

RESPONSE OF THE AUSTRALIAN GOVERNMENT
TO THE VIEWS OF THE COMMITTEE IN
COMMUNICATION NO. 930/2000 WINATA V AUSTRALIA

1. The Australian Government presents its compliments to the members of the Human Rights Committee.
2. The Australian Government has given careful consideration to the Views of the Committee expressed in Communication No. 930/2000 Winata v Australia. The Australian Government provides the following information in response to the Committee's Views and apologises for the delay in finalising this response.

Article 17

3. The Australian Government does not accept the Committee's view that there will be a breach of article 17 of the International Covenant on Civil and Political Rights (Covenant) if Mr Winata and Ms Li are removed to Indonesia. The Australian Government does not accept that it should refrain from enforcing its migration laws in cases where unlawful non-citizens are said to have established a family life.
4. The key issues in relation to the alleged violation of article 17 are whether removal of Mr Winata and Ms Li would amount to 'interference' with their family and, if it would amount to interference, whether the interference would be 'arbitrary'.
5. Australia notes the Committee's view that:

the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹

¹ Views of the Human Rights Committee, *Winata v Australia*, Communication No. 930/2000, CCPR/C/72/D/930/2000, (26 July 2001) para 7.1. See also *Jonny Rubin Byahuranga v Denmark*, Communication No 1222/2003, views adopted 9 December 2004, para. 11.5.

6. Indeed, the Committee has found on a number of occasions that there has been no violation of article 17 (or other provisions of the Covenant) in removal cases where the applicants had existing families in the State which was removing the applicants.²
7. In the debates of the Human Rights Commission and the Third Committee of the General Assembly during the drafting of the Covenant, 'it was stressed above all that "arbitrary" clearly went beyond "unlawful" and contained an element of "capriciousness"'.³ Furthermore, expert commentator Manfred Nowak states that 'arbitrary interference contains elements of injustice, unpredictability and unreasonableness'.⁴
8. International jurisprudence has emphasised that where individuals are aware of their 'precarious' immigration status, claims for respect of family life will carry much less weight as the situation has resulted from choices and decisions knowingly made by the applicant.⁵ The Australian Government submits that the jurisprudence of the European Court of Human Rights is relevant, as article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is substantially similar to article 17 of the Covenant.
9. In *O and OL v United Kingdom*, the ECHR decided:

where the applicants' parents have repeatedly taken measures which breached or circumvented immigration rules, and where they must to a large extent be held to be responsible for their present separation from their children it could not be held that the removal of the parents was contrary to art 8.⁶
10. In *Ahmut v The Netherlands*, the ECHR also said that article 8 does not guarantee a right to choose the most suitable place to develop family life.⁷ Similarly, Australia submits, a family cannot choose the place of residence for its family simply by unlawfully remaining in the country in which it wishes to raise its family.

² For example, *Charles E Stewart v Canada* Communication No 538/1993 (also no violation of article 23); *Giosue Canepa v Canada* Communication No 558/1993, views of 3 April 1997 (also no violation of article 23).

³ Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Comment* (1993) p. 291.

⁴ *Ibid* p. 292.

⁵ *Baghli v France* (30 November 1999), ECHR, Publications of the European Court of Human Rights, Reports 1999-VIII, para. 48.

⁶ ECHR, Application No. 11970/86, Admissibility Decision (13 July 1987).

⁷ *Ahmut v The Netherlands*, judgment of 28 November 1996, Application No. 21702/93.

11. The Australian Government's position is supported by the views of Committee members Mr Prafullachandra Natwarlal Bhagwati, Mr Ahmed Tawfik Khalil, Mr David Kretzmer and Mr Max Yalden who state that the Committee's interpretation of interference with the family 'ignores prevailing standards of international law which allow states to regulate the entry and residence of aliens in their territory.'⁸ The Australian Government also agrees with the above Committee members that the:

Committee's approach may provide an unfair advantage to persons who ignore the immigration requirements of a State party and prefer to remain unlawfully in its territory rather than following the procedure open to prospective immigrants under the State party's laws.⁹

12. Australian migration laws allowing removal of unlawful non-citizens are not arbitrary. These laws are based on sound policy reasons – the maintenance of the integrity of Australia's migration system. This reflects the principle of State sovereignty, which is recognised in international law, including in the Covenant.
13. Australian migration law lays down generally applicable, objective criteria which are consistent with Australia's international obligations, against which applications for visas are assessed. The operation of these laws is not unreasonable or unpredictable and is therefore not arbitrary. All applications of Mr Winata and Ms Li were properly considered in accordance with these laws.
14. For these reasons, the Australian Government does not accept the Committee's view that Australia will breach article 17 of the Covenant if Mr Winata and Ms Li are removed to Indonesia.

Article 23(1)

15. The Australian Government does not accept the Committee's view that there will be a breach of article 23(1) of the Covenant if Mr Winata and Ms Li are removed to Indonesia. The Australian Government does not accept that any such removal would breach Australia's obligation to protect the complainants' family unit.

⁸ *Individual Opinion of Committee Members Mr Prafullachandra Natwarlal Bhagwati, Mr Ahmed Tawfik Khalil, Mr David Kretzmer and Mr Max Yalden (Dissenting), Winata v Australia* Communication 930/2000, para. 4.

⁹ *Ibid* para. 6.

16. Article 23(1) concerns the protection of the family as an institution. In its General Comment 19 on article 23, the Committee said that '[e]nsuring the protection provided for under article 23 of the Covenant requires that States parties should adopt legislative, administrative or other measures.'¹⁰ Article 23 does not regulate the details of how the family is specifically to be protected.¹¹
17. The Australian Government clearly meets the obligation under article 23(1). At the Federal level, there is a comprehensive system of family law which covers issues ranging from marriage to custody of children and superannuation on divorce. The States and Territories all have rigorous child protection laws, which are supported by State and Territory government departments and specialist units, together with police services. Australia recognises and acknowledges the importance of the institution of the family and invests considerable resources to support families through a wide range of policies and programs.
18. Article 23(1) must be read against the background of the acknowledged right of Australia, under international law, to control the entry, residence and expulsion of aliens.¹² Australia protects families within its jurisdiction, but this protection must be balanced with the right of a State to take reasonable measures to control immigration. This is a right recognised in article 13 of the Covenant.
19. Australia recognises and respects the importance of the close family relationship between parents and children. Australia is not seeking to separate or to damage the family unit in this case. If Mr Winata and Ms Li are required to leave Australia, the Government will not prevent their son from leaving with them or travelling to Indonesia to visit them.
20. For these reasons, the Australian Government does not accept the Committee's view that Australia will breach article 23(1) of the Covenant if Mr Winata and Ms Li are removed to Indonesia.

Article 24(1)

21. The Australian Government does not accept the Committee's view that there will be a breach of article 24(1) of the Covenant if Mr Winata and Ms Li are removed to Indonesia. If Mr Winata and Ms Li are removed, it will be a direct

¹⁰ Human Rights Committee, CCPR General Comment 19, *Protection of the family, the right to marriage and equality of the spouses (Article 23)*, 27 July 1990, para. 3.

¹¹ Nowak p. 406.

¹² *Moustaquim v Belgium* (1991) 13 EHRR 802 at 814.

result of their having overstayed their visas and their unlawful status in Australia, not a result of Australia failing to provide adequate measures of protection to children within its jurisdiction. The Australian Government points out that Barry Winata turned 18 on 2 June 2006, and is no longer considered a child under Australian law or under the Convention on the Rights of the Child. Although Barry Winata is no longer a child, the Australian Government wishes to make the following comments.

22. As Nowak has observed, article 24(1) does not define which protective measures are required by a child's status as a minor,¹³ but does dictate that States must implement these measures in a non-discriminatory manner.¹⁴
23. Before he turned 18, Barry Winata was afforded the same measures of protection as other children in Australia. This includes a wide range of policies and programs and legislation designed to ensure the health, safety and wellbeing of children in Australia. As noted previously, Australia has highly developed systems of family law, child protection law and criminal law. States and Territories have government departments responsible for administering programs and policies designed to protect children. There are special units within police services dedicated to fighting crimes against children. These, and other measures, are outlined in Australia's reports under both the Convention on the Rights of the Child and the Covenant. These can be found at:
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.129.Add.4.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.129.Add.4.En?Opendocument), and
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.AUS.98.3.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.AUS.98.3.En?Opendocument). Alternatively, the Australian Government would be happy to provide the Committee with copies of the relevant reports.
24. Furthermore, there is nothing to suggest that Barry Winata would not eventually adjust to the changes involved in any move to Indonesia. While Barry Winata may experience some inconvenience or a period of adjustment as a result of the move, the Covenant does not exist to protect children from such change. As noted by Committee members Bhagwati, Khalil, Kretzmer and Yalden:

Many families the world over move from one country to another, even when their children are of school age and are happily integrated in school in one country. Are State Parties required to take measures to protect children against such actions by their

¹³ Nowak p. 424.

¹⁴ Nowak p. 427.

parents? It seems to us that a vague value judgement that a child might be better off if some action were avoided does not provide sufficient grounds to substantiate a claim that a State party has failed to provide that child with the necessary measures of protection required under Article 24.¹⁵

25. For these reasons, the Australian Government does not accept the Committee's view that Australia will breach article 24(1) of the Covenant if Mr Winata and Ms Li are removed to Indonesia.
26. Mr Winata and Ms Li are currently living unlawfully in the Australian community. Mr Winata and Ms Li are currently the subject of an outstanding request under section 417 of the Migration Act 1958 for the Minister for Immigration to use her discretionary power to allow Mr Winata and Ms Li to remain in Australia. This request will be processed if and when Mr Winata and Ms Li are located. Until then, it is not possible for further action to be taken on their case. In the meantime, there are no plans to remove Mr Winata and Ms Li from Australia. If this situation changes, the Australian Government will inform the Committee.
27. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.

¹⁵ *Individual Opinion of Committee Members Mr Prafullachandra Natwarlal Bhagwati, Mr Ahmed Tawfik Khalil, Mr David Kretzmer and Mr Max Yalden (Dissenting), Winata v Australia* Communication 930/2000, para. 2.