decision maker must ensure that they do not treat any other factor as inherently more significant than the best interests of the child, and any other relevant considerations must outweigh their best interests.
246. The Minister has the power under the Migration Act to substitute his own more favourable decision if he thinks that it is in the public interest to do so. In this case, the Minister declined to exercise his powers. The Minister is not required to provide written reasons for refusing to exercise his discretion; therefore it is unclear what factors he took into consideration in this case.
247. The submissions made by the department to the Minister indicate that the department had considered the engagement of article 3 of the CRC, but also identified the maintenance of Australia's migration system as a countervailing primary consideration in this case. The Minister had these submissions before him when he made the decision not to intervene.

248. It is my view that, with reference to the best interests of Miss BR, balanced against the community's expectations in relation to Australia's migration network, the act or practice of failing to intervene in the case leading to a period of temporary separation would not constitute a breach of article 3 of the CRC. This is because the Commonwealth did identify the best interests of Miss BR as a primary consideration, but then determined that the consideration was outweighed by the need to maintain the integrity of Australia's migration system.

15.2 Articles 9 and 10

249. Article 9 of the CRC states that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

250. Article 10 of the CRC states that:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

251. In his initial complaint to the Commission, Mr BP relied upon article 9(1) of the CRC in submitting that his removal 'would be an unwarranted and unreasonable breach of Miss BR's rights by depriving her of her father'.

252. In its referral to the Minister, the department states that:

Article 9.1 does not prohibit a State Party from separating a child from his or her parent where the parent is removed. Article 9.4 contemplates that separation may result from the action of a State Party by way of deportation and imposes obligations on State Parties in this situation. There is no suggestion that Australia would not abide by these obligations in this case.

253. Under the heading 'Immigration and deportation', the UNICEF Implementation Handbook for the CRC explains that when articles 9 and 10 were being drafted, the chairman of the Working Group declared that:

It is the understanding of the Working Group that article 6 [now article 9] of this Convention is intended to apply to separations that arise in domestic situations, whereas article 6 *bis* [now article 10] is intended to apply to separations involving different countries and relating to cases of family reunification. Article 6 *bis* [now 10] is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.⁵³

254. Given my view that the Commonwealth's interference with Mr BP, Ms BQ and Miss BR's family rights is legitimate and non-arbitrary, I am not satisfied that, properly construed, article 9.1 of the CRC acts as a bar to the temporary separation of parent and child through the ordinary application of general immigration laws, given that article 9.4 of the CRC, contemplates parent-child separation because of deportation. This is also supported by the drafting history of the provisions.

16 Recommendations

255. For the reasons above, I have found that Mr BP raised new protection claims that should have been referred to the Minister in accordance with the relevant guidelines. It appears that an administrative error within the department resulted in pertinent information not being put before the relevant decision maker. Consequently, on the material before me, I cannot be satisfied that the department conducted an assessment of Mr BP's changed circumstances sufficient to properly assure itself that deportation or removal would not expose Mr BP to a 'real risk' of treatment prohibited by article 7 of the ICCPR upon return to Sri Lanka. As a result, I consider that the department's decision to finalise Mr BP's request for ministerial intervention without referral to the Minister was inconsistent with, or contrary to, his human rights.

256. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with, or contrary to, any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.⁵⁴ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.⁵⁵ The Commission may also recommend other action to remedy or reduce the loss or damage suffered by a person.⁵⁶

257. Pursuant to these provisions, I make the following recommendations:

Recommendation 1

The department review its systems to ensure that information received by the department is properly attached to departmental files and available to relevant decision makers, particularly in the context of requests for Ministerial intervention that raise protection claims.

Recommendation 2

To reduce the loss or damage suffered by Mr BP as a result of the department's conduct, consideration should be given to expediting the processing of his partner visa application to facilitate his reunification with his family in Australia.

17 The department's response to my findings and recommendations

258. On 3 April 2019, I provided the department with a notice of my findings and recommendations.

259. On 17 April 2019, the department provided the following response to my findings and recommendations:

Recommendation 1

The Department review its systems to ensure that information received by the Department is properly attached to departmental files and available to relevant decision makers, particularly in the context of requests for Ministerial intervention that raise protection claims.

Response to recommendation 1

The Department notes the findings of the Commission and acknowledges that in this individual case there was an administrative oversight in the updating of records and registration of the additional information, which was provided subsequent to the lodgement of the initial section 417/48B request. The Department has reviewed the circumstances that led to this oversight and adjusted its administrative procedures relating to the receipt of additional information in support of ministerial intervention requests, to ensure that such errors are minimised in the future.

Recommendation 2

To reduce the loss or damage suffered by Mr BP as a result of the Department's conduct, consideration should be given to expediting the processing of his partner visa application to facilitate his reunification with his family in Australia.

Response to recommendation 2

The Department has expedited the processing of Mr BP's Partner (subclass 309/100) visa application to facilitate his reunification with his family in Australia. Mr BP was granted a permanent Partner (Migrant) (subclass 100) visa on 6 April 2019.

Comments on other findings

The Department does not accept, as stated in our response to the Commission's preliminary findings, the Commission's view that Mr BP was 'otherwise removed'. Mr BP chose to engage with the International Organization for Migration (IOM), who then supported and facilitated his departure from Australia. While the IOM administers the Assisted Voluntary Return (AVR) program on behalf of the Government, IOM does not and will not assist with any forced or involuntary departures. IOM undertakes their own assessments to assure itself that the departure is voluntary.

It is the Department's view that the decision to finalise Mr BP's ministerial intervention request under section 48B of the Migration Act without referral to the Minister did not result in Mr BP being removed from Australia. Mr BP's departure from Australia was voluntary. As such, the Department respectfully disagrees that its actions in this matter exposed Mr BP to a 'real risk' of treatment prohibited by article 7 of the International Covenant on Civil and Political Rights upon return to Sri Lanka.

260. I note that Mr BP was granted a permanent Partner visa on 6 April 2019 and I commend the department on its constructive response to my recommendation on this issue.

261. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

May 2019

Endnotes

- 1 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act. On 22 October 1992, the Attorney-General made a declaration under s 47 that the *Convention on the Rights of the Child* is an international instrument relating to human rights and freedoms for the purposes of the AHRC Act: *Human Rights and Equal Opportunity Commission Act 1986* (Cth)—*Declaration of the United Nations Convention on the Rights of the Child*.
- 2 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, where Branson J found that the Commission could not, in conducting its inquiry, disregard the legal obligations of the secretary in exercising a statutory power. Note in particular 212–3 and 214–5.
- 3 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 4 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33(1).
- 5 For example, see the changes introduced by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) and the explanatory memorandum dealing with those changes.
- 6 UN Human Rights Committee, *Views: Communication No 706/1996*, 61st sess, UN Doc CCPR/C/61/D/706/1996 (4 November 1997) 11 [8.1]–[8.2] (*Mrs G.T. v Australia*); UN Human Rights Committee, *Views: Communication No 692/1996*, 60th sess, UN Doc CCPR/C/60/D/692/1996 (11 August 1997) (*ARJ v Australia*); UN Human Rights Committee, *Views: Communication No. 900/1999*, 67th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (*C v Australia*); UN Human Rights Committee, *Views: Communication No 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (11 November 1993) [13.1]–[13.2] (*Kindler v Canada*); UN Human Rights Committee, *Views: No 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (7 January 1994) [14.1]–[14.2] (*Ng v Canada*); UN Human Rights Committee, *Views: Communication No 539/1993*, 52nd sess, UN Doc CCPR/C/52/D/539/1993 (9 December 1994) [16.1]–[16.2] (*Cox v Canada*); UN Human Rights Committee, *Views: Communication No 829/1998*, 78th sess, UN Doc CCPR/C/78/D/829/1998 (13 August 2003) 20–22 [10.2]–[10.7] (*Judge v Canada*); UN Human Rights Committee, *Views: Communication No 1540/2007*, 94th sess, UN Doc CCPR/C/94/D/1540/2007 (30 October 2008) [7.3] (*Nakrash and Qifen v Sweden*); UN Human Rights Committee, *Views: Communication No 1205/2003*, 92nd sess, UN Doc CCPR/C/92/D/1205/2003 (4 April 2003) [6.3] (*Bauetdinov v Uzbekistan*); UN Human Rights Committee, *Views: Communication No 1539/2006*, 96th sess, UN Doc CCPR/C/96/D/1539/2006 (21 August 2009) [14.2] (*Munaf v Romania*).
- 7 *Nakrash and Qifen v Sweden*, UN Doc CCPR/C/94/D/1540/2007 (n 6) [7.3]. See also: *Bauetdinov v Uzbekistan*, UN Doc CCPR/C/92/D/1205/2003 (n 6) [6.3]; *Munaf v Romania*, UN Doc CCPR/C/96/D/1539/2006 (n 6) [14.2].
- 8 UN Human Rights Committee, *Views: Communication No 1763/2008*, 101st sess, UN Doc CCPR/C/101/D/1763/2008 (9 May 2011) 21 (concurring opinion of Ms Keller, Ms Antoanella Motoc, Mr Neuman, Mr O'Flaherty and Sir Rodley) (*Pillai v Canada*).
- 9 UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 2 [12].
- 10 *Migration Act 1958* (Cth) s 36(2A).
- 11 *Convention against Torture and Other Cruel, Inhumane or Degrading treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987) art 1, widely accepted as setting out the definition of torture.
- 12 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 216.
- 13 UN Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment and punishment)* 44th sess, UN Doc A/44/40 (10 March 1992) [4].
- 14 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, N.P. Engel, 2005) 160 [4].
- 15 Freedom House, 'Freedom in the World 2015—Sri Lanka' *Refworld* (19 June 2015) <<http://www.refworld.org/docid/5594ec9715.html>>; International Truth and Justice Project Sri Lanka, 'Silenced: survivors of torture and sexual violence (2016)' (Report, January 2016) <<http://www.itjpsl.com/reports/silenced-report>>.
- 16 UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, UN Doc HCR/EG/LKA/12/04 (21 December 2012) 27.
- 17 Department of Foreign Affairs and Trade, 'Country Report: Sri Lanka' (24 January 2017) [3.47].
- 18 UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 2 [12].
- 19 James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 318.
- 20 James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 318.
- 21 Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd ed, Oxford University Press, 1996) 122.
- 22 James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 318.
- 23 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 1–2 [5].
- 24 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 1–2 [5]; UN Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th sess, UN Doc HRI/GEN/1/Rev.1 (27 July 1990) 1 [2]; UN Human Rights Committee, *Views: Communication No 201/1985*, 33rd sess, UN Doc CCPR/C/33/D/201/1985 (27 July 1988) [10.3] (*Hendriks v Netherlands*).
- 25 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 670.
- 26 UN Human Rights Committee, *Views: Communication No. 35/1978*, 12th sess, UN Doc CCPR/C/12/D/35/1978 (9 April 1981) [9.2] (*Aumeeruddy-Cziffra et al v Mauritius*).

- 27 UN Human Rights Committee, *Views: Communication No. 558/1993*, 59th sess, UN Doc CCPR/C/59/D/558/1993 (3 April 1997) ('*Canepa v Canada*'); UN Human Rights Committee, *Views: Communication No. 930/2000*, 72nd sess, UN Doc CCPR/C/72/D/930/2000 (26 July 2001) ('*Winata v Australia*').
- 28 *Moustaquim v Belgium* (1991) Eur Court HR (ser A) 193 [43].
- 29 UN Human Rights Committee, Communication No. 893/1999, 77th sess, UN Doc CCPR/C/77/D/893/1999 (28 March 2003) 12 [8.2] ('*Sahid v New Zealand*').
- 30 *Rodrigues Da Silva & Hoogkamer v the Netherlands* (European Court of Human Rights, Chamber, Application No 50435/99, 31 January 2006) [39].
- 31 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1988) 1 [4].
- 32 *Canepa v Canada*, UN Doc CCPR/C/59/D/558/1993 (n 28) 9–10 [11.4].
- 33 UN Human Rights Committee, *Views: Communication No. 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) 11 [8.3] ('*Toonen v Australia*').
- 34 *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000 (n 27).
- 35 *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000 (n 27) [7.2].
- 36 *Winata v Australia*, UN Doc CCPR/C/72/D/930/2000 (n 27) [7.3].
- 37 *Sahid v New Zealand*, UN Doc CCPR/C/77/D/893/1999 12 [8.2].
- 38 S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, 2013) 684.
- 39 United Nations Human Rights Committee, *Gonzalez v Guyana*, Communication No. 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010).
- 40 United Nations Human Rights Committee, *Gonzalez v Guyana*, Communication No. 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010) [2.9].
- 41 United Nations Human Rights Committee, *Gonzalez v Guyana*, Communication No. 1246/2004, UN Doc CCPR/C/98/D/1246/2004 (2010), Appendix, 14.
- 42 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221, art 8 (entered into force 3 September 1953).
- 43 *Rodrigues Da Silva & Hoogkamer v the Netherlands* (European Court of Human Rights, Former Second Section, Application No. 50435/99, 31 January 2006) [39].
- 44 *Rodrigues Da Silva & Hoogkamer v the Netherlands* (European Court of Human Rights, Former Second Section, Application No. 50435/99, 31 January 2006) [39].
- 45 *Jeunesse v The Netherlands* (European Court of Human Rights, Grand Chamber, Application No. 12738/10, 3 October 2014) [101].
- 46 See M Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005), 518, on the negative/positive distinction between articles 17 and 23. However, he concedes that the distinction is 'difficult to maintain in practice'.
- 47 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 666.
- 48 Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd ed, Oxford University Press, 2013) 667.
- 49 R Hodgkin and P Newell, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 38.
- 50 United Nations Committee on the Rights of the Child, General Comment No. 14 (62nd session, 2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc CRC/C/GC/14 (2013) 7 [21].
- 51 *Wan v Minister for Immigration & Multicultural Affairs* (2001) 107 FCR 133, [26].
- 52 United Nations Committee on the Rights of the Child, General Comment No. 14 (62nd session, 2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, UN Doc CRC/C/GC/14 (2013) 9 [32].
- 53 Rachel Hodgkin and Peter Newell, UNICEF, *UNICEF Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, 2007) 125.
- 54 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(a).
- 55 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(b).
- 56 *Australian Human Rights Commission Act 1986* (Cth) s 29(2)(c).

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

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

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611

Website: www.humanrights.gov.au

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