A Primary Consideration: Children's Rights in Australian Immigration Law

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Within the variety of texts on children's rights, there has been little consideration given to children subject to, or affected by, immigration decisions. Recently, the flurry of publicity given to the case of *Ah Hin Teoh*,[2] focussed attention on the situation of Australian children who may be separated from a parent when the parent is deported. Teoh had been convicted of heroin importation and the Minister proposed deporting him to Malaysia. He was the father of seven Australian children. The plight of children in such circumstances is a recurring theme in Australian and overseas immigration cases.[3]

The *Teoh* case also drew attention to the text of the *United Nations Convention on the Rights of the Child* and its application to immigration decisions. The Minister's decisions to refuse Teoh residence and to deport him were an "action concerning children" and according to Article 3.1 of the Convention, in such actions, "the best interests" of the children must be "a primary consideration". It was clear in the case that the Minister's delegate had balanced the "very difficult and bleak future" of the children against the seriousness of their father's offence, but a majority of the High Court found the delegate had departed from Article 3.1 because she had not balanced the welfare of the children as a primary consideration asking whether the force of any other consideration outweighed it.[4] The Convention ranked the interests of the children of first importance along with other considerations which require equal, but not paramount, weight.[5] A majority of the High Court held that the decisions to refuse residence and to deport Teoh were void. If the decision maker proposed making a decision that did not accord with the *Convention* requirement for the children's best interests to be a primary consideration, Teoh had a legitimate expectation that he would be informed of this in order that he might argue against that course. He had been denied procedural fairness.[6]

Following the *Teoh* case, it is timely to examine the immigration rights of children and consider whether Australian immigration law pertaining to children is in accordance with the international treaty obligations to which Australia has acceded.

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2 (1995) 128 ALR 353.

3 Allars M "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law"(1995) 17 *Sydney Law Review* 204 at 210-13; Human Rights Commission, *Report No. 18: The Human Rights of Australian-Born Children Whose Parents are Deported*, AGPS, Canberra, 1986; Cronin K *Children: Nationality and Immigration* (Children's Legal Centre, London, 1985) 85-102.

4 per Mason CJ and Deane J at 366.

5 per Mason CJ and Deane J at 363; Toohey J at 373-4.

6 A detailed exposition of the *Teoh* case is given in Allars M *op cit*.

This consideration does not address the larger, controversial issues associated with child refugee claimants. That topic necessitates its own article.

Living With The Family

The *Universal Declaration of Human Rights* 1948 cites the family as "the natural and fundamental unit of society. . . entitled to protection by society and the State". (Article 16). The *Convention on the Rights of the Child* gives concrete expression to this principle, stating that:

> 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 interest of the child . . .
>
> 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 . . .
>
> Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death. . . 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. (Article 9).

In an immigration context, questions arise concerning whether such rights to live with, or not be separated from, one's parents, carry with them a right to live as a family in a country of one's choice.[7] The issue is an important one because of the well established, international law principle that, while citizens have a right to reside in the country of their nationality, States have sole discretion to decide whether any non-citizens[8] can enter or stay in their territories. Under this sovereignty principle, States decide on entry, the terms and conditions of a non-citizen's stay and the circumstances in which they can or must be removed.[9] Children's rights to live with and not be separated from their parents become immigration questions

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7 Cvetic G "Immigration Cases in Strasbourg: The Right to Family Life under Article 8 of the European Convention" (1987) 36 *International and Comparative Law Quarterly* 647; Storey H "The Right to Family Life and Immigration Case Law at Strasbourg" (1990) 39 *International and Comparative Law Quarterly* 328.

8 Throughout this article I use the term non-citizen because this is the term used in Australian migration law. The term is meant to convey that the person is not a citizen of the country to which she seeks entry. In the Australian context, it refers to any person who is not an Australian citizen. Such persons are not in fact non-citizens. They are citizens of some other country.

9 This sovereignty principle is a key article of Australian immigration law. See Cronin K "A Culture of Control: An Overview of Immigration Decision-Making" in Jupp J and Kabala M, *The Politics of Australian Immigration* (AGPS, 1993), 84-5.

when children or their parents are not citizens of a country in which they hope to reside. Australia's commitment to facilitate family reunion in such circumstances is examined in this article.

Successive Australian governments have featured family reunion policies as an enduring contract within the migration program. Indeed, by world standards, Australia's family immigration rules are generous.[10] Children figure in the immigration rules as primary visa applicants, who qualify for a visa in their own right; as dependant visa applicants joined within a family visa application, who qualify for the visa as dependants of a successful visa applicant; or as the Australian sponsors of non-citizen parents, where the parents are the visa applicants.

Joining A Parent

Australian citizen or permanent resident parents can sponsor their 'natural' and certain of their adopted children to settle here. In such instances the child is the visa applicant. [11] If the parent is migrating to Australia, the 'natural' or adopted child is joined as a dependant applicant within their non-citizen parent's visa application.[12] Children must be dependant on their sponsoring parent. Children under 18 must be 'wholly or substantially in the daily care and control' of their sponsor, while those 18 years and over must be 'wholly or substantially dependant' on the sponsor 'for financial, psychological or physical support', or incapacitated for work because of a disability.[13]

In many instances, child visa applicants have been separated from their parents for some time. The reasons for the separation vary. These can be divorce,[14] financial pressures, family constraints or civil strife. In many instances, parents leave their children overseas with their extended families, because they are unable to care for them in Australia.[15] In one such case, the elder child, born in Lebanon, was returned to his grandparents in a small village in north Lebanon. As his mother told the Immigration Review Tribunal, her son was "sickly", with repeated ear infections. The boy's ear drum had burst during bombing raids in Beirut. The mother had to find employment, and while she could place her other, healthy children in child care, the son's persistent illnesses made this impossible. Years of poverty, a marital

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10 For example, Australian immigration law allows legal and defacto spouses as well as gay partners to migrate or secure residence here in order to settle with their Australian citizen or resident partners. In most comparable countries only legal spouses have such entitlements.

11 The child visas comprise visa subclass 101 applied for when the child is offshore or outside Australia and visa subclass 802 which is for children applying in Australia for permanent residence.

12 Stepchildren can be included as dependant applicants if their 'natural' parent is still the spouse of the primary visa applicant: *Migration Regulations* 1994 reg 1.21(1)(b).

13 *Migration Regulations* 1994 reg 1.03.

14 See, for example, *Re Salami*, IRT decision, N93/00616, Sydney, 2 Dec 1993; *Re Ozgur*, IRT decision, V93/01219, Brisbane, 19 Aug 1994; *Re Jessica Leung*, IRT decision, N93/00344, Perth, 23 Feb 1994.

15 Re *Manalo*, IRT decision, N93/00562, Sydney, 1 Nov 1993; *Re Nisha*, IRT decision, N94/01512, Sydney, 23 Dec 1994; *Re Quang To Anh Nguyen*, IRT decision, V94/00269, 25 May 1995.

breakdown and the continuing strife in Lebanon conspired to continue the separation of this boy and his family for 16 years.[16]

Wartime conditions likewise cause family separation. In one quite typical Vietnamese case, the parents had raised a large sum of money to pay for their escape. When word came that their boat was ready, they had one hour in which to depart. Their adopted son had gone to a movie with a friend and they could not locate him in the time available. With considerable misgivings, they entrusted his care to remaining family members and departed. Ten years followed, during which the parents corresponded with various government officials, trying to obtain documentation concerning the boy's adoption. The boy eventually was reunited with his parents in Australia.[17]

In such cases, it can be difficult to show that the child applicant is dependant upon the sponsoring parent. In order to accommodate such children within the immigration rules, the Immigration Review Tribunal has developed a flexible test for assessing whether a child is 'wholly or substantially in the daily care and control' of parents. According to the Tribunal, the rules simply require the parent to show "some degree of overall responsibility for their child".[18] Children have been granted visas where the parent has regular communication with the child, has detailed knowledge of the child's circumstances and has played a role in advising the child, say on education. [19] As one 15 year old visa applicant explained when applying to join his father in Australia after 12 years living with his mother in Lebanon — his father was "more in charge" of him than his mother.[20]

In most immigration cases involving children, both parents are agreed that their children should come to Australia. However where the parents are estranged, children's moves here take them away from the other parent. Given Australia's commitments to forestall international child abduction,[21] the *Migration Regulations* seek to ensure that both parents have consented to the child coming to or remaining in Australia. No child can qualify for a visa to Australia, unless the immigration officer is satisfied that 'the grant of the visa would not prejudice the right and interests of any person who has custody or guardianship of, or access to' the child.[22]

The principle is laudable but the terminology used in the Regulations can cause difficulty. The regulation is not directed specifically at ensuring parental consent to

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16 *Re Yacoub*, IRT decision, N93/01215, Sydney, 31 Jan 1994.

17 *Re Ngoc Phu Pham*, IRT decision, V94/00366, Melbourne, 25 May 1995.

18 *Re Narayan*, IRT decision, Q94/01115, Brisbane, 17 Jan 1995.

19 See IRT decisions: *Re Ngoc Phu Pham*, V94/00366, Melbourne, 25 May 1995; *Re Parkin*, N94/01500, Sydney, 29 March 1995; *Re Jonker*, V94/00722, Melbourne, 15 Sept 1995; *Re Lidya Chamoun*, N93/01544, Sydney, 27 May 1994.

20 *Re Salemi*, IRT decision, N93/00616, Sydney, 2 Dec 1993.

21 The *Family Law (Child Abduction Convention) Regulations* brought the Convention into force from 1 Jan 1987. See Curtis L "The Hague Convention on the Civil Aspects of International Child Abduction: The Australian Experience" April 1989, *Commonwealth Law Bulletin*, 627; Dickey A "Rights of Custody under the Child Abduction Convention" (1990) 64 *Australian Law Journal*, 85.

22 See, for example, *Migration Regulations* 1994, Subclass 101, para 101.226.

the move. Decision-makers are directed to consider whether the absent parent's rights and interests in the child would be prejudiced if a visa was granted to the child. Arguably even if a parent has consented to the child moving to Australia, such a move prejudices the remaining parent's rights to access because there will be a diminution in the access between the child and the overseas parent.

These issues were considered in one matter before the Immigration Review Tribunal. In the case, the father lived in Hong Kong. He agreed to the child's departure for Australia. The Hong Kong Supreme Court had sanctioned the child's removal here to join his mother. Even so, the Tribunal, in applying the criteria, felt compelled to weigh up the father's competing interests in the child. The Hong Kong court order represented a determination that the child's best interests would be served if taken to Australia. The order did not answer the criteria, whether the father's rights of access were prejudiced if an Australian visa was granted. In this instance, given the father's consent to the move, the Tribunal approved the grant of the visa.[23] But what if the father opposed the child's move to Australia? If the parents cannot agree on such a move, an overseas court order approving the child's removal may not satisfy Australian visa criteria if, as is presently the case for visa purposes, overseas parents' views are taken to be decisive of the issue of whether their rights or interests concerning children are prejudiced. The issue remains to be resolved.

Adopted Children

A different set of competing considerations arise when the children applying to join or to accompany their parents are adopted children. Immigration services are concerned to see that adoptions are genuine family arrangements and 'have not been contrived to circumvent. . . migration requirements'.[24] In New Zealand and Britain the immigration issues associated with near relative adoptions have been ventilated and adjudicated upon in adoption proceedings. Immigration ministers have intervened in such proceedings to argue against the making of particular adoption orders, claiming that the adoptions in question were primarily designed to secure immigration advantages for the children. In each such case the adopters were seeking to adopt their younger relatives — nieces or nephews — in circumstances where the child would not otherwise qualify to obtain residence.[25] Such procedures do allow full consideration of these cases. As the case examples detailed below make clear, similar Australian cases have been quietly excluded from the immigration and family law systems.

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23 *Re Lai*, IRT decision, A91/01216, Canberra, 30 Sept 1992.

24 Regulation 1.04.

25 *Re W (a minor)* 1985 3 WLR 945; *Re H (a minor)* [1984] 3 All ER 84; *Application by Webber* [1991] NZFLR 537. See also Rytting P "Immigration Restraints on International Adoption" (1986) *Brigham Young U Law Review* 809.

Alongside the immigration control provision, the *Migration Regulations* dealing with adopted children incorporate international principles concerning intercountry adoptions. These principles are set down in the *Convention on the Rights of the Child* and the 1993 *Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.*[26] The Children's Convention requires that due regard be paid to a child's 'ethnic, religious, cultural and linguistic background' in considering options for children unable to be cared for by their families.[27] Article 21(b) states that intercountry adoption may be considered 'as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.' In this ordering of placements for children, intercountry adoption is at the end of the list of possible options. The *Hague Convention* has softened this approach, approving intercountry adoption as a child care option, above institutional placement in the home country.[28] In any event, the *Migration Regulations* reflect Australia's commitment to limit overseas adoptions by its nationals.

There are different rules for adopted children applying to enter or stay on in Australia depending on whether they are being sponsored into Australia by prospective adoptive parents, or, if adopted overseas, that at the time of their adoption, their parents were, or were not Australian citizens or permanent residents. Many of the immigration rules for adopted children were formulated by the Joint Committee on Intercountry Adoption in its report to the Council of Social Welfare Ministers and the Minister for Immigration in 1986.

There are two visas available to adopted children.[29]The child visa is for children adopted overseas, whose parent(s) were not then Australian citizens or residents. The adoption visa is for children proposed and approved for adoption in Australia as well as for children adopted overseas by parents who were then Australian citizens or residents, providing, that at the time of the adoption, the parents were resident overseas for more than twelve months. The Joint Committee on Overseas Adoptions advocated the overseas residence requirement to forestall 'a casual approach, inadequate preparation, inappropriate placements. . . including the commercial placement of children.'[30]

Overseas adoptions whether by Australian or non-Australian parents must comply with certain formalities to be recognized for immigration purposes. The child must

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26 This Convention is expected to be ratified by Australia. Consultations are continuing with the States on the matter.

27 Article 20.

28 Article 4(b). See Pfund P "Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise" (1994) 28(1) *Family Law Quarterly* 56.

29 There is a possibility that some adoptees also might qualify for the Preferential family visa as the orphan relatives of Australian citizens or residents.

30 Joint Committee on Intercountry Adoption, *Report to the Council of Social Welfare Ministers and the Minister for Immigration and Ethnic Affairs*, 1986, 37.

have been adopted before the age of 18 and the adopter have assumed a parental role by virtue of:

- formal adoption arrangements made in accordance with, or recognised under Australian State or Territory laws.
- formal adoption arrangements made in accordance with the laws of another country in which the adopters became the parents of the child.
- overseas customary adoption arrangements, providing the adoption arrangements were made in accordance with the usual practice or recognised custom in the child's and adopter's culture; that the parent-child relationship is significantly closer than any other relationship between the child and any other person and that formal adoption proceedings either were not available or not reasonably practicable in the circumstances.[31]

Again the Immigration Review Tribunal has given flexible interpretations of these rules, so as to facilitate the entry of adopted children. Thus a transfer of custody, authorised by a local People's Committee in Vietnam was approved by the Tribunal as a customary adoption because there was no alternative adoption system working there at the time.[32] Recently the Tribunal accepted that it had not been reasonably practicable for the parents to institute formal adoption proceedings in the Philippines to adopt their niece, because their lawyer at the time had counselled against such adoption, claiming that they should delay such application until they were better able to satisfy the court of their financial means to support the child.[33]

If the child is to be adopted in Australia, the visa requirements ensure that the prospective adopters have been approved by State or Territory child welfare authorities and that the relevant overseas authorities have approved the child's departure for adoption in the custody of the proposed adopters.[34] Under these arrangements intercountry adoption remains largely a State and Territory matter with the Commonwealth's role limited to immigration matters.[35] If children are adopted in Australia by Australian citizens or residents, the children become Australian citizens on adoption, with a right to enter and stay here.[36] Overseas born

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31 *Migration Regulations* 1994, reg 1.04.

32 *Re Ngoc Phu Pham*, IRT decision, V94/00366, Melbourne, 25 May 1995. Compare with *Re Ka Lan Mok*, IRT decision, N93/00755, Sydney, 18 Aug 1994, in which the customary adoption was rejected as formal adoption arrangements were 'reasonably practicable' in the circumstances.

33 *Re Nganmaya*, IRT decision, N94/00107, Sydney, 27 Sept 1994.

34 *Migration Regulations* 1994, subclass 102, para 102.211(3) (d) & (e).

35 The Minister for Immigration and Ethnic Affairs also is the titular guardian of children brought into Australia for adoption, under the *Immigration (Guardianship of Children) Act* 1946. The guardianship power is delegated to appropriate State welfare ministers under amendments to the Act in 1994. *Immigration (Guardianship of Children) Amendment Act* 1994, s4AAA.

36 *Australian Citizenship Act* 1948, s 10A. Note that from 22 Nov 1984 such children acquire Australian citizenship on adoption only if they are present in Australia as permanent residents at the time of the adoption.

children accounted for 41 per cent (222 children of 764) of adoptions in Australia in 1993-94.[37]

It is generally agreed that Australia has relatively high standards for intercountry adoptions and that the limitations on private, intercountry adoptions reflect international concerns to protect children in these arrangements.[38] Even so, the rules can work unjustly, particularly in cases of inter-family adoptions. Case examples illustrate the problems particular families have experienced because they are unable to satisfy immigration requirements to secure entry for their adopted children.

In one instance, the wife was Fijian. Prior to her marriage, she had resided in Fiji with her two sisters and their children. She had been primarily responsible for and very closely attached to one of her nephews and after her marriage it was agreed within the family that she and her husband should adopt the boy and bring him with them to Australia. They were incorrectly advised by the Immigration Department and the Department of Health and Community Services to adopt the child in Fiji. Community Services refused to assess them as prospective adopters so that they could bring their nephew to Australia to be adopted here, saying it was 'policy' to refuse assessment for relative adoptions. The couple returned to Fiji for the adoption. They made arrangements for schooling their boy here and applied for his visa. They were then informed that their Fijian adoption took them outside the immigration rules, because at the time of the adoption they had not been residing in Fiji for the required 12 months. The Departmental review officer noted on the file that this was clearly a genuine adoption which would be of benefit to the child. As with other such cases known to the review officer, the parents had been attempting to comply with the legal requirements but had been misled by Australian officials. The child was ineligible for any Australian migration visa.[39]

In another case the Australian couple had travelled to the Philippines to care for the wife's brother who was dying of cancer. The brother had two young children and was estranged from his young wife who did not want to be "saddled" with the children. The Australians tended the father and his children during his illness. During this time they and their children became very attached to the brother's children. The brother requested that they continue to care for the children after his death. Again, on the incorrect advice of Australian officials, the couple formally adopted the children in the Philippines only to find that this disqualified their adopted children from obtaining a visa. The adoptive parents had no idea why their adopted children were refused entry. As the Tribunal noted on review, it had been the parents' "sad misunderstanding that the previous decision-maker. . . had

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37 Zabar P and Angus G *Adoptions Australia*, 1993-94 Child Welfare Series, No 11, Australian Institute of Health and Welfare, Canberra, 1995, 8.

38 Prent J "Hague Convention on Intercountry Adoption", Paper delivered at the First World Congress on Family Law and Children's Rights, 4-9 July 1993, Sydney, 1189; Bayes H "Protecting Children in Intercountry Adoption", *Adoption Australia*, Spring, 1992, 10.

39 *Re Williamson*, IRT decision, V94/00938, Melbourne, 29 May 1995.

doubted the[ir] Australian citizenship'' not that their adopted children were unable to qualify for a visa.[40]

The Immigration Tribunal has observed that the combined effect of the immigration rules and community welfare inaction concerning relative adoptions has been to preclude such children from being considered for migration.[41] The costs to such children must be incalculable.

Sponsoring Parents To Australia

Australian immigration laws make an important concession to children's rights in permitting Australian citizen or resident children to sponsor their non-citizen parents here as migrants. Where the children are under 18, the formal sponsorship in fact is undertaken by an adult relative of the child or a community organization[42] but the parents qualify for the visa because of the relationship with their Australian children. Again the concession does not work for all cases.

To qualify for a parent visa the parent must show that the number of their children in Australia is ''greater than, or equal to, the total number'' of the parent's children resident overseas or ''greater than the greatest number of children of the parent who are resident in any single overseas country''.[43]In this 'balance of family test', as it is styled, the numerical calculation of the parent's children, including certain step children, can disqualify parent visa applicants. Further, under the rules, parents in Australia cannot qualify from within Australia for permanent residence unless they are aged parents. All such parents under retirement age, must leave Australia and obtain their parent visa from abroad.

The limitations of these rules were relieved somewhat in the case of *Chen Wen Ying*.[44] In that case, the visa applicant was the Chinese mother of two Australian citizen children. She had come to Australia as a student. The children's father was an Australian resident. The mother was ineligible to remain here as the spouse of an Australian resident because the father was married to, and still in a relationship with another woman. The mother could not get a parent visa in Australia as she was not an aged parent. She applied for residence here as a 'special need relative' of her infant child — that is, as a relative who could give 'substantial and continuing assistance' to an Australian who had 'a permanent or long-term need for assistance because of death, disability, prolonged illness or other serious circumstances' which

40 *Re Nobbs*, IRT decision, N92/01902, Sydney, 18 Oct 1993.

41 *Re Williamson*, Statement of Decision, op cit at 14. The issues concerning near-relative, intercountry adoptions were largely overlooked in the NSW Law Reform Commissioner's, *Review of the Adoption of Children Act* 1965 (NSW): Discussion Paper 34, April 1994 but the immigration adoption rules presently are the subject of an interdepartmental review from within the Immigration Department.

42 *Migration Regulations* 1994, sch 2, para 103.212.

43 Ibid, reg 1.05(2)(b).

44 *Chen Wen Ying v MIEA* (1994) 51 FCR 322; 123 ALR 126.

could not be provided by another relative of the Australian or community services.[45] In the Federal Court, Davies J held that the definition of a 'special need relative' may encompass the relationship of a parent and child. The child's need arose because of a 'serious circumstance', namely the 'weighty and important' relationship between a child and its mother. According to Davies J, such interpretation of the visa criteria accorded with Australia's obligations under the *Convention on the Rights of the Child* not to separate a child of tender years from its mother save in exceptional circumstances.[46]

The *Convention* rights to family life also inform other immigration rules affecting children. These rules are directed to spouse visa applicants. If a person would have qualified for residence in Australia as the spouse of an Australian citizen or resident[47] but the relationship has broken down, the spouse can still qualify for the residence visa. The qualifying circumstances include, that spouse visa applicants or their children have suffered domestic violence from the nominating spouse, or have custody or joint custody of a child with their Australian partners, or the Australian partners have access to or maintenance obligations concerning such children. [48] Where the parent is eligible to qualify for this concession, the child's rights to maintain personal relations with both parents are preserved.[49]

Children As Unlawful Non-Citizens

If a non-citizen present in Australia does not have a visa authorising stay, that person is an unlawful non-citizen, and is liable to be detained[50] and removed from Australia.[51] This is the setting of irregular migration. Although Australia has made provision for the operation of children's rights within the orderly migration program areas, there are few such concessions for those who offend the immigration rules. Children are particularly poorly served under this control focus.

Most persons who become unlawful non-citizens do so by overstaying the terms of stay permitted under their temporary visas. Children may have been brought here ostensibly as visitors or students and left here with family or friends when their parents returned overseas or they may have remained living here with their overstayer parents. Children born in Australia to unlawful non-citizen parents are taken to be unlawful non-citizens from birth.[52]

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45 *Migration Regulations* 1994, reg 1.03.

46 On the human rights approach to interpreting migration legislation, see Allars M, op cit, 210-218.

47 Including the spouse of certain visa applicants who will soon themselves be Australian residents, that is, the dependant spouse applicant included within certain non-citizens' visa applications.

48 See, for example, *Migration Regulations* 1994, sch 2, paras 801.221, 820.21 - .22.

49 The text of the concession accords with the European Court of Human Rights' interpretation on the Convention 'right to family life' in the *Berrehab case* (3/1987/126/177) ECHR. Ser A, Vol 138; [1989] 11 E H R R 322.

50 Such person must be detained and cannot be released unless given a visa. The visa authorising release for most non-citizens is termed a bridging visa: *Migration Act* 1958, ss 188-197; 72-76.

51 *Migration Act* 1958, ss 14,198-9.

52 If a child born in Australia has one parent who is an Australian citizen or resident, the child is an

There are very limited options for unlawful non-citizens to regularise their stay from within Australia. It is expected that they will leave. Some may qualify for a visa to return here.[53] Child overstayers may get residence here if they have a citizen or resident parent or if they are refugees but such cases will be rare. The most useful visa option for child overstayers in Australia is available to them only when they have turned 18. To qualify for this visa, they must have spent the greater part of their formative years in Australia[54] and be independent from and not residing with the family with whom they first entered Australia.[55] An examination of case facts within this visa class reveals something of the pressures of living here as a child overstayer.

Most children, in the cases examined, had limited education here. One young woman who came here as a 14 year old, attended school for one month, leaving when the school wanted her to show her passport.[56] Others refer to difficulties finding schools which would accept them without identification papers.[57] Denied the prospect of schooling such children went to work. One 15 year old working fulltime in 1984, in a cousin's restaurant, earned $10 per week.[58] Others record being "forced to clean relative's houses. . . to cook and shop for the whole family. I was treated more as a 'cleaning lady' than as a relative."[59] Another young man, brought here from Hong Kong when he was 15, described his life as follows:

> I was brought here by my parents who stayed here only for a month or so before they returned to Hong Kong without telling me that they were intending to do that and without my knowing that I was left to remain illegally in Australia.
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> Following the departure. . . of my parents I lived for the next two months in Surry Hills at the home of my brother's parents-in-law. I was not well received in their home and felt obliged to make my own accommodation arrangements. . . I moved to a boarding house in Bondi and for all the time since then I have been totally responsible for my own welfare.

52—*Continued*
Australian citizen at birth: *Australian Citizenship Act* 1948, s 10. If neither parent is a citizen or resident, the child may take the parent's citizenship and is taken to be included in both parents' visas from birth: *Migration Act* 1958, ss 10, 78.

53 For a discussion concerning this aspect of immigration policy, see: Cronin K, "A Culture of Control" op cit at 92-96.

54 That is the years before they turned 18. As to whether this necessitates a simple numerical or qualitative assessment of the years spent in Australia, see *Skea v MILGEA* (1994) 51 FCR 82; *Khan v MIEA* (1994) 35 ALD 47.

55 *Migration Regulations*, sch 2, para 832.21-.22.

56 *Re Siu Ling Wong*, IRT decision, N94/00720, Brisbane, 27 March 1995.

57 *Re Hong*, IRT decision, N92/01454, Perth, 29 Oct 1993; *Re Fabiola Rivera*, IRT decision, N93/00005, Sydney, 24 Aug 1994.

58 *Re Siu Ling Wong*, op cit.

59 *Re Fabiola Rivera*, op cit at 4.

> . . . I recall my brother. . . trying to enrol me in school but obviously without success. I. . . was forced to discontinue my schooling at age fifteen and a half years and I started working ..as a kitchenhand.[60]

Many of the young overstayers had no idea of their irregular immigration status until they were adult. The revelation was shattering. Again one of the young people tells his story:

> I was ten years old when my father told me we were going to live in Australia. I wanted to know why. My parents gave me all sorts of answers, but none of them made sense. All I knew was that I didn't want to leave my toys, my dog, my best friend Jojo, and my school friends. . . I felt the loss deeply.
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> Looking back now, I realise how quickly I forgot what I left behind. I lost nothing that was not replaced by something better in Australia . . .
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> I was 22 when I was told that I don't really belong here, that I have to leave my home yet again and leave behind all things familiar. I felt betrayed by my parents and the system. . . I don't understand it. I feel I am Australian. . . If I lose Australia, I would be utterly homeless.[61]

Family relations become strained under such pressures. Various of the young people experienced depression and were hostile towards the parents who had caused their predicament. Their unlawful immigration status affected all aspects of their lives — their education, work prospects and social relationships. One young woman explained:

> At the time of our arrival, my parents were very much concern (sic) with our 'possible' friends as they were afraid that we might disclose our illegal status. Therefore, we did not have friends.[62]

Although these cases make for sobering reading, the visa applicants in fact are the lucky ones because they have the capacity to regularise their immigration status and stay on in Australia. As the Regulations make clear they qualify for the visa when they have reached adulthood and are independent from their families. This is in line with the policies of successive governments which have sought to ensure that there are no concessions made to unlawful non-citizen children which the parents of such children could exploit to secure their own residence in Australia. Such an approach is not necessarily inconsistent with the principles of the children's *Convention* which protects children's rights to live with their families, not their right to live in any particular country with their families. Even so, children have been the losers in this control contest.

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60 *Re Yun Lam Liu*, IRT decision, N93/00824, Sydney, 10 March 1994.
61 *Re Estrella*, IRT decision, N93/01811, Sydney, 17 June 1994.
62 *Re Fabiola Rivera*, op cit.

Prior to 20 August 1986, all children born in Australia were automatically Australian citizens.[63] The rights of such citizen children to live with their families in Australia[64] then featured in litigation concerning the Minister's decision to deport the children's parents.[65] The government's solution in such cases was to remove children's rights to citizenship. Thereafter children born in Australia acquired citizenship only if one of their parents had secure immigration status, either because the parent was a citizen and outside the immigration control system or because the parent was a resident here.[66] The problem did not disappear for the government, because, as with the *Teoh* case, the issues concerning children can still arise when the Minister proposes deporting the children's one unlawful non-citizen parent. For children born in Australia, their rights have been considerably circumscribed. Some of them will be stateless.[67]

This camouflaging of the children's issue was completed in December 1989, when the codification of immigration law replaced the discretionary decision-making model with an exhaustive set of legal requirements, binding on all decision-makers including the Minister. Non-citizens required a visa to enter or stay on in Australia. Visas had strict criteria. Applicants must satisfy all criteria in order to be granted a visa. The Minister had residual discretion to depart from the rules, but this was reserved only for visa applicants with a review right.[68] Non-citizens in Australia without a visa, were required to be detained and must be removed, unless they could qualify for a visa — and there are very few such visas accessible either to unlawful non-citizen children or to the unlawful parents of Australian children.

In this context the *Teoh* case represents not the dawn of a new era of child-centred decision-making, but a symbol of what has been lost to those parents and children who, unlike Teoh, apply for their visas after December 1989. With no visa to apply for, or no decision on deportation, there is now no forum for a consideration of children's interests. The *Migration Act* explicitly preserves that forum only for those Australian residents who have committed serious criminal offences and are to be deported. Such deportation decisions will continue to focus on the person's

63 The exceptions were if, at the time of the child's birth, the father (later the 'parent') was a diplomat or enemy alien.

64 Note in the *Teoh* case, Gaudron J bases her decision in part, on a common law right of the citizen child to protection, at 375-6.

65 See, for example, *Kioa v MIEA* (1985) 159 CLR 550; 62 ALR 321; *Kaufusi v MIEA* (1985) 9 FCR 86; 70 ALR 476.

66 *Australian Citizenship Act* 1948, s 10. See: Joint Standing Committee on Migration, *Australians All: Enhancing Australian Citizenship*, Sept 1994, 100-1.

67 The *Citizenship Act* makes certain provision to prevent statelessness for such children, but it will not work for all cases. Children born here, not Australian citizens, acquire citizenship after they have been here 10 years (s 10(2)(b)) and can acquire it at any time if the Minister is satisfied they are not and have never been entitled to acquire another citizenship: s 23D.

68 See, for example, *Migration Act* 1958, s 351.

Australian family ties.[69] For those who have offended against immigration requirements the children's issue has been hushed.

69 s 201. If such persons are deported from Australia, they are permanently barred from returning here, notwithstanding that they may have family here: *Migration Regulations* 1994, sch 5, 5001. Note that Teoh was not proposed for deportation under these provisions, because he had not been an Australian resident. He was to be deported as an overstayer.