



Australian
Human Rights
Commission

CM v
Commonwealth of
Australia (DIBP)

[2015] AusHRC 99

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**CM v Commonwealth of
Australia (Department of
Immigration and Border
Protection)**

[2015] AusHRC 99

Report into arbitrary interference
with family

Australian Human Rights Commission 2015



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Commission

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**Australian
Human Rights
Commission**

October 2015

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint made by Mr CM against the Commonwealth of Australia – Department of Immigration and Border Protection (department).

I have found that the direction by the then Minister of Immigration and Border Protection to his delegates under section 9(2)(b) of Direction 62 made under section 499 of the *Migration Act 1958* (Cth) was an arbitrary interference with family, contrary to articles 17 and 23 of the *International Covenant on Civil and Political Rights*. This direction provides that delegates are not to take into account any special circumstances of a compelling or compassionate nature in relation to Family Stream visa applications in which the applicant's sponsor is a person who entered Australia as an unauthorised maritime arrival and holds a permanent visa.

In light of my findings, I recommended that the Minister amend Direction 62 to remove section 9(2)(b), and that when deciding the order for considering and disposing of the visa application of the complainant's spouse, the delegate of the Minister take into account any special circumstances of a compelling or compassionate nature.

By letter dated 6 August 2015 the department provided a response to my recommendations. I have set out the department's response in part 6 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

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1 Introduction to this inquiry

1. The Australian Human Rights Commission has conducted an inquiry into a complaint by Mr CM.
2. Mr CM has asked that he and his wife not be referred to by name in this report. I consider that the preservation of the anonymity of Mr CM and his wife is necessary to protect their privacy or human rights. Accordingly, I have given a direction pursuant to s 14(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and have referred to them throughout as Mr CM and Mrs CN.
3. Mr CM arrived in Australia by boat from Sri Lanka in May 2012 and was granted a permanent protection visa in September 2013. Mr CM's wife subsequently applied for a Family Stream visa that would allow her and their two young children to migrate to Australia. Mr CM complains about the directions given by the Minister for Immigration and Border Protection to his delegates, which have impacted on the priority given to his wife's visa application.
4. This inquiry was undertaken pursuant to s 11(1)(f) of the AHRC Act.
5. Mr CM's complaint raises issues under articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR) dealing with arbitrary or unlawful interference with family.
6. As a result of the inquiry I find that the direction by the then Minister of Immigration and Border Protection to his delegates under s 9(2)(b) of Direction 62 made under s 499 of the *Migration Act 1958* (Cth) (Migration Act) was arbitrary. This direction provides that delegates are not to take into account any special circumstances of a compelling or compassionate nature in relation to Family Stream visa applications in which the applicant's sponsor is a person who entered Australia as an unauthorised maritime arrival and holds a permanent visa. This aspect of the direction (at least) is not necessary, reasonable or proportionate to the aim of discouraging unauthorised maritime arrivals from coming to Australia. By preventing the consideration of compelling or compassionate circumstances that may justify a prompt consideration of applications for family reunification, Direction 62 runs a serious risk of unnecessarily prolonging situations in which split families of Australian permanent residents are at risk.
7. I find that s 9(2)(b) of Direction 62 is inconsistent with or contrary to the rights of Mr CM under articles 17 and 23 of the ICCPR.
8. In order to prevent a continuation of practices that may result in breaches of rights in future cases similar to those that occurred in the case of Mr CM, the Commission recommends that the Minister either amend Direction 62 to remove s 9(2)(b) or issue a replacement Direction without s 9(2)(b).
9. Further, in order to remedy or reduce the loss or damage suffered by Mr CM as a result of the making of Direction 62, the Commission recommends that when deciding the order for considering and disposing of the visa application of Mrs CN, the delegate of the Minister take into account any special circumstances of a compelling or compassionate nature.

10. A note on terminology. Section 5AA of the Migration Act defines ‘unauthorised maritime arrival’ for the purposes of the Act. This definition was inserted on 1 June 2013 by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth). ‘Unauthorised maritime arrival’ replaced the terms ‘offshore entry person’ in the Act and ‘irregular maritime arrival’ in the Migration Regulations 1994 (Cth) (Migration Regulations). The differences between the definitions of these terms are not material to the present complaint. Direction 62 uses the phrase ‘illegal maritime arrival’ which is defined in the direction as having the same meaning as ‘unauthorised maritime arrival’ in the Act. Throughout this document, I will use the abbreviation IMA to refer to irregular maritime arrivals prior to 1 June 2013 and to unauthorised maritime arrivals from 1 June 2013.

2 Legal framework

2.1 Functions of the Commission

11. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly, s 11(1)(f) gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
12. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in s 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
13. Section 8(6) of the AHRC Act requires that the functions of the Commission under s 11(1)(f) be performed by the President.

2.2 Scope of ‘act’ and ‘practice’

14. 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.
15. 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.
16. 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;¹ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Interference with family

17. The rights and freedoms recognised by the ICCPR are ‘human rights’ within the meaning of the AHRC Act.² The applicant claims that the Commonwealth has engaged in acts that are inconsistent with or contrary to his rights under articles 17 and 23 of the ICCPR.
18. 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.
19. 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.
20. Professor Manfred Nowak has noted that:³

[T]he significance of Art. 23(1) lies in the protected existence of the institution “family”, whereas the right to non-interference with family life is primarily guaranteed by Art. 17. However, this distinction is difficult to maintain in practice.
21. For the reasons set out in the Australian Human Rights Commission report *Nguyen and Okoye v Commonwealth* [2007] AusHRC 39 at [80]-[88], the Commission is of the view that in cases alleging a State’s arbitrary interference with a person’s family, it is appropriate to assess the alleged breach under article 17(1). If an act is assessed as breaching the right not to be subjected to an arbitrary interference with a person’s family, it will usually follow that the breach is in addition to (or in conjunction with) a breach of article 23(1).

3 Background

3.1 Changes to family reunion arrangements

22. The Expert Panel on Asylum Seekers (the Expert Panel), in its August 2012 report to the then Prime Minister Gillard, recommended changes to family reunion arrangements.⁴
23. Australia has a Special Humanitarian Program (SHP) which makes visas available to people who are outside their home country and subject to substantial discrimination amounting to gross violation of their human rights in their home country. An applicant’s entry must be proposed by an Australian citizen or permanent resident, an eligible New Zealand citizen or an organisation that is based in Australia. The SHP is part of the offshore component of Australia’s Humanitarian Program.
24. At the time of the Expert Panel report, ‘split family’ applications for visas under the SHP could be sponsored by a person who had received a permanent visa under Australia’s offshore humanitarian program or a person who had arrived in Australia without a visa and who had been granted a protection visa onshore.⁵ That is, IMAs who were recognised as refugees could sponsor family members under the SHP.

25. One of the primary criteria for any visa under the SHP, including a split family visa, was that there were ‘compelling reasons’ for giving ‘special consideration’ to granting the applicant a permanent visa. The compelling reasons criterion prescribed four factors to which officers had to have regard:
- the degree of persecution (or discrimination) to which the applicant is subject in their home country;
 - the extent of the applicant’s connection with Australia;
 - whether or not there is any suitable country other than Australia that can provide for the applicant’s settlement and protection; and
 - the capacity of the Australian community to provide for the settlement of persons such as the applicant.
26. However, the prevailing policy was that ‘in most “split family” cases, officers may without further enquiry regard the criterion as satisfied. The existence of close family ties to Australia in these circumstances is as a matter of policy considered a sufficiently compelling reason’.⁶
27. The Expert Panel considered that allowing IMAs to sponsor family members under the SHP had two undesirable consequences.⁷ First, there were low numbers of family reunion places being granted. In 2011-12, only 714 family reunion places were granted under the SHP and there were more than 20,000 applications for such places. The Expert Panel noted that this rate of clearance meant that delays in family reunion could exceed 20 years. The huge imbalance between supply and demand increased the incentive for irregular movement of family members. That is, the fact that so few places were being granted to families of IMAs was considered problematic because it may encourage members of families who were split to take dangerous journeys to Australia by boat.
28. Secondly, if IMAs were able to access family reunion places through the SHP, this would reduce the number of places available for families of people resettled in Australia as part of the offshore component of the Humanitarian Program.
29. The Expert Panel noted the policy that immediate family applicants were presumed to meet the ‘compelling reasons’ criteria for resettlement under the SHP. This was referred to as a ‘policy concession’.
30. Two solutions were proposed by the Expert Panel. The first solution was to remove the policy concession where the sponsor was an IMA. That is, the family members of IMAs in Australia would not automatically be presumed to have compelling reasons for resettlement.
31. The second proposed solution was to reduce the backlog of outstanding applications by allowing families of IMAs to seek reunion through the family stream of the Migration Program. This would leave family reunion places under the SHP to families of people resettled as part of the offshore component of the Humanitarian Program. Further, future IMAs would not be eligible to sponsor family under the SHP but should seek to do so within the family stream of the Migration Program.
32. In recognition of the additional pressure that these changes would place on the family stream, the Expert Panel also recommended that 4,000 additional places be provided to that stream per annum for humanitarian visa holders.

33. On 22 September 2012, the Hon Chris Bowen MP, then Minister for Immigration and Citizenship, announced that the Government had accepted in principle the recommendations of the Expert Panel in relation to family reunions. In a media release issued that day, the Minister said:

For those who arrived by boat before 13 August 2012, the changes mean applicants proposed by refugees in Australia will now need to meet all the criteria to be granted an SHP visa [including the 'compelling reasons' criterion]. ...

Decisions on the applications made by family of adult boat arrivals who arrived prior to 13 August 2012 **will now take into account any discrimination or persecution they face in their home country**, as well as their connection to Australia, their protection options elsewhere, and Australia's capacity to help. Their applications will also be given lowest processing priority.

These changes will ensure highest priority is given to the applications of family of people who were granted refugee and humanitarian visas overseas and migrated to Australia in a safer and orderly manner.

... people affected by changes to the SHP would be able to sponsor their family through the regular family stream of Australia's Migration Program.⁸

(emphasis added)

34. The changes to the regulations were made by the Migration Amendment Regulation 2012 (No 5) (Cth). The expressed purpose of the amendments was to implement the recommendations in the Expert Panel report by:⁹

- preventing persons who became 'irregular maritime arrivals' from being eligible to propose family members for entry to Australia under the Humanitarian Program, and specifically, the Refugee and Humanitarian (Class XB) visa (Class XB visa);
- amending the criteria to be considered when determining whether there are compelling reasons for certain people applying for a Class XB visa to be given special consideration to grant them that visa; and
- preventing persons from being able to make a valid application for a Class XB visa if they became an irregular maritime arrival (IMA) on or after 13 August 2012.

35. In the Explanatory Statement accompanying the amending regulation, the Minister considered whether the amendments would have an impact on family rights under articles 17 and 23 of the ICCPR. He said:

As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that changes to family reunification do not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An IMA becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 are engaged. Even if Articles 17 and 23 were engaged, the change does not seek to remove the ability of IMAs in Australia to achieve family reunification; **it simply places IMAs on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia**. Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing IMAs from making the dangerous journey to Australia by boat. To the extent that this might amount to interference with the family, Australia maintains that any interference is not arbitrary and thus is consistent with the rights contained under Articles 17 and 23 of the ICCPR.¹⁰

(emphasis added)

36. At the time that these changes to the regulations were made, Direction 43 made under s 499 of the Migration Act set out the order for considering and disposing of Family Stream visa applications.¹¹ The preamble to Direction 43 provided that:
- High levels of demand in visa classes, where places under the Migration Program are limited, have created a need to manage the grant of visas in these classes in an **orderly and equitable fashion**.
- (emphasis added)
37. Section 8 of Direction 43 set out the order of precedence for all Family Stream visa applications. Section 9 provided:
- 9. Special circumstances**
- (1) Notwithstanding section 8, delegates are to take into account when deciding the order for considering and disposing of Family Stream visa applications, other than parent visas, any special circumstances of a compelling or compassionate nature.

3.2 Mr CM's circumstances

38. Mr CM is a national of Sri Lanka. He arrived at Christmas Island by boat on 18 May 2012 as an IMA. His wife, Mrs CN, remained in Sri Lanka with their five year old daughter and one year old son.
39. Mr CM applied for protection in Australia as a refugee and on 2 September 2013 he was granted a protection visa.
40. The department says that on 13 December 2013 its Colombo office received a valid Partner (Subclass 309) visa application for Mrs CN. Mr CM claims that this application was submitted on 4 December 2013. Nothing turns on the difference between these dates.
41. On 19 December 2013, the Hon Scott Morrison MP, then Minister for Immigration and Border Protection, gave a direction under s 499 of the Migration Act referred to as *Direction 62 – order for considering and disposing of Family Stream visa applications* (Direction 62).
42. Direction 62 relevantly provides:
- 3. Revocation**
- Direction 43, given under section 499 of the Act and dated 18 July 2009 is revoked.
- 4. Application**
- (1) This Direction applies to delegates who consider valid applications for Family Stream visas under section 47 of the Act, and perform functions or exercise powers under subsection 51(1) of the Act to consider and dispose of applications for Family Stream visas, including in respect of matters remitted from the Migration Review Tribunal and the Administrative Appeals Tribunal.
...
- 5. Preamble**
- (1) High levels of demand for Family Stream visas have created a need to manage the consideration and disposal of applications for these visas in an orderly fashion. ...

6. Interpretation ...

(2) In this Direction: ...

Illegal Maritime Arrival has the same meaning as 'unauthorised maritime arrival' in section 5AA of the Act. ...

8. Order for considering and disposing of Family Stream visa applications

(1) Paragraphs (a) to (g) set out the order of priority for considering and disposing of Family Stream visa applications, with paragraph (a) being the highest priority and paragraph (g) being the lowest priority. ...

(g) Applications in which the applicant's sponsor (or proposed sponsor) is a person who entered Australia as an Illegal Maritime Arrival and holds a permanent visa. ...

9. Special circumstances

(1) Notwithstanding section 8, when deciding the order for considering and disposing of Family Stream visa applications, delegates are to take into account any special circumstances of a compelling or compassionate nature.

(2) Subsection 9(1) does not apply to:

- (a) Applications for all classes of Contributory Parent and Contributory Aged Parent visas; and
- (b) Family Stream visa applications in which applicant's sponsor (or proposed sponsor) is a person who entered Australia as an Illegal Maritime Arrival and holds a permanent visa.

43. On 19 February 2014, the department sent an email to Mrs CN via her migration agent, advising her that her application was affected by Direction 62. The email stated in part:

Your visa application has been identified as being affected by a new instruction ("Direction 62") by the Minister for Immigration and Border Protection. This instruction states that Family Migration visa applications sponsored by IMAs [illegal maritime arrivals] will henceforth be given the lowest processing priority. This instruction applies to all Family Migration visa applicants sponsored by a person who arrived in Australia as an IMA and who now holds a permanent visa. It does not apply where a sponsor arrived in Australia as an IMA but has since become an Australian citizen.

As your sponsor arrived in Australia as an IMA and is not an Australian citizen your application will not be processed until all applications of higher priority have been finalised. As a result, your visa application will not be able to be processed for many years. There is no priority for families sponsored by an IMA who are facing compelling or compassionate circumstances.

Applicants who have already lodged valid applications and have paid the Visa Application Charge (VAC) will not be refunded the VAC even if they withdraw their application. We recommend that you cancel any travel plans, and cancel any appointments for health, DNA and character checks, if these have been arranged.

As this visa processing instruction has been made by the Minister for Immigration and Border Protection, this office is unable to assist with further enquiries and complaints about this change. If you have any questions you should discuss these with your sponsor or migration agent.

44. On 9 May 2014, Mr CM made a complaint in writing to the Commission alleging that the processing prioritisation imposed by Direction 62 was in breach of his rights under articles 17 and 23 of the ICCPR. The complaint was unable to be resolved with the department by way of conciliation.

- 45. In its submission of 4 September 2014, the department said that it had taken no further action in relation to Mrs CN's Partner visa application.
- 46. I provided my preliminary view in this matter to both the department and the current Minister for Immigration and Border Protection. The Minister replied to say that his department would respond on behalf of the Commonwealth.

4 Consideration

4.1 Decision to give Direction 62 is an administrative act

- 47. Mr CM complains about the content of Direction 62. A threshold question is whether the giving of this direction is a legislative or an administrative act.
- 48. As noted above, the effect of *Burgess*' case is that an inquiry under s 11(1)(f) of the AHRC Act does not include an inquiry into acts or practices that are required by law.¹² This conclusion was referred to with approval by the Full Court of the Federal Court in a later case.¹³
- 49. In *Sumner v Public Sector Superannuation Board*,¹⁴ the then President of the Commission Sir Ronald Wilson AC QC considered the scope of the term 'act' in relation to the Commission's power to inquire into breaches of the *Sex Discrimination Act 1984* (Cth) as it stood at the time. While that case dealt with what is now referred to as 'unlawful discrimination' under the AHRC Act (now dealt with under Part IIB of the AHRC Act), rather than a breach of human rights (now dealt with under Part II), some useful comments were made about the scope of legislative acts. In particular, President Wilson considered that steps leading up to the making of a legislative instrument are part of a legislative, not administrative, process. The final step in the process by which the instrument assumes its effective force is the approval, explicit or implicit, of the Parliament.
- 50. When considering the scope of the terms 'act' or 'practice' for the purposes of s 11(1)(f) of the AHRC Act, and in particular acts or practices which are done 'by or on behalf of the Commonwealth or an authority of the Commonwealth' or 'under an enactment', I consider that these terms should be limited to discretionary administrative acts, rather than acts which, explicitly or implicitly, are required or approved by the Parliament.
- 51. It is therefore necessary to consider whether Direction 62 is a legislative instrument. Direction 62 was given by the Minister under s 499 of the Migration Act to delegates of the Minister exercising functions under ss 47 and 51(1) of the Migration Act.
- 52. Section 499 of the Migration Act relevantly provides:
 - (1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
 - (a) the performance of those functions; or
 - (b) the exercise of those powers.

...

(2A) A person or body must comply with a direction under subsection (1).

(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of Parliament within 15 sitting days of that House after that direction was given.

53. It appears that some directions made under s 499 are legislative instruments and some are not.
54. A 'legislative instrument' is an instrument in writing that is of a legislative character and that is or was made in the exercise of a power delegated by the Parliament.¹⁵
55. An instrument is of a legislative character if it determines the law or alters the content of the law, rather than applying the law in a particular case, and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.¹⁶
56. However, instruments that comprise, in their entirety, directions to delegates are not legislative instruments.¹⁷ In this context, the delegates are standing in the shoes of the person who has been granted the power to make administrative decisions and are making decisions on his or her behalf. Directions to delegates are effectively announcements by a decision maker about how he or she will make decisions rather than rules that govern how the decision maker is required make decisions.
57. Direction 62 comprises, in its entirety, directions to delegates of the Minister exercising functions under ss 47 and 51(1) of the Migration Act. The direction sets out how the Minister expects delegates to exercise their functions when making decisions on the Minister's behalf. Accordingly, it is not a legislative instrument and the act of giving Direction 62 is an administrative act of the Minister. The making of the direction is an act that the Commission may inquire into under s 11(1)(f) of the AHRC Act.

4.2 Arbitrary or unlawful interference with family

(a) Application of Direction 62

58. Mrs CN was entitled to apply for a 'split family' visa under the SHP because Mr CM arrived in Australia prior to 13 August 2012. She was also entitled to apply under the Family Stream. The application she made for a Partner (Subclass 309) visa was for a Family Stream visa.
59. The application that Mrs CN made was valid. Pursuant to s 47(1) of the Migration Act, the Minister is obliged to consider it. The Minister has delegated the function of considering visa applications to officers of his department. At the time Mrs CN's application was received by the department in its Colombo office, Direction 43 was in force. Pursuant to this direction, the Minister indicated to the delegates tasked with the consideration of valid applications for Family Stream visas the order in which these applications were to be disposed of. Section 9 of Direction 43 provided that notwithstanding the order of precedence in that direction, delegates were to take into account any special circumstances of a compelling or compassionate nature when deciding the order for considering and disposing of Family Stream visas.
60. On 19 December 2013, shortly after Mrs CN's application was received, the then Minister for Immigration and Border Protection gave Direction 62. At the time this direction was given, Direction 43 was revoked.

61. Section 8(g) of Direction 62 makes clear that applications for Family Stream visas are to be given the lowest priority if the applicant's sponsor is a person who entered Australia as an IMA and holds a permanent visa. The application by Mrs CN fell into this category.
62. Like s 9 of Direction 43, s 9 of Direction 62 provides that notwithstanding the order of precedence in s 8, delegates are to take into account any special circumstances of a compelling or compassionate nature when deciding the order for considering and disposing of Family Stream visas. However, a significant difference in Direction 62 is the new s 9(2). As a result of this new subsection, delegates are precluded from taking into account any special circumstances of a compelling or compassionate nature, if the sponsor for the visa is a person who entered Australia as an IMA and holds a permanent visa. The application by Mrs CN fell into this category.
63. The result of Direction 62 on the application by Mrs CN was that it was given the lowest order of priority and delegates were precluded from considering whether there were any special circumstances of a compelling or compassionate nature in her application which suggested that it should be given a higher priority.
64. Mrs CN provided the Commission with a signed statement in Tamil along with an English translation by a NAATI accredited translator setting out circumstances that she considered should be taken into account in prioritising her application for a visa. In particular, she said that:
- in the village where she lives, it is known that she lives without her husband and with her two young children;
 - on 1 June 2014 while the family was at church, her house was broken into: 'unknown persons had entered the house and ransacked the house, damaging the household belongings and robbed the valuable things from the house';
 - she reported the incident to the police but they have not identified the perpetrators; and
 - she is afraid that similar incidents may happen again in the future and she is afraid for her safety and well-being and that of her children without her husband.
65. The department says that, as a result of Direction 62, '[a]n assessment of the effect of processing arrangements on Mr CM's family unit has not been made'.

(b) Interference

66. When there were changes to the family reunion provisions in the Migration Regulations to implement the recommendations of the Expert Panel report, the Government argued that these changes did not engage articles 17 and 23 of the ICCPR. As set out above, in the Explanatory Statement accompanying the amending regulation the Government said:

As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that changes to family reunification do not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An IMA becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 are engaged.¹⁸

67. This argument is broad enough to also encompass the administrative action of the Minister in giving Direction 62.
68. In its response dated 15 June 2015 to my preliminary view in this matter, the department acknowledged that the freedom from interference with the family found in articles 17 and 23 of the ICCPR creates an obligation for states not to arbitrarily or unlawfully interfere with the family unit. However, the department submitted that there is ‘no right to family reunification’ under international law ‘particularly when families have been separated when one family member has chosen to travel to Australia and enter unlawfully’.
69. I consider that the policies and prioritisation that Australia applies to permanent residents of Australia who wish to be reunited in Australia with other members of their family, who in turn have validly applied for visas to achieve reunification, can amount to an ‘interference’ with family.
70. The United Nations Human Rights Committee has confirmed that article 23 of the ICCPR places positive obligations on States Parties to adopt legislative, administrative and other measures to ensure the protection provided for in that article.¹⁹ In discussing the scope of article 23 of the ICCPR, the Committee has held that:
- The right to found a family implies, in principle, the possibility to procreate and live together. ... Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.²⁰
71. The Committee has also provided guidance on what will amount to an ‘interference’ with family. In the case of *Aumeeruddy-Cziffra v Mauritius*, it said:
- 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, and 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. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either ‘arbitrary or unlawful’ as stated in article 17(1), or conflicts in any other way with the State party’s obligations under the Covenant.²¹
72. I find that the introduction of administrative measures such as Direction 62 which affect the ability of permanent residents of Australia to achieve the reunification of their family engages articles 17 and 23 of the ICCPR and amounts to an ‘interference’ with the family. This finding is strengthened by the acknowledgment by the Government that in the case of permanent residents of Australia who have been recognised as refugees, if family reunification is denied or significantly delayed the practical result will be that they are separated from their family (although the Government claims that this is not as a result of a ‘positive action on the part of Australia to separate the family’).

(c) Arbitrary or unlawful

73. The next issue to consider is whether the interference with family is either arbitrary or unlawful. The UN Human Rights Committee has said in a case dealing with Australia that ‘there is significant scope for States parties to enforce their immigration policy’ but that this discretion is ‘not unlimited and may come to be exercised arbitrarily in certain circumstances’.²² The requirement that interference with family not be arbitrary means that ‘even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’.²³
74. Section 47 of the Migration Act provides that the Minister must consider a valid application for a visa. The department agrees that the application by Mrs CN for a Partner (Subclass 309) visa was valid.
75. Section 51 of the Migration Act provides that the Minister may consider and dispose of applications for visas in such order as he or she considers appropriate. In particular, s 51(2) makes clear that applications are not required to be dealt with in the order in which they are made. It provides:
- The fact that an application has not yet been considered or disposed of although an application that was made later has been considered or disposed of does not mean that the consideration or disposal of the earlier application is unreasonably delayed.
76. However, s 51 is not so broad that it will mean that any prioritisation system will necessarily be valid. Section 51(2) appears to acknowledge that circumstances may arise where an application for a visa may have been unreasonably delayed.
77. Questions may arise about the legal validity of a scheme which gives a lower priority to applications of a particular kind than to applications of any other kind regardless of when the other application was made. In such a scheme, it may be possible for an application in the lowest priority category never to be dealt with. This could occur if new applications are received and are granted higher priority while others are being processed and the backlog of higher priority applications is never completely exhausted. This would require an assessment of how the prioritisation scheme operates in practice.
78. Here, the lowest priority is given to applications in which the applicant’s sponsor (or proposed sponsor) is a person who entered Australia as an IMA and holds a permanent visa. The application by Mrs CN falls into this category.
79. Recall that the department said in its email to Mrs CN on 19 February 2014:
- As your sponsor arrived in Australia as an IMA and is not an Australian citizen your application will not be processed until all applications of higher priority have been finalised. As a result, your visa application will not be able to be processed for many years.
80. At some point, real questions may arise about whether the prioritisation chosen under s 51 forecloses the opportunity to perform the duty required of the Minister under s 47 to consider the application. This is a matter that may be open to Mr CM to raise in administrative law proceedings challenging the validity of Direction 62.
81. Further, there may also be legal questions about the proposed retrospective application of Direction 62 to visa applications which had already been lodged.

82. For the purposes of this inquiry it is not necessary for me to reach a final view on whether Direction 62 is lawful, in the sense that it is consistent with the Migration Act. This is because there is another aspect of Direction 62 which I consider is arbitrary. This is the application of s 9(2)(b) of the direction.
83. Section 9(2)(b) of Direction 62 means that if a person applies for a split family visa under the Family Stream, and the applicant's sponsor is a person who entered Australia as an IMA and holds a permanent visa, then the Minister's delegate is not able to take into account any special circumstances of a compelling or compassionate nature in deciding how to prioritise the application against other applications.
84. With one exception, the effect of s 9 is that delegates can take into account special circumstances of a compelling or compassionate nature for any person applying for a split family visa, other than a family member seeking to reunite with a recognised refugee who was granted protection by Australia after arriving by boat.
85. The exception is that special circumstances are also not taken into account in relation to applications for all classes of Contributory Parent and Contributory Aged Parent visas.²⁴ However, the impact of this exclusion on people applying for this category of visas is low. Applicants for a Contributory Parent visa pay substantially higher charges and a larger assurance of support bond than applicants for non-contributory parent visas.²⁵ As a result, 'visa applications in the contributory parent category are accorded a higher priority for processing' than applicants in the non-contributory parent category.²⁶ The department notes that 'applicants in the contributory parent category have significantly shorter waiting periods for applications to be finalised' than applicants in the non-contributory parent category.²⁷ However, a person's application for a Contributory Parent visa will be given the lowest priority if the person's sponsor entered Australia as an IMA and holds a permanent visa.²⁸
86. The Minister's decision, set out in s 9(2)(b) of Direction 62, that delegates should ignore special circumstances of a compelling or compassionate nature when prioritising split family applications from family members of IMAs, represents a departure from the previous direction. As set out above, s 9 of Direction 43 provided that delegates were to take into account any special circumstances of a compelling or compassionate nature when deciding the order for considering and disposing of all Family Stream visa applications, other than parent visas.
87. This decision also went considerably further than what the Expert Panel considered was necessary for the purpose of discouraging IMAs from 'making the dangerous journey to Australia by boat'. The Expert Panel recommended removing the policy concession which presumed that there were 'compelling reasons' for immediate family of IMAs to be granted a visa under the SHP. If there were compelling reasons, these would need to be established in each case. Section 9(2)(b) of Direction 62 not only removes any presumption that there are special circumstances of a compelling or compassionate nature that suggested that an application for a 'split family' visa under the Family Stream should be accorded priority, it provided that even if there are such circumstances they must not be taken into account in determining the priority of assessment.

88. Similarly, the decision was contrary to the statement by the then Government about how IMAs would be treated once the Expert Panel's recommendations were implemented. In changing the Migration Regulations, the Government said that it was implementing the Expert Panel's recommendations. Further, it said that the changes to the regulations would not amount to an arbitrary interference with family, contrary to articles 17 and 23 of the ICCPR, because:
- the change does not seek to remove the ability of IMAs in Australia to achieve family reunification; it simply places IMAs on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia.²⁹
89. In fact, the subsequent direction to delegates in s 9(2)(b) of Direction 62 does not put IMAs on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia. On the contrary, it means that even if IMAs have special circumstances of a compelling or compassionate nature, their applications will not be processed until after the processing of the applications of all other Australian citizens and permanent residents wanting their family to join them in Australia (regardless of whether or not there are special circumstances in this later group and regardless of when these applications are received). There has been no attempt by the Minister to justify this significantly disproportionate impact as reasonable in the circumstances.
90. The changes made between Direction 43 and Direction 62 appear to acknowledge that the latter direction may lead to inequitable results. The preamble to Direction 43 provides that there is a need to manage the grant of Family Stream visas in 'an orderly and equitable fashion'.³⁰ This was replaced in Direction 62 with a reference to managing the grant of these visas in 'an orderly fashion'.³¹
91. In the department's 15 June 2015 response to my preliminary view, it acknowledges that the family members of IMAs will often have compelling or compassionate circumstances which would ordinarily justify them receiving priority. However, the department seeks to use this as a reason for deliberately deprioritising applicants likely to be most in need. The department says:
- Compelling and compassionate circumstances are common in the backgrounds of many IMAs, and it is likely that the family members they sponsor would satisfy a delegate that compelling or compassionate reasons exist to prioritise their application. Without the inclusion of s 9(2)(b), delegates would not be able to consistently deprioritise applications for IMA sponsored family stream visas, and those applications may receive higher priority than the family members of permanent residents who arrived lawfully or Australian citizens. Had s 9(2)(b) been excluded, this would have adversely impacted their processing times as IMA sponsored visa applications would be processed first and granted any remaining places in capped visa categories.
92. I note that since the families of IMAs were first permitted to apply under the Family Stream, there was no longer a presumption that they have compelling or compassionate circumstances. Rather, they were put 'on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia'. That is, if *any* applicant had compelling or compassionate circumstances that justified prioritisation, this needed to be established. If there were no compelling or compassionate circumstances, then the families of IMAs would receive the lowest level of priority. I find that removing the ability of the families of IMAs to be prioritised on the basis of compelling or compassionate circumstances because they are more likely to establish such circumstances is arbitrary.

93. When assessing the extent of any permissible infringement of a Covenant right, the UN Human Rights Committee has said:
- States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.³²
94. The aim articulated by the then Government when making changes to the Migration Regulations to implement the recommendations of the Expert Panel report was ‘the legitimate aim of preventing IMAs from making the dangerous journey to Australia by boat’.³³ In response to my preliminary view in this matter, the department has asserted that ‘Direction 62’s aim of preserving the national interest and the integrity of the migration system by stopping illegal boat journeys is a consideration that justifies any potential interference with the family’.
95. The department expanded on this view in its 15 June 2015 response, saying:
- Being able to sponsor family members to migrate to Australia is a strong incentive for migrants to make the dangerous journey to Australia by boat. Some families will choose to separate themselves to send one family member by boat in order to access family migration options and effectively bypass the managed entry of the humanitarian and family programmes. Removing the incentives for migrants making this perilous journey encourages the orderly entrance of those who claim Australian humanitarian assistance.
- Direction 62 does not permanently stop IMAs from successfully sponsoring their families. In effect, it imposes a longer waiting time on a visa pathway In relation to the Direction applying to all applications on hand, such as [Mr CM’s], the measure is intended to discourage individuals offshore from making the journey. According a lower priority to the application sponsored by [Mr CM] may have had the effect of discouraging someone in [Mrs CN’s] community from deciding to make the perilous journey to Australia by boat and arriving as an IMA.
96. I find that s 9(2)(b) of Direction 62 was not necessary to prevent IMAs from making a dangerous journey to Australia by boat. Reliance on this aim assumes that IMAs will be informed of Australia’s regulatory arrangements in relation to asylum seekers and will make rational decisions based on that knowledge. Assuming this to be true, family reunion arrangements applying to asylum seekers who have been granted permanent visas to stay in Australia are irrelevant to any decision by a person to now come to Australia by boat without a visa. This is because since 19 July 2013 the policy of the then Government, which has been continued by the present Government, is that IMAs who arrive in Australia by boat have no prospect of being resettled in Australia.³⁴ In those circumstances, neither they nor their families will have an opportunity to make an application for family reunion. Direction 62 has no application in relation to potential IMA sponsors who are not already in Australia.
97. In any event, the department submits that the Direction merely ‘imposes a longer waiting time’ on a visa pathway. No explanation is provided as to why granting a family reunion visa at a later time is an effective disincentive to irregular migration. The Expert Panel came to the opposite conclusion, finding that the existence of long delays ‘increases the incentive for irregular movement of family members’.³⁵ Further, if asylum seekers mistakenly believed that Australian policy permitted them to be resettled in Australia through arriving by boat without a visa, then longer waiting times for family reunion may provide a greater incentive for whole families to make the dangerous journey together.

98. Section 9(2)(b) (at least) of Direction 62 has no rational relationship to the aim of discouraging IMAs from coming to Australia by boat. It cannot be said to be necessary to that aim, and it fails at the threshold of any analysis of reasonableness or proportionality.
99. A more general aim of the Expert Panel report, which was accepted by the then Government, was that applications by the family of IMAs were to be given a lower processing priority than applications of the family of people who migrated to Australia in a 'safer and orderly manner,' while decisions on all applications should 'take into account any discrimination or persecution they face in their home country'.³⁶ In response to my preliminary view, the department says that the aim of Direction 62 is to manage Family Stream visa applications in an orderly and systematic way. To the extent that this seeks to distinguish people on the basis of the merits of their application, s 9(2)(b) is also not reasonable or proportionate to this aim. The families of IMAs are already given the lowest processing priority in s 8. However, an additional requirement that decision makers must ignore special circumstances of a compelling or compassionate nature only in the case of applications by the family of IMAs cannot be justified as reasonable or proportionate. It prevents any ability to take into account any discrimination or persecution faced by the families of IMAs in their home country in prioritising visa applications. Under such a regime, applicants who face discrimination and persecution will be given a lower priority than those who do not if their sponsor was an IMA.

5 Findings and recommendations

100. As noted above, s 9(2)(b) of Direction 62 is not necessary to prevent IMAs from making a dangerous journey to Australia by boat and the interference with family caused by s 9(2)(b) was not a reasonable or proportionate means of achieving this aim. Direction 62 has no application in relation to potential IMA sponsors who are not already in Australia.
101. I find that the direction by the Minister to delegates under s 9(2)(b) of Direction 62 that they not take into account any special circumstances of a compelling or compassionate nature in relation to Family Stream visa applications in which the applicant's sponsor is a person who entered Australia as an IMA and holds a permanent visa, was arbitrary. By preventing the consideration of compelling or compassionate circumstances that may justify a prompt consideration of applications for family reunification, Direction 62 runs a serious risk of unnecessarily prolonging situations in which split families of Australian permanent residents are at risk. This is not consistent with the aims and objectives of the Covenant.
102. I find that s 9(2)(b) of Direction 62 is inconsistent with or contrary to the rights of Mr CM under articles 17 and 23 of the ICCPR.
103. 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.³⁷ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice,³⁸ and for the taking of action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice.³⁹

Recommendation 1

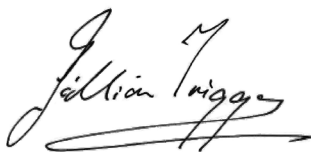
104. The Commission recommends that the Minister either amend Direction 62 to remove s 9(2)(b) or issue a replacement Direction without s 9(2)(b).

Recommendation 2

105. The Commission recommends that when deciding the order for considering and disposing of the visa application of Mrs CN, the delegate of the Minister take into account any special circumstances of a compelling or compassionate nature.

6 Department's response

106. The Commission provided a notice of its findings and recommendations to the department on 6 July 2015 and asked whether the Commonwealth has taken or is taking any action as a result of the findings and recommendations.
107. The department replied to this request on 6 August 2015, saying:
- The Department has consulted with the Minister for Immigration and Border Protection, the Hon Peter Dutton MP on this matter and remains of the view outlined in correspondence to you on 15 June 2015.
108. The reply did not indicate that the Commonwealth was taking any action in response to the Commission's findings and recommendations.
109. I report accordingly to the Attorney General.



Gillian Triggs
President
Australian Human Rights Commission
October 2015

- 1 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 2 The ICCPR is referred to in the definition of 'human rights' in s 3(1) of the AHRC Act.
- 3 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005) 518.
- 4 *Report of the Expert Panel on Asylum Seekers* (August 2012), 40-41, 52, 135-139. At <http://pandora.nla.gov.au/pan/135568/20120813-1258/expertpanelonasylumseekers.dpvc.gov.au/report.html> (viewed 23 March 2015).
- 5 Department of Immigration and Citizenship, *Procedures Advice Manual, Refugee and Humanitarian – Offshore humanitarian program – Visa application & related procedures* (as at 1 July 2012 to 14 August 2012) at section 40 – About split family cases.
- 6 Department of Immigration and Citizenship, *Procedures Advice Manual, Refugee and Humanitarian – Offshore humanitarian program – Visa application & related procedures* (as at 1 July 2012 to 14 August 2012) at section 42.2 – Compelling reasons.
- 7 *Report of the Expert Panel on Asylum Seekers* (August 2012), 40-41, 52.
- 8 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Government implements Expert Panel's family reunion recommendation' Media Release (22 September 2012). At <http://pandora.nla.gov.au/pan/67564/20130204-1043/www.minister.immi.gov.au/media/cb/2012/cb190059.htm> (viewed 25 March 2015).
- 9 Explanatory Statement, Migration Amendment Regulation 2012 (No 5) (Cth), 1. At <http://www.comlaw.gov.au/Details/F2012L01961/Explanatory%20Statement/Text> (viewed 25 March 2015).
- 10 Explanatory Statement, Migration Amendment Regulation 2012 (No 5) (Cth), Statement of Compatibility with Human Rights, 2.
- 11 Minister for Immigration and Citizenship, *Direction No. 43 – Order for considering and disposing of Family stream visa applications* (18 July 2009).
- 12 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208, 214.
- 13 *Peacock v Human Rights and Equal Opportunity Commission* [2005] FCAFC 45, [53], [61] (Weinberg, Jacobsen and Lander JJ), see also the decision in *Commonwealth of Australia v Peacock* (2000) 104 FCR 464, [41].
- 14 *Sumner v Public Sector Superannuation Board* [1998] HREOCA 16.
- 15 *Legislative Instruments Act 2003* (Cth), s 5(1).
- 16 *Legislative Instruments Act 2003* (Cth), s 5(2).
- 17 *Legislative Instruments Act 2003* (Cth), s 7(1)(a), item 21; *Legislative Instruments Regulations 2004* (Cth), Sch 1, Part 1, item 1.
- 18 Explanatory Statement, Migration Amendment Regulation 2012 (No 5) (Cth), Statement of Compatibility with Human Rights, 2.
- 19 UN Human Rights Committee, *General Comment No. 19: Article 23 (The family)*, UN Doc HRI/GEN/1/Rev.6, 149 (1990) [3]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6620&Lang=en (viewed 30 March 2015).
- 20 UN Human Rights Committee, *General Comment No. 19: Article 23 (The family)*, UN Doc HRI/GEN/1/Rev.6, 149 (1990) [5].
- 21 UN Human Rights Committee, *Aumeeruddy-Cziffra v Mauritius*, Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978 (1981) [9.2(b)(i)2]. At <http://www.refworld.org/docid/3f520c562.html> (viewed 31 March 2015).
- 22 UN Human Rights Committee, *Winata v Australia*, Communication No 930/2000, UN Doc CCPR/C/72/D/930/2000 (2001) [7.3]. At <http://www.refworld.org/docid/3f588ef67.html> (viewed 31 March 2015).
- 23 UN Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy)*, UN Doc HRI/GEN/1/Rev.6, 142 (1988) [4]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en (viewed 30 March 2015).
- 24 Direction 62, s 9(2)(a).
- 25 Department of Immigration and Border Protection, *Family stream migration: contributory parent category visas*, Fact Sheet 39. At <https://www.border.gov.au/about/corporate/information/fact-sheets/39contributory-parent> (viewed 1 September 2015).
- 26 Department of Immigration and Border Protection, *Family stream migration: contributory parent category visas*, Fact Sheet 39.
- 27 Department of Immigration and Border Protection, *Family stream migration: contributory parent category visas*, Fact Sheet 39.
- 28 Direction 62, s 8(1)(d) and (g).
- 29 Explanatory Statement, Migration Amendment Regulation 2012 (No 5) (Cth), Statement of Compatibility with Human Rights, 2.
- 30 Direction 43, s 5(1).
- 31 Direction 62, s 5(1).
- 32 UN Human Rights Committee, *General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [6]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en (viewed 1 April 2015).
- 33 Explanatory Statement, Migration Amendment Regulation 2012 (No 5) (Cth), Statement of Compatibility with Human Rights, 2.
- 34 The Hon Kevin Rudd MP, Prime Minister, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG' Media Release (19 July 2013). At <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html> (viewed 1 April 2015).
- 35 *Report of the Expert Panel on Asylum Seekers* (August 2012), 40. At <http://pandora.nla.gov.au/pan/135568/20120813-1258/expertpanelonasylumseekers.dpvc.gov.au/report.html> (viewed 1 July 2015).
- 36 The Hon Chris Bowen MP, Minister for Immigration and Citizenship, 'Government implements Expert Panel's family reunion recommendation' Media Release (22 September 2012). At <http://www.chrisbowen.net/media-centre/media-releases.do?newsId=6340> (viewed 1 September 2015).
- 37 AHRC Act s 29(2)(a).
- 38 AHRC Act s 29(2)(b).
- 39 AHRC Act s 29(2)(c)(ii).

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