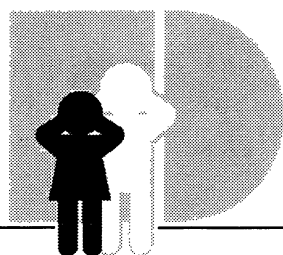


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CROC CAN STILL BITE The *Lam* and *Vaitaiki* Cases

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Two recent cases in the Federal Court have reaffirmed the relevance of the UN Convention on the Rights of the Child (UNCROC) in deciding whether a parent of an Australian citizen child may be deported or not.

In two separate proceedings, Mr Lam and Mr Vaitaiki, both of whom have an Australian-born child, appealed against deportation orders, on the basis of the principle established in the *Teoh* case. The Federal Court decided in both cases that the Department of Immigration and Multicultural Affairs must consider the impact on a child of losing contact with his or her parent and weigh this against the need to protect the Australian community, before making its decision. If the Department fails to consider the child's rights without first affording the parent procedural fairness, it has failed to correctly apply Article 3 of UNCROC.

In the original case about this issue in 1995, the High Court upheld an appeal by Mr Teoh against his deportation, finding that a decision-maker must have an eye to the principles enshrined in UNCROC, in particular the best interests of the child, when deciding whether a parent of an Australian citizen child should be

deported. The majority of the High Court held that the ratification of an international convention is a positive statement by the Commonwealth Government that it will act in accordance with that convention, and is not, in the words of Chief Justice Mason and Justice Deane "a merely platitudinous or ineffectual act". Thus, the High Court held that people have a legitimate expectation that administrative decisions will be made in conformity with UNCROC, and will treat the best interests of children as a primary consideration unless there is legislation to the contrary.

In other words, if a decision is proposed which will negatively impact on a child, the person affected (ie the parent) must be given the opportunity to argue against the decision on the basis of the child's best interests.

In *Lam v the Minister for Immigration and Multicultural Affairs* ("Lam") (unreported, 4 March 1998), Justice Sackville found that the Administrative Appeals Tribunal had incorrectly applied Article 3 of UNCROC. Mr Lam had been refused a permanent visa on the grounds that he was not of good character, and was a person who could not satisfy the public

Inside

NSW Commissioner - Submission	3	Children's rights in South Asia	10
Juvenile Justice Networking	5	DCI Grows in Europe	11
March against Child Labour	6	Out of the Shadows	11
Children with Altitude!	7	Budgets for Children	12
Oz Children's Commissioner	8	A Good Day at the Office	13
Obituary - Harry McGurk	8	Mukti means liberation	13
		Publications, training, conferences	14-15

CROC CAN STILL BITE (cont.)

interest criteria for a visa. Mr, Lam, a Chinese citizen had arrived in Australia in 1985 as a stowaway and had only been detected in 1989, when he was arrested for possession of an imported narcotic. Prior to his arrest, Mr Lam had formed a relationship in Australia and had a son, David, born in 1988. The Tribunal accepted that if Mr Lam was to be deported, David would either face separation from his father, or a move to China where he would probably live in poverty and have poor educational opportunity. However, it decided that the need to protect the Australian community outweighed David's interests.

In the Federal Court, Justice Sackville held that the Tribunal should have given Mr Lam the opportunity to make submissions as to why David's interests should be treated as a primary consideration.

Similarly in *Vaitaiki v the Minister for Immi-*

gration and Multicultural Affairs ("Vaitaiki") (unreported 15 January 1998) the Federal Court held that the Administrative Appeals Tribunal had erred in failing to accord procedural fairness to Mr Vaitaiki. The Court emphasised the importance of procedural fairness where a decision could lead to a child being separated from a parent or a child moving to a country where he/she would face a bleaker future, in order to stay with the parent.

The Federal Court has, in these two cases, reaffirmed the Teoh principle. Nonetheless, the administrative decisions which were taken to the Federal Court highlight the need for continued promotion of UNCROC and for urgent appointment of a Children's Commissioner to ensure that decision-makers take sufficient account of the effect of their decisions on children.

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