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Family Protection and Deportations in
Australia and Austria

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The starting points of Australia and Austria could not be more different, especially regarding history of immigration, geographic circumstances and, most relevantly for the present survey, the extent of domestic Human Rights protection. Hence it is highly fascinating to evaluation similarities and differences regarding the consideration of family life in connection with deportations.

Therefore international treaty obligations are assessed especially regarding its content and domestic ratification, to proceed to the domestic immigration law frameworks.

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I. Introduction

The starting points of Australia and Austria could not be more different. While Australia has always been an immigration country, with various waves of immigration throughout the last two centuries, the First and Second World War caused a massive wave of emigration from Austria. Only in the last 30 years of the 20th century Austria experienced immigration.

The geographic differences are striking as well. While Australia is surrounded by sea, Austria is located in the middle of the European continent and the majority of its neighbours are fellow Member States of the European Union.

One aspect of immigration is the way of prohibiting persons to reside or abode in the country. Hardly any State actions affect personal circumstances as intensely as the prohibition to remain and subsequent deportation, especially when deportees have spent the best parts of their lives in a country and most likely established personal ties.¹

One more crucial difference is the extent of Human Rights protection. While Austria signed and ratified the European Convention on Human Rights (ECHR), Australia does not have a Bill of Rights at the time of writing. Hence it might appear that this results in less protection of fundamental rights such as family life and subsequently in a higher number of deportations. Thus it is highly fascinating to assess how the different starting points of Australia and Austria influence the way family life is considered while evaluating the legitimacy of deportations.

Therefore initially the importance of international treaty obligations is scrutinised by evaluating their content as well as their implementation into the domestic legal systems. In this regard it is examined how important the protection of family life is considered to be in deciding whether a person should be deported.

II. International Obligations

A. *Content of International Obligations*

1. Australia

Australia is signatory to several major international human rights treaties² enshrining, among other rights, the protection of family life. Most importantly Art 17 of the International Covenant of Civil and Political Rights (ICCPR)³ requires that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation’ and furthermore that ‘everyone has the right to the protection of the law against such interference or attacks’. Moreover Art 3 of the International Convention on the Rights of the Child (CRC)⁴ demands that ‘in all actions concerning children, whether undertaken

¹ Due to the different expressions used in this context the common term ‘deportation’ is used, which should be understood as an order and/or measure to leave a country.

² Eg Convention relating to the Status of Refugees (1951) and the New York Protocol (1967), International Convention on the Elimination of all Forms of Racial Discrimination (1966), International Covenant on Economic, Social and Cultural Rights (1966), International Convention on the Elimination of all Forms of Discrimination against Women (1979), Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984). A list of international treaties signed by Australia is found at Flynn (2004, 34-167).

³ Signed 16 December 1966, 999 UNTS 171, entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Art 41 which entered into force on 28 January 1993.

⁴ Signed 20 November 1989, ATS 1991 No 4, entered into force 2 September 1990, entered into force for Australia 16 January 1991.

by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

On a number of occasions, the Human Rights Committee has clearly expressed the obligation in cases of deportations:

[I]n cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party’s reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.⁵

Due to these international sources Australia’s Human Rights Commission has also recognised the importance of family protection by recommending that the government should make measures ‘to deport only when there is a greater interest at stake than that of protecting the family and, in particular, the children, irrespective of whether they were born in Australia’.⁶

Thus a balance of interest between the power of the State to deport according to various reasons and of the individual to the protection of his family life and the subsequent presence in Australia is set out as an obligation for Australia under international law.

2. Austria

Austria is also signatory to several international human rights treaties.⁷ Of these the most relevant is the ECHR, together with its Additional Protocols.⁸ Among other human rights safeguards Art 8 ECHR enshrines the right to respect of private and family life for everyone.⁹

This provision guarantees on the side of private life eg a right to privacy, including protection from surveillance by the state, protection of physical and psychic integrity, which affects issues such as health and different forms of treatments, a right to sexual self-determination and minority protection. Moreover, relevantly for the issue at stake, is the right to respect for family life, affecting primarily spouses and their relationships with their children, but also several other family links or de-facto relationships.¹⁰

This provision is frequently raised in challenges on immigration matters. The European Court of Human Rights (ECtHR)¹¹ recognises Member States’ right to control the entry of aliens into its

⁵ *Madafferi* (2001) CCPR/C/81/D/1011/2001 p 21.

⁶ It was furthermore noted, that ‘particularly where a person has been in Australia for many years, he is likely to have married and children may be involved’ (Human Rights Commission [1983] para 29).

⁷ Eg International Covenant on Civil and Political Rights (BGBl 1978/591), International Convention on the Elimination of all Forms of Racial Discrimination (BGBl 1972/377), Convention against Torture and other Cruel, Inhuman or Degrading Treatment (BGBl 1987/492), International Convention on the Elimination of all Forms of Discrimination against Women (BGBl 1982/443).

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome, 4 November 1950, ratified by Austria on 24 September 1958 (BGBl 1958/210) and the Additional Protocols 1 (BGBl 1958/210), 4 (BGBl 1969/434), 6 (BGBl III 1998/30), 7 (BGBl 1988/628), 11 (BGBl III 1998/30) and 13 (BGBl III 2005/22).

⁹ The ECHR includes eg a right to life (Art 2), prohibition of torture (Art 3), prohibition of slavery and forced labour (Art 4), right to liberty and security (Art 5), right to a fair trial (Art 6), prohibition of punishment without law (Art 8), freedom of thought, conscience and religion (Art 9), freedom of expression (Art 10), freedom of assembly and association (Art 11), right to marry (Art 12) and right to an effective remedy (Art 13).

¹⁰ For an intensive elaboration in the scope of Art 8 ECHR refer to Feik (2009) 176-192, Grabenwarter (2008) 189-225, Heissl (2009) 160-175, Ovey et al (2006) 241-299, Maruhn & Meljnik (2006) 744-816 and Wiederin (2002) 1-95.

¹¹ The ECtHR, established through Protocol No. 11, which entered into force 1 November 1998, is eg open for individual complaints (Art 34 ECHR: The Court may receive applications from any person, non-governmental

territory and their residence.¹² Moreover, there is no guaranteed right to establish family life in any desired country. Only family life itself is protected, no matter where. In any event Anyhow once a family life is established orders of deportations or removals as well as the refusal of admission fall within the scope of Art 8 ECHR.¹³

Since this provision does not apply absolutely (unlike the non-derogable prohibitions on torture, slavery and punishment without law)¹⁴ interference is possible, due to the States' power to control immigration and more specifically to expel alien (especially when convicted of criminal offences).¹⁵

Interferences must be in accordance with the law (as required by Art 8 para 2 ECHR), thus based on a domestic legal source that enables the State to perform such measures. Furthermore it has to serve one of the legitimate aims stated, such as interests of national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

The chief issue to be determined is whether the interference is 'necessary in a democratic society', thus an individual assessment of the legality of deportations has to be undertaken in the light of the particular facts of each case.¹⁶ In many cases over several years the ECtHR developed relevant criteria for the assessment of whether expulsions are necessary and proportionate, such as:¹⁷

- length of the applicant's stay in the country from which he or she is to be expelled;
- nationalities of the various persons concerned;
- applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether there are children of the marriage, and if so, their age;
- seriousness of the difficulties which the spouse is likely to encounter in the country to which the person is to be expelled;
- best interests and well-being of the children, in particular the seriousness of the difficulties which any children are likely to encounter in the country to which the person is to be expelled; and
- solidity of social, cultural and family ties with the host country and with the country of destination.

Once criminal convictions are the reason for deportations it is furthermore necessary to assess:¹⁸

- whether the spouse knew about the offence at the time when he or she entered into a relationship with the offender;
- nature and seriousness of the offence committed;¹⁹

organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right).

¹² ECHR *Üner* (2006) 46.410/99 (GC) para 54 with reference to *Abdulaziz, Cabales and Balkandali* (1985) 9214/80, 9473/81, 9474/81 para 67 and *Boujlifa* (1997) 25.404/94 para 42. See further Wiederin (2002) 89 and Heissl (2008) 'Ausweisung' 617.

¹³ Ovey et al (2006) 263.

¹⁴ Art 15 ECHR.

¹⁵ ECHR *Üner* (2006) 46.410/99 (GC) para 54.

¹⁶ For an intensive elaboration on the issue refer to Grabenwarter (2008) 214, Heissl (2008) 'Ausweisung' 617, Ovey et al (2006) 262 ff and Wiederin (2002) 99.

¹⁷ For the development of the case law refer to Ovey et al (2006) 264 ff. The criteria are summarised in ECHR *Üner* (2006) 46.410/99 (GC) para 57.

¹⁸ *Üner* (2006) 46.410/99 (GC) para 57

- time elapsed since the offence was committed and the personal conduct during that period.

This balance of interest can result in the legitimate deportation of second generation immigrants,²⁰ because as stated above there is no absolute right not to be expelled.²¹

Apart from Austria's obligations under the ECHR and the subsequent ECtHR guidelines, deportations can also affect the freedom of movement guaranteed by the European Union.²² This is the case when EU citizens commit crimes in Member States other than their own and are subsequently expelled and/or prohibited to re-enter. The European Court of Justice (ECJ) ruled that in these circumstances, the personal conduct of the offender has to give reason to believe that he or she will commit further serious offences prejudicial to the public interest.²³ Therefore, previous criminal convictions can only be taken into account in so far as the personal conduct constitutes a present, genuine and sufficiently serious threat to the requirements of public policy, affecting the fundamental interests of society.²⁴ A test considering notions of general deterrence must not be applied.²⁵

B. Domestic Ratification

As demonstrated above international treaty obligations protect the integrity of the family and demand the consideration of aspect of family life in cases of deportation for Australia and Austria. Hence it is worth assessing if and to what extent these human rights obligations are fulfilled, recognised and implemented into domestic law.

1. Australia

Generally Australia has not implemented either the ICCPR or the CRC into domestic law. Furthermore its legal system (similar to the majority of countries) does not contain any provision authorising the use of international law in interpretation methods.²⁶ According to the accepted judicial approach, 'treaties do not have the force of laws unless they are given that effect by statute'.²⁷ As such, the mere '(r)atification of the ICCPR as a executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision'.²⁸

¹⁹ In this regards it is worth noting also that the age when the time was committed is considered, once young perpetrators are regarded as being more likely to change their behaviour. (*Maslov* [2008] 1638/03 [GC] para 71-73).

²⁰ The expression 'second generation immigrants' is used for aliens who were born in the deporting country or entered when they were very young, and grew up there.

²¹ ECHR *Üner* (2006) 46.410/99 (GC) para 55.

²² Eg 39, 43 and 49 Treaty Establishing the European Communities and as Directive 2004/38. See Heissl (2008) 'Aufenthaltsverbote' 46.

²³ ECJ *Von Duyn* (1974) C-41/74 para 6 and *Nazli* (2000) C-340/97 para 64.

²⁴ ECJ *Bouchereau* (1977) C-30/77 para 27-35.

²⁵ ECJ *Von Duyn* (1974) C-41/74 para 6, *Nazli* (2000) C-340/97 para 64 and *Bouchereau* (1977) C-30/77 para 27-35.

²⁶ Such a provision is included in, for example, sec 39 para 1 of South Africa's Constitution: 'When interpreting the Bill of Rights, a court, tribunal or forum ... (b) must consider international law'.

²⁷ *Gibbs J in Kioa* (1985) 159 CLR 550 at 570. See further *Wong* (1986-1988, 396).

²⁸ *Mason J and McHugh J in Dietrich* (1992) 177 CLR 292 at 305. See further *Balkin* (1997, 127).

Even though at the date of writing there is no direct implementation of either the ICCPR or the CRC, this view has been challenged repeatedly²⁹ leading to the famous decision in *Teoh*, a case concerning the deportation of a criminal.³⁰ The majority of the High Court recognised the significance of the ratification of international treaties in contravention of the established position. It was expressed that the lack of incorporation into domestic law ‘does not mean that its ratification holds no significance for Australian law’:

[R]atification of a convention is a positive statement by the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interest of the children as ‘a primary consideration’.³¹

This decision triggered a clarification from the government which fundamentally contradicted the High Court’s view.³² The later *Lam* case, although not formally overriding *Teoh*, suggests ‘that the present High Court would overturn its ruling on legitimate expectations arising out of ratification of a treaty’ (McAdam 2007, 191).³³ Formally the doctrine of ‘legitimate expectations’ is still valid; its significance and application can be questioned though.³⁴ Moreover *Al-Kateb*, affirming the legality of indefinite detention of unlawful non-citizens, indicated the ability of Parliament to legislate without regard to international treaty obligations especially regarding human rights.³⁵

As demonstrated Australia has not always been a good follower of international human rights protection principles. This has resulted in a couple of adverse findings of UN treaty monitoring bodies, many of which, though not exclusively, concerned issues relating to immigration (Byrnes et al 2009, 38).³⁶

The issue of family protection has been raised repeatedly, particularly in regard to deportations. The prohibition on arbitrary interference with family life was challenged in *Winata*, concerning the deportation of both parents of a 13-year-old Australian citizen.³⁷ It was found to be incumbent on the State to demonstrate and value additional factors, which go beyond a simple

²⁹ Eg Kriby J stated in *Newcrest* (1997) 147 ALR 42 at 148 that ‘international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights’.

³⁰ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. The case concerned the pending deportation of a Malaysian citizen, convicted of drug related crimes. He was married to an Australian citizen, mother of seven children, three of which were with the applicant. The whole family was heavily dependent on his support and would suffer hardship in the case of his deportation. See Allars (1995), Griffith & Evans (2000), Lacey (2001), Roberts (1995) and Walker & Mathew (1995-1996).

³¹ Mason CJ and Deane J in *Teoh* (1995) HCA 20 at 34.

³² Joint Statement issued by the Minister for Foreign Affairs, Senator Gareth Evans and the Attorney General, Michael Lavarch (10 May 1995): ‘We state, on behalf of the Government, that entering into an international treaty is no reason for raising any expectation that government decision-makers will act in accordance with the relevant treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. ... Any expectation that may arise does not provide a ground for review of a decision.’ (cited in Allars [1995, 237]). This joint statement expired at the end of the Howard government and was not reissued by its successor (Rudd government) at the date of writing. It remains to be seen how this controversial issue will be dealt with.

³³ *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* (2003) 214 CLR 1. The case concerned the deportation of the father of two Australian citizens, who was engaged with an Australian woman and had committed several drug related crimes. See Lacey (2004, 131).

³⁴ See Piotrowicz & Kaye (2000, 281) and Williams (2002, 20).

³⁵ *Al-Kateb v Godwin* (2004) HCA 37, 219 CLR 562. Regarding the circumstances of the case refer eg to Allan (2005, 1), Crock (2007, 1064), Curtin (2005, 356) and Kneebone (2005, 146).

³⁶ Eg in *Toonen* (1994) CCPR/C/50/D/488/1992, the conviction of homosexual was found of being a violation to Art 17 ICCPR. See Charlesworth et al (2006, 82). In a number of cases immigration detention was criticised regarding its compliance with Art 9 ICCPR. Eg *A* (1997) CCPR/C/59/D/560/1993, *Baban* (2003) CCPR/C/78/D/1014/2001, *Bakhtiyari* (2003) CCPR/C/79/D/1069/2002, *Shams ea* (2007) CCPR/C/90/D/1255 ea/2004 and *Shaqif* (2006) CCPR/C/88/D/1324/2004.

³⁷ *Winata and Li* (2001) CCPR/C/72/D/930/2000. See as well *Madafferi* (2001) CCPR/C/81/D/1011/2001.

enforcement of its immigration law, to justify the deportation. Without such a balance of interest the interference with the family in the form of a deportation, would be arbitrary and therefore a violation of Art 17 in conjunction with Art 23 ICCPR.

The response of Australia to the findings of the Human Rights Committee has rarely been to accept the criticisms and adopt legislative amendments, but rather to deny culpability 'particularly in relation to decisions on matters of immigration law and policy' (Byrnes et al 2009, 38).³⁸

2. Austria

Austria's legal system forms a hierarchy;³⁹ at the top are fundamental constitutional principles of the State, such as principles of democracy, republican government, rule of law, separation of powers and federalism. These can only be changed by a majority of 2/3 in the parliament and a referendum. Next is the (ordinary) constitutional law, established by a mere majority of 2/3 in the parliament. Further down are further legal provisions. This hierarchy requires each law to be in accordance with the constitution, which itself has to be in accordance with the fundamental principles.

The European Convention of Human Rights was ratified in 1958 as part of the Austria's Federal Constitution.⁴⁰ Thus every Act has to be in accordance with these fundamental human rights safeguards. There are even attempts to include the ECHR as a liberal constitutional principle of similar rank as for example, democracy, at the highest possible level of Austria' legal system.

In this context the Austrian Constitutional Court emphasis that it is generally obliged to give the ECHR as a constitutional provision the content, which applies according to the nature as international human rights protection instrument. Hence the case law of the ECtHR, as chief interpretation institution, must be of considered significantly for its interpretation.⁴¹

However, this does not mean that the ECtHR approves all measures performed by Austria regarding immigration matters. For example, an individual assessment of the balance of interests that did not give sufficient consideration to the age of a minor perpetrator, who perpetrated a crime, was recently found to be in violation with Art 8 ECHR.⁴²

III. Family Protection in Domestic Legal System regarding Deportations

A. Australia

1. No Human Right to Family Protection

Australia's legal system does not include a Bill of Rights.⁴³ Thus fundamental guarantees of individuals are scattered in different legal sources.⁴⁴

³⁸ Eg it was stated: 'Australia's obligation to protect the family under article 23 of the Covenant does not mean that Australia is unable to remove an unlawful non-citizen just because that person has established a family with Australian nationals.' (Fifth periodic reports on Australia [2008] CCPR/C/AUS/5 p 12).

³⁹ See Öhlinger (2007) 55 and Walter et al (2007) 76.

⁴⁰ BGBl 1958/210.

⁴¹ VfSlg 15.027, 11.500.

⁴² *Maslov* (2008) 1638/03 (GC).

⁴³ For the ongoing discussion on the implementation of a Bill of Rights see Byrnes et al (2009).

The Constitution contains only a limited number of human rights. The commonly recognised ones are:⁴⁵ Sec 41 (right to vote), sec 80 (trial by jury), sec 116 (freedom of religion) and sec 117 (freedom from discrimination based on interstate residence). Additionally a few more can be listed, focusing mainly on economic aspects such as sec 51 (xxxi) (acquisition of property on just terms), sec 92 (free trade, commerce and intercourse among the States) and sec 51 (ii) (no discrimination between state regarding taxation).⁴⁶ As Williams (2002, 47) puts it, ‘the relevant provisions are indeed sparse and the protection offered apparently minimal.’

The role of common law regarding human rights protection is controversial. On the one hand common law can be seen as ‘vibrant and rich source of human rights’ (Williams 2002, 15). Examples are the recognition of a right to counsel when being accused of serious crimes⁴⁷ as well as a prohibition of torture under common law.⁴⁸ On the other hand Piotrowicz & Kaye (2000, 279) highlighted that ‘[the common law] has also functioned as a vehicle for the repression of such rights’, offering as an example attempts of equal treatment of women.

This lack of human rights protection has been demonstrated repeatedly. The inadequacy of family protection was illustrated in *Kruger* (‘*Stolen Generation*’ case), where a law enabling Aboriginal children to be forcibly removed from their families and communities was found to be legitimate under Australia’s Constitution.⁴⁹ Regarding immigration in *Al-Kateb*, the need for an established right to freedom became obvious when it was ruled that even the indefinite detention of unlawful non-citizen would be in accordance with the Constitution.⁵⁰

2. Balance of Interests under Immigration Law

Australia’s immigration law is primarily regulated by the *Australian Citizenship Act 2007* (Cth, *ACA 2007*) and the *Migration Act 1958* (Cth, *MA 1958*).⁵¹ Unlawful non-citizens generally face removal under sec 198 *MA 1958*. There are three different ways to fall within the category of ‘unlawful non-citizens’. The first and most obvious option is illegal entry, whereas the second and most common way is to enter legally and overstay the visa. The third way is to have one’s visa cancelled.⁵² Most relevantly for the present survey is the power of ‘refusal or cancellation of visa on character grounds’ under sec 501 *MA 1958*. Once the visa is cancelled the person becomes unlawful and therefore subject to removal (sec 198 *MA 1958*). The other option relevant to prohibiting residence in Australia is the power of deportation under ss 200-206 *MA 1958*. Both powers arise mainly when the person has been sentenced to a term of imprisonment for a minimum of 12 months.

⁴⁴ Due to the power of the Commonwealth in dealing with deportation and immigration matters, Human Rights Acts in individual states and territories will not be considered. For an extensive discussion see Williams (2002, 8).

⁴⁵ For an exhaustive description see Piotrowicz & Kaye (2000, 211-224) and Williams (2002, 96-128).

⁴⁶ Furthermore sec 99 of Australia’s Constitution guarantees no preference relating to trade, commerce or revenue to one State or any part thereof over another State or any part thereof. A general overview on the economic rights in Australia is provided by Williams (2002, 47 and 129-154).

⁴⁷ *Dietrich v R* (1992) 177 CLR 292

⁴⁸ Cooke J in *Taylor v New Zealand Poultry Board* (1984) 1 NZLR 394 at 398.

⁴⁹ (1997) HCA 27, 190 CLR 1.

⁵⁰ *Al-Kateb v Godwin* (2004) HCA 37, 219 CLR 562. Regarding the circumstances of the case refer eg to Allan (2005, 1), Crock (2007, 1064), Curtin (2005, 356) and Kneebone (2005, 146).

⁵¹ For the development of Australia’s Migration Act 1958 it is referred to O’Neill (2004, 701), Crock (1998, 231ff), Wood (1986, 295) and Germov & Motta (2003, 33). Due to its limited practical application the content of the Extradition Act 1988 will not be assessed in this essay.

⁵² An exhaustive evaluation on the possibilities is provided by Vrachnas et al (2008, 163): cancellation because of inaccurate information (ss 97-115), general cancellation power (ss 116-118); cancellation of business visa (sec 134) and automatic cancellation of student visa (ss 137J-137P).

The *MA 1958* does not contain any provision to take family aspects into account. Of many possible avenues for removals only the ones on visa cancellation and deportation are subject to a ministerial General Direction.⁵³ These general directions issued by the Minister of Immigration and directed to persons or bodies having functions or powers under the *MA 1958*, provide guidelines for the assessment of the legality of deportations and visa cancellations.

It should be noted, that the majority of annual ‘compliance related departures’ are based on different provisions, to which the required consideration of family protection does not apply.⁵⁴ For the balance of interests a hierarchy between primary and other considerations is established. Primarily the protections of the Australian Community and its members, who expect not be put at any risk, as well as the obligation of non-citizens to obey domestic laws, has to be weighted against the best interest of the child. The aspect of ‘community protection’ takes into account the seriousness and nature of the committed crime, risk of recidivism and notion of general deterrence. The ‘best interests of the child’-factor orientates at: nature of the relationship between the child and the non-citizen, the child’s legal status, its age and the time spend in Australia, as well as the likely effect of separation from the non-citizens on the child, and the living conditions in the destination country.

Other considerations must also be taken into account, but are of ‘less weight than the primary’⁵⁵ ones, including the degree of hardship to family members as well as any other Australian citizen or permanent resident. The effect on any marital or de-facto partner and any other family member must be evaluated according to the nature of the relationship between them, whether they are able to follow or travel overseas to visit the non-citizen, as well as whether they are dependent on support from the deportee which cannot be provided elsewhere. Social ties established after the deportee becomes aware of his or her liability for deportation or the character concerns are to be given less weight.

3. Safeguards out of Citizenship

Furthermore the issue of citizenship is highly important, relating not only to the deportee him or herself but also to his or her family members.

While the definition of citizenship has been controversial, recent judicial developments indicate the applicability of the statutory concept, meaning that a person is a citizen, once he or she obtained the citizenship regulated by the *ACA 2007*. Aspects such as the integration into the community, taking as a primary consideration the length of residence in Australia, do not apply.⁵⁶

⁵³ Based on sec 499 *MA 1958*. General Direction No 9, known as ‘(Australia’s) Criminal Deportation Policy’, 21 December 1998 regarding deportations, and General Direction No 21, 23 August 2001, concerns the deportation power.

⁵⁴ In 2007-08, there were 8404 compliance related departures, including 4055 monitored departures, 722 voluntary returns, two criminal deportations and 3625 removals from Australia. This is a decrease of 11 % from 2006-07 when there was a total of 9489 (4433 monitored departures, one criminal deportation and 5055 removals from Australia). A total of 65 people were removed after their visas were cancelled or refused under sec 501 of the *Migration Act 1958*, compared with 55 in 2006-07 and 44 in 2005-06 (Department of Immigration and Citizenship 2007-08, 122).

⁵⁵ General Direction 9 para 21.

⁵⁶ Especially due to the late establishment of the Australian Citizenship Act in 1948 it has been argued that there was already ‘an Australian Community for which the Constitution existed’, leading to a concept of membership of the Australian community (Ebbeck 2004, 140). According to this view the absorption into the community is of primary importance, relying mainly on the period of permanent residence as well as the conduct of the person (Wood 1986, 292). This concept was sustained in *Patterson/Taylor* (2001) 207 CLR 391, concerning the deportation of a British citizen who lived the majority of his life in Australia, where Kirby J (at 487) as part of the majority argued that persons comparable to the applicant have been treated ‘as full and equal members of the Australian community and nation’. They therefore ‘share rights and duties akin to those which, following the

The most common way to obtain citizenship is to be born in Australia and have a parent who is Australian citizen or permanent resident at the time of birth.⁵⁷ A person born of neither Australian citizens nor permanent residents becomes a citizen after being ordinarily resident throughout a period of ten years beginning with the day of birth (sec 12 *ACA 2007*).⁵⁸ Further ways of gaining citizenship is by adoption (sec 13 *ACA 2007*) or incorporation of Territory (sec 15 *ACA 2007*).⁵⁹

Due to the predominant statutory concept of citizenship several differences remain between aliens (even if they are long term permanent residents) and citizens. Apart from a few guaranteed rights under the Constitution the main advantage of citizenship is the right to abode, and so the protection from deportation. Even though this right can be questioned, the Australian government has no ability to deport citizens.

This unconditional right to abode and the subsequent prohibition of deportation is pivotal when parents of Australian citizens face deportation. In cases where minor children are still unable to survive independently and are therefore dependant on the care of the deportee this can lead to the consequence that children subsequently have to leave as well. This constitutes a de-facto deportation of Australian citizens. Even though this does not lead to the presumption that any deportation of parents of Australian citizens is prohibited, it implies, in my view, an obligation to assess the impact on the children as well, when parents face deportation. This must be applicable for any other family member, whose life would be affected by the deportation.⁶⁰

B. Austria

1. Constitutional Safeguards

As indicated above the ECHR is part of Austria's Federal Constitution, and so the case law of the ECtHR is of importance for the interpretation of its provisions. In regards to expulsion the Austrian Constitutional Court has followed the guidelines developed by the ECtHR regarding consideration of the right to private and family life and emphasised its applicability for the domestic legal system. Thus the Austrian Constitutional Court has stated that the balance of interests should be orientated on the following factors:⁶¹

- length of residence;
- factual existence of family life as well as its intensity;
- question of whether the private life deserves protection;
- extent of integration;⁶²

introduction of the concept of citizenship in 1948, Australia citizens enjoyed as such'. The High Court declared unanimously this deportation would be illegitimate (the reactions are summarised by Crock [2002, 126]).

The fundamental shift of opinion was performed in *Shaw* (2003) 218 CLR 28. With smallest possible majority the High Court ruled that a person who enters Australia as an alien in the constitutional sense remains an alien, unless a statutory citizenship is obtained.

⁵⁷ Children of Australian citizens born overseas can apply for citizenship under sec 16 *ACA 2007*.

⁵⁸ The jus soli principle (nationality by birthplace) was abandoned in 1986 after *Kioa v West* (1985) 159 CLR 550 where it was claimed that the child of deportees was born in Australia and therefore citizen and entitled to natural justice. Even if the High Court did not follow this view, 'it was enough to encourage a change in legislation' (Rubenstein 1995-1996, 507). See Berns (1998, 1) and Wong (1986-1988, 396).

⁵⁹ Furthermore children found abandoned in Australia are deemed to be citizens, unless and until the contrary is proved (sec 14 *ACA 2007*).

⁶⁰ Similarly Gaudron J expressed in *Teoh* (1995) 183 CLR 273 at 304 'that citizenship carries with it a common law right on the part of children and their parents to have the child's best interest taken into account, at least as a primary consideration, in all discretionary decisions by governments and governments agencies which directly affect that child's welfare'.

⁶¹ Constitutional Court (2007) B 328/07 and B 1150/07, (2008) B 1032/07, B 16/08, B 61/08, B 1859-1863/07, B 1918/07.

⁶² This aspect considers ties to relatives and friends, education, employment and participation in social life.

- social ties to the country of origin;
- clean criminal record;
- breaches of immigration laws;
- necessities of public order; and
- whether the family life was established, after the persons concerned became aware of their insecure legal status.

Since the Court stated the relevant factors as examples it is submitted that further development by the Strasbourg Court should be applied as well.

2. Immigration Law

Having confirmed the juridical acceptance of the guidelines based on Art 8 ECHR it is next worth assessing whether the domestic administrative regulations apply similar criteria.

Matters concerning immigration fall within the power of the national parliament.⁶³ Austria's immigration law is mainly regulated by the *Asylum Act 2005*, the *Alien Police Act 2005 (APA)*, which contains provisions relevant to the issue at stake, and the *Residence and Abode Act 2005*.⁶⁴

While a person without a valid visa can be expelled, this is mandatory as soon as any criminal offence is committed or the person is unable to proof sufficient funds to survive in Austria (sec 53 *APA*). More relevant, especially after the commitment of criminal offences, is the prohibition on re-entry (residence bans under sec 60-65 *APA*), which can be imposed for up to ten years or undetermined.

A residence ban can be imposed on a person once he or she has been sentenced either to a term of imprisonment for more than three months or repeatedly of committing similar offences (sec 60 para 2 lit 1). While this provision applies for any alien in Austria, there are additional safeguards taking the period of residence and extent of integration into account. If the person was already entitled to obtain citizenship, which requires among other criteria a period of residence of more than ten years,⁶⁵ the minimum prison term sentence applied reaches a minimum level of one year. Residence bans for persons who have grown up in Austria, namely second generation immigrants, require a two year prison sentence.⁶⁶

Once either the expulsion or the residence ban is shown to affect the private and family life of the person concerned, as it almost always does,⁶⁷ a balance of interest test has to be applied to assess its necessity and proportionality. In this regard sec 66 *APA* reiterates the guidelines released by the Constitutional Court. Again it is submitted that the factors listed are only demonstrative and additional significant aspects have to be taken into account.

In regard to measures prohibiting the residence and re-entry of EU citizens, the personal conduct must constitute a factual, present and genuine threat for a fundamental interest of the society. In reiteration of the established case law of the ECJ, consideration of the notion of general deterrence is prohibited (sec 86 *APA*).

⁶³ Art 10 para 1 3. of Austria's Federal Constitution.

⁶⁴ These three Acts formed the most relevant parts of the Alien Law Package 2005, BGBl I 2005/100.

⁶⁵ Additionally a residence for at least five years is required (sec 10 para 1 1. Citizenship Act 1985). Refer to Stern (2007) 91.

⁶⁶ Sec 61 3. and 4. *APA* 2005.

⁶⁷ The cohabitation of four week was found to insufficient to develop family links (Administrative Court [2007] 2005/20/0040).

Apart from the regulations of the *APA* the prohibition on deporting Austrian nationals is enshrined in Art 3 4th Additional Protocol ECHR, which was ratified and implemented into domestic law.⁶⁸

IV. Summary

The content of Australia's and Austria's international treaty obligations are similar.⁶⁹ Relevant treaties enshrine safeguards regarding family protection, affecting deportations as well. A balance of interests is required, where several personal and family-related factors must be taken into account.

The main and crucial difference is the domestic acceptance and implementation of these international obligations. Australia (apart from some judicial dissents and unfollowed judgements) shows general reluctance to fulfil its obligations under international law, which results in the required balance of interests test not being applied due to the lack of domestic implementation of the relevant ICCPR and CRC provisions.

Contrastingly the ECHR forms part of Austria's constitution. The hierarchy of the domestic legal system requires every ordinary law to be in accordance with the constitutional framework, including the safeguards enshrined in the ECHR. Hence every measure of the State has to comply with the right to private and family life, leading to the required and demanded balance of interests test being applied in order for deportations to be legitimately performed.

The shortcomings in Australia due to its lack of a Bill of Rights once again become obvious. Since no family protection safeguards in the form of human rights are available limited safeguards in the immigration legal framework are the only ones applied.⁷⁰ Merely two ministerial General Directions require the performance of a balance of interests test, but only in a limited number of cases. It must also be noted that General Directions are issued by the Minister without any parliamentary involvement; hence they can be revoked through a similar process. Ministers are politicians and therefore dependent on the discretion of the electorate. The field of immigration in particular can be and is used and misused repeatedly to trigger emotions and movements in the society, especially in close temporal connection to elections.⁷¹ In this context the Human Rights Commission (1983, para 40) highlights that 'policies ... must conform with human rights, and not human rights that must conform with policies'. In addition, the Australian citizenship of dependent children can also lead to the obligation to take their consequences into account.

Contrastingly again, due to the rank of the ECHR as part of the Constitutional framework in Austria, the required balance of interest test has to be applied in every case. Thus, the impact on aspects of family life must be taken into account before deportation orders are issued. Although criteria are clearly set out by relevant case law of the ECtHR and, subsequently, of the Austrian Constitutional Court as well, the result of such a balance remains still unpredictable. While it is

⁶⁸ BGBl 1969/434.

⁶⁹ Although Art 17 ICCPR appears to be similar to Art 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR - 'Everyone has the right to respect for his private and family life ...'), their scope and content differs. Whereas Art 17 ICCPR intends to prohibit interference with the family, Art 8 ECHR enshrines a right to family protection, hence offering a wider application range, leading to a balance on interests between the state and the individual. The difference between the two legal sources was assessed in *Winata and Li* (2001) CCPR/C/72/D/930/2000, 14, as well as by the Human Rights Commission (1983) para 31.

⁷⁰ The former Australian Human Rights Commissioner, Brian Burdekin, stated: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community' (cited in Williams 2002, 23 at FN 109).

⁷¹ Crock (2007, 1069) highlights in this context that 'votes lie with parties that are seen to be tough on crime, tough on security and tough on border control'.

recognised by the ECtHR itself that individual assessments can result in legal uncertainty the imposition of strict guidelines would not be in accordance with Art 8 ECHR.

Although the clear availability of guidelines does not result in a reduced number of deportations,⁷² it does make them more predictable to the individuals concerned, as the criteria are well recognised. This provides a form of legal certainty which is missing in Australia, due to its lack of established safeguards for family protection.

⁷² Although to obtain reliable and comparable figures on deportations proves very difficult, it appears that in the late 1990s and early 2000s the number of deportations per 10000 heads of population was 5.5 in Australia and 9.8 in Austria (Nicholls 2007, 167).

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