

**Mandates of the Working Group on discrimination against women and girls and the Special Rapporteur on the human rights of migrants**

REFERENCE:  
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7 July 2020

Excellency,

We have the honour to address you in our capacities as Working Group on discrimination against women and girls and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 41/6 and 34/21.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the situation of Ms. **Agnieska Ewa Miler**, a dual citizen of Poland and the United Kingdom, who has lived in Australia, for the past three years, in conditions of vulnerability and uncertainty, with restrictions of movement and inability to access social protection and support, as a result of the discriminatory impact of the intersection of family law and immigration law.

According to the information received:

On 13 October 2014 Ms. Miler, a national of Poland and the UK, arrived in Australia together with her then husband- a national of New Zealand -and their two young children on a 461 New Zealand Citizen Family Relationship Temporary visa, which had been issued on 10 July 2014, through the sponsorship of her then husband on the basis of their marriage. In November 2014, about a month after her arrival in Australia, Ms. Miler separated from the husband, and decided to return with their children back to the United Kingdom.

However, by the judgment of 14 August 2015 the Family Court of Australia dismissed her interim application for re-location to the United Kingdom. On 12 July 2017, the judgment on the merits of custody effectively granted custody to Ms Miler as the primary care-taker of the children, while her former husband was given extensive contact rights. This decision made it impossible for Ms Miler to leave Australia while her children are minors as attempting to do so would result in an infringement of her former husband's right to have direct contact with the children.

Following the expiration of her 461 temporary visa on 10 July 2019, Ms. Miler was on a "bridging visa" for a period of 9 months during which she was not allowed to leave Australia.

On 18 July 2019 Ms. Miler received a new 461 Temporary visa which will expire on 18 July 2024. Under the new visa, although she is entitled to work, she does not have access to social benefits (including family benefits) and faces several restrictions in relation to property acquisition. Moreover, holders of the 461 New Zealand Citizen Family relationship temporary visa are not eligible to become a

permanent resident or an Australian citizen. The only way for Ms. Miler to change her status and achieve a more long-term solution regarding her residency status is to enter another stable relationship with a person who would be able to sponsor her, which would put her in a situation of dependence.

Ms. Miler thus currently faces a difficult situation, whereby she is not allowed to leave Australia due to the judgment of the Family Court, but at the same time her rights are restricted in Australia, due to immigration law. Compared to her former husband, Ms. Miler does not have an equal right to family benefits, while she faces heavier burdens of parenthood, as the primary caretaker of their children. Furthermore, she does not have the same residence rights as her former husband and her children.

While we do not wish to prejudge the accuracy of the information made available to us, we would like to express our concern over the serious impact on Ms. Miler's human rights by the discriminatory treatment resulting from the intersection between immigration law (which restricts her to a particular type of visa) and family law (which denies her the right to leave Australia with her children). We are concerned that while her freedom of movement has been restricted on the grounds that the children have the right to have contact with both parents, the Government has not at the same time ensured that she has the same residence rights as her children and former husband. Moreover, unlike her former husband, Ms. Miler has to pay prohibitive taxes to acquire property, has limited pension rights, and cannot apply for social benefits.

The intersection of the two laws significantly disadvantages migrant women, who, according to the data of the Australian Bureau of Statistics, constitute the majority of those on a dependent visa (secondary applicants), and those who are given primary custody of children.

The situation of immigrant women in Australia was a subject of concern for the Special Rapporteur on violence against women, its causes and consequences, during her visit to Australia in 2017. In her report on the country visit (para. 70) she noted that immigrant women and temporary visa holders are facing barriers "in accessing services because of visa conditions that can restrict access to income support, public housing, health care and child services, while those services are essential in situations where migrant women fear for their safety."<sup>1</sup>

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

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<sup>1</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/106/17/PDF/G1810617.pdf?OpenElement>, para.70

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide any additional information on measures to be taken to grant Ms. Miler full residents' rights in order to empower her to assume her responsibility as the primary caretaker of her children.
3. Please provide information on measures taken by your Excellency's Government in removing barriers faced by immigrant women and temporary visa holders in accessing essential social services, and other services such as pension benefits, or the right to acquire property; and in accordance with international human rights standards including the recommendation of the Special Rapporteur on Violence Against Women.
4. Please provide information on measures taken to ensure that immigration status does not lead to gender-based discrimination in the settlement of family law matters.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications report. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to prevent the applicant from being in a precarious situation regarding her residence permit and to prevent such situation from recurring, and, if the inquiries corroborate or suggest that the allegations are correct, to guarantee the responsibility of any competent authority which has refused to issue the appropriate residence permit.

Please accept, Excellency, the assurances of our highest consideration.

Melissa Upreti  
Vice-Chair of the Working Group on discrimination against women and girls

Felipe González Morales  
Special Rapporteur on the human rights of migrants

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to draw your Excellency's attention to the following human rights standards:

We would like to remind your Excellency's Government of the obligation to eliminate gender based discrimination. In particular, article 13 (a) of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – ratified by Australia on 28 July 1983 - provides that “States Parties shall take appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits.” In addition, article 15 (4) of CEDAW provides that: “States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.” According to the commentary on Article 15, “Domicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman's right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right.” Furthermore, article 16 (1.C) of CEDAW prescribes that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, the same rights and responsibilities during marriage and its dissolution.

The CEDAW Committee, in its General Recommendation N°. 26 on Women Migrant Workers has recommended the States parties to take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers (including those who migrate to join their spouses), namely “when these permits are on the sponsorship of an employer or a spouse, State parties should enact provisions relating to independent residency status.”

We would like to draw Your Excellency's Government's attention on articles 6 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Australia on 10 December 1975. Article 6 states that States Parties to the recognize the right to work “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” Article 11 furthermore provides for the recognition of the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

Even when the Covenant rights are limited or restricted in accordance with the ICESCR, the essential minimum content of each right must be preserved in all

circumstances, and the corresponding duties extended to all people under the State's effective control, without exception. This "minimum core" obligation includes at the very least a duty to "ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

We would like to refer Your Excellency's Government to the principle of non-discrimination enshrined in article 2 of the Universal Declaration of Human Rights, and article 2 and 26 of the International Covenant on Civil and Political Rights as well as in several other United Nations declarations and conventions which provide that every individual is entitled to the protection of their rights and freedoms without discrimination or distinction of any kind, and that all persons shall be guaranteed equal and effective access to remedies for the vindication of those rights and freedoms.

We would also like to remind your Excellency's Government that the enjoyment of the rights guaranteed in the International Covenant on Civil and Political Rights (ICCPR) to which Australia ratified on 13 August 1980, are not limited to citizens of States parties but "must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (ICCPR/C/21/Rev.1/Add. 13 (2004), Para. 10).

In addition, we would like to refer you to paragraph 70 of the thematic report by the Working Group on discrimination against women and girls on Eliminating discrimination against women in cultural and family life, with a focus on the family as a cultural space, published in 2015, A/HRC/29/40, which provides that ensuring access to justice for women and girls who have suffered discrimination within the family or in cultural life is part of the State obligation to protect and respect their right to equality. This access must be guaranteed at the legislative and institutional levels. This means, for example, revising all additional laws that affect family and personal status matters, a process in which women must be involved. Also concerned are auxiliary regulations, including special measures adopted, where necessary, in such areas as taxation, social security, retirement benefits, survivors' benefits, rights relating to nationality and the right to family reunification, to ensure women and girls' de facto equality in the various types of family. Women must take part in the formulation and interpretation of national laws, including those relating to family affairs. At the institutional level, they must be involved, on an equal footing, in policy development and judicial bodies so as to ensure that the principle of equality is effectively applied and that decisions handed down demonstrate respect for gender equality. Improving access to justice for women also requires gender-equality training for State authorities and non-State officials responsible for law enforcement, social services and education and for medical and forensic personnel.

Finally, we would like to refer your Excellency's Government to the report of the Special Rapporteur on the human rights of migrants regarding good practices and initiatives on gender-responsive migration legislation and policies (A/74/191). In paragraph 115, the Special Rapporteur states that States should develop human rights-

based, gender-responsive and child-sensitive migration policies that recognize the independence and agency of migrant women and girls and promote their empowerment and leadership. He recommends to “(d) Lift gender-specific barriers to the labour market, for example by providing migrant women with legal status, independent of their families, spouses and employers;” and “(f) Carry out a robust and timely gender-sensitive analysis of the differentiated impacts of laws and policies on migrants, and revise any migration-related laws and policies that fail to respect gender equality and have a proven negative impact on the enjoyment and protection of human rights of all migrants, particularly migrant women and girls;”