CHAPTER 7

THE CASE OF MR SE

Introduction

7.1 Mr SE arrived in Australia on 2 October 1997.[1] He presented at Melbourne airport without a passport and requested to see an Immigration officer. An immigration officer interviewed Mr SE and, as he was not in possession of a relevant visa, he was refused immigration clearance.[2] Mr SE claimed refugee status and was advised he would be held in custody as an unlawful non-citizen pending determination of his Protection Visa application.[3] He was taken to the Immigration Detention Centre at Maribyrnong.[4]

7.2 Throughout the various stages of decision making, Mr SE relied on the following background information to support his claim for refugee status. Born on 10 July 1960, Mr SE worked as a goldsmith in Mogadishu, Somalia where his father was an elder of the Shikal clan. The Shikal clan is known for having brought Islam to Somalia, its religious leadership and relative wealth. Mr SE claimed that he owned three shops in Mogadishu and that his family owned eight villas. Following the civil war in 1990, other more powerful clans, particularly the Hawiye clan, targeted the Shikal clan. In 1991, Mr SE's father refused to provide money and one of his sons to the Hawiye militia. The militia retaliated by killing his father and one of his brothers. One of Mr SE's sisters was raped multiple times by the militia and later committed suicide as a result of the attacks. Mr SE married in 1995 and left Somalia in 1997.[5]

7.3 Mr SE's claim for refugee status was based on the fear that should he be returned to Somalia his life would be endangered, particularly by members of the

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1 The Immigration Inspector's Report states that Mr SE was 'uncooperative insofar as details of his journey to Australia were concerned' although he admitted travelling on flight BA 9. He claimed that early in June he left Somalia for Kenya, then travelled to Rome on a Kenyan passport. He claimed he sought refugee status in Italy but was rejected. After 10 weeks, a Somali person, Ahmed, arranged his trip to Australia. For the first leg of the trip he used a Kenyan passport but Ahmed retained the passport he travelled on to Australia and on arrival in Melbourne he claimed he could not find him. The Immigration Inspector noted that other information suggested he had travelled on an Italian passport and had been ticketed London/Melbourne/Auckland: See the Immigration Inspector's Report at Department of Immigration and Multicultural Affairs File, Folio 3 (Note: no material from these files has been published)

2 *Migration Act 1958*, s 166

3 This application is also taken to include an application for a Bridging Visa

4 *Submission No. 38*, The Refugee & Immigration Legal Centre, p. 337

5 These facts have been stated in several documents pertaining to Mr SE's application for a Protection Visa. See for example, DIMA File, Protection Visa Decision Record, Folios 46-57 and Department of Immigration and Multicultural Affairs File, Refugee Review Tribunal Decision and Reasons for Decision, Folios 93-100

Hawiye clan who control most of Mogadishu.[6] Mr SE told the authorities that since the attacks in 1991 until he left Somalia in 1997, he had continually moved around the country for reasons of security, travelling to places that he thought would be safer.[7]

7.4 Mr SE's application for refugee status was rejected at the primary stage on 25 March 1998 and his review application was rejected on 21 May 1998. On several occasions, the Minister for Immigration, the Hon. Philip Ruddock, refused Mr SE's request that he exercise his discretion under s417 of the *Migration Act 1958*. Interim proceedings in respect of Mr SE's case led to applications in the Federal Court and the High Court and, in addition, his case was the subject of a communication to the United Nations Committee against Torture. Mr SE refused to board a QANTAS flight for his removal back to Somalia in October 1998 and this was followed by a second, unsuccessful attempt to remove him in November 1998. This assisted in creating media interest in his case. Amnesty International also contested Mr SE's removal and has maintained an interest in the case. Mr SE is currently represented by the Refugee Immigration and Legal Centre.[8] Mr SE remains in custody today awaiting further resolution of his situation; he has been able to make a second Protection Visa application, which remains on foot.

7.5 The public interest in this case and the widespread media interest justified the inclusion of this matter in the Terms of Reference. The relevant matters for inquiry by the Committee are:

> (i) the circumstances in which the Australian Government decided to proceed with the deportation of Mr SE, despite being on notice that an application had been sent to the UN Committee Against Torture, and the circumstances in which the Australian Government decided to suspend the deportation proceedings in the case of Mr SE; and
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> (j) why cases such as the Chinese woman and that of Mr SE are not being picked up early enough by the Department of Immigration and Multicultural Affairs and the Refugee Review Tribunal.

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6 Information indicates that the Hawiye clan controlled Mogadishu at least up until the United Nations Committee Against Torture's investigation into Mr SE's case. The views of the United Nations Committee Against Torture were available in May 1999: Views of the Committee Against Torture Under Article 22, Paragraph 7, of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – Twenty-Second Session concerning Communication No. 120/1998, p. 13

7 See for example Mr SE's statement, undated with hand-written notation 'Initial Statement', Department of Immigration and Multicultural Affairs File, Folio 163

8 Mr SE was initially provided with application assistance under the Immigration Advice and Application Assistance Scheme. After the Refugee Review Tribunal hearing, Mr SE found it necessary to secure different representation and claimed that he had not had the benefit of competent legal advice throughout the primary and Refugee Review Tribunal stages of his application. This is discussed in greater detail in paragraphs 7.28 – 7.30 below. Refugee and Immigration Legal Centre, which currently represents him, was previously Refugee Advice and Casework Service (Victoria), and certain documents relating to the case have this letterhead

7.6 A chronology of events to date can be found at Appendix 6 of this report.

7.7 This chapter traces the successive stages of decision-making in Mr SE's claim for refugee status between October 1997 and May 1999 and identifies the key issues that arose in relation to each. Where procedural deficiencies have been demonstrated by this case they have been cross-referenced to relevant recommendations in the body of the report. The Committee's examination of this case is restricted to the decision-making in relation to Mr SE's first application for a Protection Visa and the attempts to remove him from Australia. The Committee is aware that the Minister has exercised his discretion under section 48B of the Migration Act 1958 and allowed Mr SE to make a second application. As that application is current, the Committee considers it is inappropriate to refer to that second application and any information in its possession that may have a bearing on the case. The Committee has also refrained from making any assessments of the correctness or otherwise of the decisions involved in the case so far.

Confidential nature of material

7.8 The Committee's examination of this case was assisted by the provision of an extensive range of material by Mr SE and his legal representatives.[9] The Committee had the opportunity to take direct evidence from Mr SE at an in camera hearing at the Maribyrnong Detention Centre, at which Mr SE was accompanied by his legal representative and also by an interpreter. Further material was provided by the Department of Immigration and Multicultural Affairs and the Department of Foreign Affairs and Trade. Some of that material is of a sensitive nature and includes:

- Details of Mr SE's claims for protection;
- Copies of confidential interviews,
- Copies of file notes and correspondence;
- Copies of applications, affidavits and documents filed in judicial proceedings;
- Transcripts of evidence in RRT and Court proceedings;
- Copies of documents relating to the UNCAT;
- Government to Government communications; and
- In-camera evidence.

7.9 As noted in the chapter concerning Ms Z,[10] the Committee prefers evidence to be public where possible, and to provide sources for the statements made and the

9 This material was provided to the Committee at hearings held in Melbourne on 29 August 1999

10 See Chapter 9

conclusions reached by the Committee. In view of the personal nature and the sensitivity of some of the material, the Committee has respected the confidentiality sought by all concerned, limiting the publication of most material and minimising the references to individuals.

Issues arising from the case of Mr SE

7.10 In the course of consideration of this particular term of reference, several aspects of the refugee determination system raised concerns. Some of the most significant included:

- Whether applicants have adequate access to application assistance;[11]
- The use that can be made of an applicant's initial statements (on arrival) to contradict information provided at a later stage in the formal application;[12]
- Whether applicants have adequate access to assistance in order to prepare and present their case to the RRT;[13]
- Whether Country Information contained in the CIS[14] and available to DIMA and RRT decision makers is relevant, accurate and contemporaneous;[15]
- Whether the refugee determination procedures meet Australia's international convention obligations;[16]
- Whether DIMA delegates and RRT members make appropriate inquiries of applicants to elicit information necessary to correctly assess their claims;[17]
- Whether there are sufficient accountability mechanisms for repatriation contractors (this issue is only dealt with to the extent that it is relevant to Mr SE's particular case);[18] and
- The circumstances in which the Government proceeded with the removal of Mr SE despite being on notice that an application had been sent to the UN Committee Against Torture.[19]

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11 See below, Paragraph 7.19

12 See below, Paragraph 7.21

13 See below, Paragraph 7.28

14 Including information from Department of Immigration and Multicultural Affairs and Department of Foreign Affairs and Trade sources

15 See below, Paragraphs 7.23 and 7.78

16 *Submission No.73*, Law Council of Australia, p. 1072

17 See below, Paragraphs 7.22 and 7.31

18 See below, Paragraph 7.48

7.11 Many of these issues have been considered in earlier chapters but are referred to again to the extent to which they are usefully demonstrated by the case of Mr SE.

International conventions

7.12 As noted previously, chapters 1 and 2 discuss the international conventions, which contain Australia's obligations to asylum seekers. The principal obligation of non-refoulement arises under the Conventions as follows:

- Article 33(1) of the Convention in relation to the Status of Refugees (1951) and the Protocol (1967) prohibits states from expelling or refouling a refugee to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion;[20]

- Article 3 of the Convention Against Torture (the CAT) prohibits refoulement where there are substantial grounds for believing that a person, if returned, would be in danger of being tortured;[21] and

- Although lacking the direct language contained in the CAT and the Refugees Convention, various articles in the International Covenant on Civil and Political Rights (the ICCPR) also require that asylum seekers not be refouled.[22]

7.13 In accordance with the current legislative system, Mr SE's claim for a Protection Visa was initially examined against the Refugee Convention, specifically turning on whether Mr SE was a refugee as defined in the Refugee Convention and discussed above in Chapter 2. Under the Convention, a refugee is any person who:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

19 This is term of reference (i). See below, Paragraph 7.61

20 But note also the exceptions to article 33(1) referred to in paragraph 2.13 above

21 Article 3(2) provides that in making such a determination, "… the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

22 Article 7 of the International Covenant on Civil and Political Rights provides that no-one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. The United Nations Human Rights Committee has asserted that refouling a person to a place where he or she may be subjected to torture or such treatment will constitute a breach of article 7. Further, it has been asserted that the principle of non-refoulement may also be derived from article 9 (protection of the right to life), and the general requirement in article 2(1) for the protection of the rights of individuals

habitual residence, is unable or, owing to such fear, is unwilling to return to it.[23]

Mr SE's application for protection under the Refugee Convention

Primary stage: Application for Protection Visa

7.14 Mr SE lodged his initial application for a Protection Visa on the day of his arrival, being 2 October 1997.[24] By letter dated 13 October 1997, Mr SE was advised that he was not eligible for a Bridging Visa.[25] Pending determination of his application for a Protection Visa, Mr SE was detained at Maribyrnong Detention Centre in Melbourne, Victoria.

7.15 At Maribyrnong, Mr SE accessed the Immigration Advice and Application Assistant Scheme (IAAAS) and a migration agent was provided to assist the preparation of his formal application for a Protection Visa. He submitted a formal written application dated 15 October 1997[26] and an additional short written statement claiming persecution as a member of the Shikal clan in Somalia.[27] A DIMA officer interviewed him with the assistance of an interpreter in the presence of the IAAAS adviser on 12 November 1997.[28]

7.16 Mr SE's application for a Protection Visa was refused on 25 March 1997.

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23 Refugee Review Tribunal Reference: V98/08514. The Tribunal noted that this definition was judicially considered by the High Court in *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A & Anor v MIEA and Anor* (1997) 142 ALR 331 at 354 and *MIEA v Guo & Anor* (1997) 144 ALR 567 at 575-6, and by the Federal Court in several cases including *Ram v MIEA and Anor* (1995) 57 FCR 565

24 This application automatically includes an application for a Bridging Visa. Department of Immigration and Multicultural Affairs' file includes a copy of Mr SE's initial application, the forms for which he was provided by the Immigration Officer at the airport. It appears that he subsequently lodged the application, which does little more than note that he wishes to apply for a Protection Visa, with management at the Detention Centre. See Department of Immigration and Multicultural Affairs File, Folio 10

25 The letter noted that the Bridging Visa application was rejected because Mr SE could not be given an immigration clearance and he was not in the prescribed class of persons defined in Migration Regulation 2.20

26 The Department of Immigration and Multicultural Affairs file contains Mr SE's 'Refugee Status Application Request for Assistance' dated 8 October 1997 and it is noted that official documents refer to Mr SE's application for a Protection Visa as being lodged on 8 October 1997. The 'Refugee Status Application Request for Assistance' may serve to indicate lodgment of an application for refugee status. Mr SE's formal and more detailed written application form, however, is dated 15 October 1997 and was forwarded under cover of letter by Mr SE's migration agent dated 16 October 1997: See Department of Immigration and Multicultural Affairs File, Folios 17-42

27 Department of Immigration and Multicultural Affairs File, Folio, 44. According to the Department of Immigration and Multicultural Affairs File, the statement was forwarded under cover of letter dated 24 October 1997 by Mr SE's migration agent

28 Department of Immigration and Multicultural Affairs File, Protection Visa Decision Record, Folio 47

7.17 The Protection Visa Decision Record states that although there were unresolved credibility issues, the decision-maker proceeded on the basis that they were resolved in Mr SE's favour. These issues involved Mr SE's identity and the possibility that he had been away from Somalia for a long period of time.[29] Factors weighing against the conclusive identification of the applicant as Mr SE included the following:

- A man of his description told Sydney Immigration he lived in Italy for 13 years;[30]
- A man of his description travelled from London to Sydney on an Italian passport;[31] and
- Fingerprint checks from Italy and Kenya were not yet available.[32]

7.18 The decision maker proceeded to make an assessment based on the claims made about Mr SE's experience in Somalia, relative to the Refugees Convention, and assuming that any credibility issues as to identity were resolved in Mr SE's favour. The decision-maker found that Mr SE did not have a well-founded fear[33] of persecution, having apparently remained in Somalia for several years after the events that he saw as demonstrating specific and on-going persecution. The war affected everyone in the area equally and available CIS information suggested a substantially improved situation.

Issues arising from the primary decision phase

Adequate access to competent advice

7.19 It was contended by the RILC that a major flaw in the primary decision phase of Mr SE's case was that his case was never properly put to the DIMA delegate. RILC argued that this was because of the limited resources available to his IAAAS-

29 Although the decision maker acknowledged as 'possible' that Mr SE might be Somali given he was 'quite fluent in this language', he speculated that Mr SE might have spent considerable time away from Somalia since 1991. The evidence that suggested this as a possible scenario was that Mr SE's general knowledge of Somalia was only 'reasonable': Department of Immigration and Multicultural Affairs File, Protection Visa Decision Record, Folio 46

30 'Advice had early in the day been received from [XX] at Department of Immigration and Multicultural Affairs, Sydney Airport regarding a passenger who was Melbourne bound on the BA 9, transiting onto the QF101 to Auckland. This passenger was of Somali ethnicity, born in Mogadishu but travelling on an Italian passport. He had stated that he had been living in Italy for some 13 years. … Enquiries made of QANTAS revealed that (that passenger) had not subsequently shown up for his flight to Auckland.': Department of Immigration and Multicultural Affairs File, Folio 2

31 That passport, in the name of Mr Ali Nur, was not found on Mr SE

32 Protection Visa Decision Record: See Department of Immigration and Multicultural Affairs File, Folios 46-47

33 See above, Chapter 1, Paragraph 1.15 , which discusses the meaning of a 'well-founded' fear

funded representative.[34] The issue of IAAAS funding is dealt with more fully below[35] as the argument relates to the RRT stage as well.

7.20 On the same point, the Refugee Council WA cited the HREOC report, *Those who've come across the seas: Detention of unauthorised arrivals*, as authority for the proposition that access to competent legal advice is crucial if cases such as Mr SE's are to be 'picked up' early enough by DIMA and the RRT. That report suggests that the initial information given by arrivals is crucial in determining the Department's view of whether persons, in fact, engaging Australia's protection obligations. As so much can turn on what people say at this point, it is contended that they should be provided with appropriate advice[36] at the earliest opportunity. The Committee was told that:

> If the person does not ask for legal advice a legal adviser will not be provided and the person will not be advised of their statutory entitlement to obtain legal advice. HREOC recommended that the Migration Act be amended to positively require that people be advised of their right to legal assistance. In addition, they recommended that DIMA fund the provision of on-site legal assistance at the Port Hedland centre and that all detainees be given prompt access to a legal advice bureau.[37]

The use made of statements at initial interview that contradict the later application

7.21 The possibility that applicants may not have access to adequate advice is also relevant to the issue of whether (and, if so, to what extent) statements made by an applicant on arrival should be used to contradict information provided at a later stage in the application. In Mr SE's case, there were a number of credibility issues raised in respect of his identity and the means by which he had travelled to Australia where it appeared that information provided by him may have been false.[38] While the provision of false information is often used in courts of law to discredit a witness, there are arguments against attaching so much weight to the provision of false information in the refugee determination process. These arguments include the following:

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34 *Submission No.38,* Refugee and Immigration Legal Centre, p. 341

35 See below, Paragraphs 7.28 – 7.30. This issue is also discussed in Chapter 3

36 As is discussed above in Chapters 3, 4 and 5, the Committee is not convinced that such advice must be 'legal' in the sense of being provided by a legally qualified person. Advice should be available from a number of qualified sources

37 *Submission No. 18,* Refugee Council of Western Australia, p. 103 citing the Human Rights and Equal Opportunity Commission report, *Those who've come across the seas*, pp. 26-27 and 224-225. The Committee notes that there is no obligation on Department of Immigration and Multicultural Affairs to provide information on available assistance to prospective applicants, and that amendments to the Migration Act, arising from the *Migration Legislation Amendment Act (No. 2) 1999* ratified limits on access to information

38 The Immigration Inspector's Report noted: 'It is clear that [Mr SE] has sought to conceal his means of travelling to Australia and that none of the information provided by him in that respect is likely to be true.' Department of Immigration and Multicultural Affairs File, Folio 3

- On arrival, asylum seekers rarely, if ever, have the benefit of legal advice;[39]
- Asylum seekers may be unsure of how some information will affect their applications because they have an uninformed view of how the determination process works;[40]
- Language barriers may impede an applicant's understanding;[41] and
- New arrivals may be traumatised.[42]

The inquisitorial function of DIMA delegates

7.22 RILC also asserted that the DIMA delegate failed to properly perform the requisite 'inquisitorial' function to elicit relevant information relating to Mr SE's claim for refugee status.[43] In RILC's view, the DIMA delegate failed to ask questions of Mr SE about his clan or the risks that members of his clan are exposed to. RILC

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39 *Transcript of evidence*, [In camera], p. 43. *Submission No. 50*, Amnesty International, pp. 505-506. See also the comments of the Refugee Council of Australia, *Submission No. 24A*, pp. 260-261 on the policy of not advising new arrivals of their right to seek legal advice or make contact with the Office of the United Nations High Commissioner for Refugees

40 See the comments of the Tribal Refugee Welfare of Western Australia Inc., *Submission No.7*, pp. 30-31 as to the lack of understanding of applicants about the process. This may be information that is, in fact, of little importance to the refugee determination process, such as, whether an applicant is married or not. For example, it was submitted that 'it is common for asylum seekers to play down any 'problems' they may have had with the authorities in their home country, so as to show the Australian authorities that they will be 'good citizens'. The risk here, is that the 'problem' may have been persecutory in nature, and when the applicant later raises the issue with, for example, the Refugee Review Tribunal, he or she will be accused of recent invention and the claim will be rejected on credibility grounds: *Submission No. 35*, Nick Poynder, pp. 244-245

41 *Transcript of evidence* [In camera], p. 44

42 *Submission No. 48*, Australian Red Cross, p. 453. See also *Submission No. 36*, Kingsford Legal Centre, pp. 308-309. Referring to the use made of adverse material by the Refugee Review Tribunal, it was submitted that: 'Such a practice fails to recognise how traumatic the hearing is for many applicants and the impact of this on those who have experienced torture/trauma. It also runs counter to the obligation to give the applicant the benefit of the doubt. Those most in need of protection are in fact the very people least able to respond credibly in such situations and are therefore in danger of being rejected.' *Submission No. 24A*, Refugee Council of Australia, p. 272. These comments are also applicable to the situation of applicants at the primary stage

43 Although there is no particular legislative requirement that Department of Immigration and Multicultural Affairs officers must perform an 'inquisitorial' function when assessing an application for a Protection Visa, it can be argued that the requirement arises by implication. For example, Regulation 866.22 requires that, for a Protection Visa to issue, 'the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention'. In the circumstances of applications for a Protection Visa, particularly where applicants may not speak English, have few contacts (if any) and limited access to assistance, it is difficult to see how a Department of Immigration and Multicultural Affairs decision maker can properly assess applications unless the decision maker makes appropriate inquiries. Also, the Refugee and Immigration Legal Centre states that: 'Department of Immigration and Multicultural Affairs claims that applicants in the refugee determination process do not require representation because the delegate and the Tribunal members are specifically trained to assist non-represented applicants to put their evidence and to discover the true nature of an applicant's claims': *Submission No. 38*, Refugee and Immigration Legal Centre, p. 342

suggested that this may have been because Mr SE was represented by an IAAAS provider and the DIMA delegate may have assumed all the relevant claims had been put forward. RILC argued that if this was the case, Mr SE had been disadvantaged by having been represented.[44]

Country Information Service

7.23 The case of Mr SE also raises questions about the quality and accuracy of the Country Information Service. The information provided by CIS about the situation in Somalia differs markedly from that available to the UNCAT.[45] The Committee notes that it is critical that the primary decision-makers have available relevant, accurate and contemporaneous, advice about the conditions in the country against which they are to assess applicants.

Secondary stage: Refugee Review Tribunal

7.24 Mr SE sought a review of his case by the RRT on 30 March 1998 and the RRT hearing was held on 8 May 1998. A number of points can be noted about his case, including the fact that he was not represented and that his IAAAS adviser did not obtain a record of the hearing. His new legal representative later stated that no new information was provided to the RRT.

7.25 The RRT member conducted a hearing into the existence or otherwise of a well-founded fear of persecution on account of any of the five Convention grounds.[46] In doing so, the RRT noted that Mr SE's claims were contained in written submissions to DIMA and the RRT, in an interview conducted by a DIMA officer on 12 November 1997 and in oral evidence at the RRT hearing[47] given by three witnesses identifying Mr SE and by Mr SE himself.[48] This oral evidence concerned Mr SE's background in Mogadishu, the reasons he remained in Somalia after members of his family were targeted in 1991, and his fears of returning.[49]

7.26 On 21 May 1998 the RRT affirmed the delegate's decision not to grant a Protection Visa to Mr SE. Although accepting the specific incidents involving his father, brother and sister, the Tribunal found that Mr SE's clan had not been the

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44 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 342. Refugee and Immigration Legal Centre used the phrase 'legally represented'

45 See below, Paragraph 7.78. The Country Information Service documents used were CX 26495 dated 3 June 1997, CX 26710 dated 6 October 1997, CX 2299 dated Autumn 1997, CX 27612 dated 2 February 1998 and CX 27608 dated 4 February 1998

46 Transcript of Proceedings, Refugee Review Tribunal, Victoria, No. V8514 of 1998

47 Refugee Review Tribunal, *Decision and Reasons for Decision*, V98/08514, Department of Immigration and Multicultural Affairs File, Folio 96

48 A Somali-speaking interpreter was present at the Refugee Review Tribunal hearing and Mr SE's evidence was given through the interpreter

49 *Transcript of Proceedings*, Refugee Review Tribunal, Victoria, No. V8514 of 1998

subject of persistent harassment or persecution since the inception of war in Somalia in 1991:[50]

> However the applicant clearly states that his clan has remained outside the conflict that has plagued Somalia since 1991. He describes his clan as the victims of war. He makes no claim that his clan has been targeted or the subject of persistent harassment. He states his delay leaving Somalia was because he did not have the money at hand to leave and desired to assemble his family before he departed. None of this suggests that the Applicant was targeted or in any way feared that he may be targeted because of his clan. He has no doubt had to move from place to place to avoid the fighting but this has been in the context of fleeing war.[51]

7.27 The RRT stated that although it was satisfied Mr SE had fled civil war and the disturbance associated with it, this did not bring him within the Refugee Convention.[52]

Issues arising from RRT Review

Adequate access to competent advice and assistance to prepare and present case to RRT

7.28 The most significant issue raised concerning the RRT review phase of Mr SE's case was that the representation available to him was inadequate. The Law Council of Australia and Amnesty International advised the Minister that the case of Mr SE demonstrated that the assistance provided to asylum seekers under the IAAAS scheme is inadequate and should be the subject of an inquiry.[53] Specifically, they complained that Mr SE had not been represented at the RRT hearing, and that, as well as the primary application being too brief, no further submissions had been put forward at the RRT stage. The Law Council and Amnesty International later asserted that this was the reason why Mr SE had not sought judicial review of his case directly from the RRT:

> We are informed that he received no legal advice or legal assistance as to any further remedies available to him within the statutory 28-day period he had for seeking judicial review. In addition, he has only had legal representation for these recent court actions because it is being provided *pro bono* by legal practitioners concerned about his particular case. Access

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50 *Submission No 62*, The Refugee Review Tribunal, p 685

51 Department of Immigration and Multicultural Affairs File, Folio 99: RRT Reference, V98/08514, p. 5

52 The Refugee Review Tribunal cited the following authority for this proposition: The Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva: The Office of the United Nations High Commissioner for Refugees, 1979) and the case of *Applicant A* per Gummow J at 374 (citation not given in Refugee Review Tribunal decision although it is (1997) 142 ALR 331 at 374.)

53 *Submission No. 73*, Law Council of Australia, Attachment A, p. 1109 being a copy of a letter from the Law Council of Australia and Amnesty International to the Hon. Philip Ruddock, dated 10 December 1998

> to justice is a fundamental human right that should not be dependent upon the charity and compassion of legal practitioners.[54]

7.29 Similarly, RILC contended that the essential problem was the failure to provide sufficient resources to assist Mr SE put forward all relevant information to support his claims for refugee status. RILC described the two-paragraph statement prepared to support Mr SE's initial application as 'woefully inadequate', claiming that it failed to mention crucial elements to his claims. In RILC's view, no further information specific to Mr SE's case was put to the RRT at review:

> The catastrophic result of the failure to put Mr SE's claims is that they were elicited only when it was too late for them to be considered. In short, Mr SE's claims were never properly put to either the DIMA delegate or the RRT member who were the only two people who ever considered the merits of his case. The extreme brevity of the claims made Mr SE's case vulnerable to the popular approach that whatever has happened to him in the past is due to the general effects of war and is not "persecution" as such.[55]

7.30 The Committee does not intend to make any finding about the adequacy or otherwise of Mr SE's representation. The Committee is aware that, prior to the RRT hearing, Mr SE's solicitors wrote to the RRT advising of their non-appearance due to funding constraints.[56] Further, Mr SE's former solicitors contended that all submissions that could have been at the RRT hearing were adequately made in writing prior to the hearing:

> It is surprising that the Law Council and other organisations have made submissions as to the inadequacy of the legal representation of Mr SE without even consulting with Mr SE's representative and obviously without

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54 *Submission No. 73*, Law Council of Australia, Attachment D, p. 1123 being a copy of a letter from the Law Council of Australia and Amnesty International to the Hon. Philip Ruddock, dated 10 March 1999. The Committee notes, however, that paragraph 6 in the Affidavit of Mr SE's Refugee and Immigration Legal Centre solicitor filed in the High Court of Australia and purporting to be sworn on 30 October 1998 (although the copy on file is not signed) states: 'Whilst the applicant's appeal rights were on foot, the applicant contacted Victoria Legal Aid and sought advice regarding the merits of a application for judicial review of the Tribunal's decision. Whilst I am not privy to the details of their advice, I am advised by Mr [SE] that he was informed that his case was not judicially reviewable and that legal aid would not be available': See Department of Immigration and Multicultural Affairs File, Folio 187

55 *Submission No. 38*, Refugee and Immigration Legal Centre, pp. 340-341. The Committee notes, however, that Mr SE's former solicitors did forward a 6 page submission by facsimile on 24 April 1998 entitled Submissions in Support of Application for subclass 866 (Protection) Visa. Presumably this was forwarded to Department of Immigration and Multicultural Affairs for inclusion in the brief to the Refugee Review Tribunal. In fact, reference is made to the Tribunal Member throughout the document. Refugee and Immigration Legal Centre's contention must therefore be that Mr SE's former solicitors did not submit material relevant to his particular claims. The Committee is not prepared to make a finding in relation to such a claim except to note that the submission does contain material relevant to the situation in Mogadishu : See Department of Immigration and Multicultural Affairs File, Folios 62 – 66 being Submissions in Support of Application for subclass 866 (Protection) Visa

56 Department of Immigration and Multicultural Affairs File, Folio 437: The Refugee and Immigration Legal Centre referred to this letter in its submission to the Office of the United Nations High Commissioner for Refugees and attached it as annexure 4 of that submission

> reading the transcript of the High Court proceeding in Mr SE's case. Despite allegations as to Mr SE's inadequate representation all such arguments before the High Court have failed and the solicitors and counsel acting for Mr SE in the High Court were unable to raise any arguments that were not previously covered by Mr SE's representative in his submission. It is true that Mr SE was not accompanied by his representative to the Tribunal hearing, however, all submissions that could have been made at this hearing were adequately made in writing prior to the hearing.[57]

The inquisitorial function of the RRT

7.31 RILC also claim that the RRT member failed to perform his inquisitorial role by not drawing out Mr SE's claims and other relevant information about his clan.[58] Mr SE told the Committee that the RRT member had failed to ask him relevant questions:

> But I feel the questions that I was expecting is not what happened in the Tribunal. The member of the Tribunal did not ask me about the problem we had before the war broke out in Somalia and with my clan Shikal. He did not ask me. He did not ask me where we were living at that time. He did not ask me what was the problem we had in the wartime. The questions asked were how I was moving from place to place and how I came to Australia. That is it. He did not ask me about my clan – he did not ask me. He did not ask me all the questions that I was expecting about my clan and me.[59]

7.32 This argument, however, must be considered against the views expressed by the High Court on 16 November 1998.[60] In proceedings before Hayne J, it was contended that the RRT had erred because no reasonable decision-maker could have found that Mr SE's experiences by reason of his being in the Shikal clan did not constitute persecution or that he did not have a well-founded fear of persecution. It was also contended that the RRT had erred because it did not follow the procedures set out in s420(2) of the *Migration Act* and did not act according to substantial justice and the merits of the case.[61] In his judgment, Hayne J clearly did not agree and he made a point of noting that, in his opinion, the RRT member had asked the relevant questions:

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57 *Submission No. 66*, Macpherson & Kelley, Solicitors, p. 804

58 *Submission No. 38*, Refugee & Immigration Legal Centre, p. 342

59 *Transcript of evidence [In Camera]*, pp. 52-53. The Committee decided to release this short passage of evidence as it illustrates the assertion in the text while having no bearing on the progress of Mr SE's second application for a Protection Visa

60 The date of the Order was 16 November 1998 and the date of publication of reasons was 25 November 1998

61 Section 420(2)(b) reads:

'The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.'

> Properly understood, the reasons reveal that the Tribunal did consider what would happen to this applicant if he returned to Somalia and did consider whether the fears he said he held were well-founded fears of persecution on account of his membership of the Shikal clan. That view is reinforced by consideration of the transcript of the oral hearing before the Tribunal. In the course of that hearing the applicant was asked what he thought would happen to him if he went back to Somalia and he replied that he would be killed. The Tribunal asked him "who by? Who is after you in Somalia?" and this elicited the answer "Yes, the people who already took my possessions and my shops, they are still there. If they saw me hanging around, they would see that I am first seeking revenge, or I am seeking my rights to get my shops back and my … so I have to get away from their family and away from them and that's …". … the answer which the applicant gave to the direct question asked of him does not reveal fear of persecution on account of his membership of a clan. As counsel for the applicant pointed out, the various documents that had been submitted on behalf of the applicant all sought to make such a case. It would, then, be surprising if the Tribunal did not consider it. Both the reasons given and the course of the hearing reveal that the Tribunal did so. There is, in my view, no basis for concluding either that the Tribunal did not address the question raised by the applicant or that it reached a decision which was not reasonably open to it. The Tribunal dealt with the question in its reasons for determination and there was material before it upon which it could reach the conclusion that it did.[62]

7.33 Hayne J also addressed the question of whether the Tribunal had sufficiently investigated the case that the applicant sought to make and whether it had sufficiently inquired as to whether Mr SE had a well-founded fear of persecution because he was a member of the Shikal clan. Hayne J iterated his earlier view:

> It is enough to say that the Tribunal asked the applicant to explain why he feared return to Somalia. It is not arguable that the Tribunal erred in fulfilling its obligations under s420(2)(b) of the Act.[63]

Request for exercise of the ministerial discretion under s417 and s48B of the Migration Act 1958 and attempted repatriation

7.34 On 3 June 1998, a DIMA officer provided written advice that he did not consider that Mr SE's case satisfied the Ministerial guidelines for stay in Australia on humanitarian grounds and the exercise of the Minister's discretion under s417.[64] At

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62 *Re Minister for Immigration and Multicultural Affairs & Anor ; Ex parte SE* [1998] HCA 72. A copy of the decision was provided to the Committee in the Department of Immigration and Multicultural Affairs File, Folios 391-403 and the particular quote is at folio 402

63 *Re Minister for Immigration and Multicultural Affairs & Anor ; Ex parte SE* [1998] HCA 72. A copy of the decision was provided to the Committee in the Department of Immigration and Multicultural Affairs File, Folios 391-403 and the particular quote is at folios 402 – 403

64 Department of Immigration and Multicultural Affairs File, Folio 102: Consideration under s417 of Migration Act 1958

that time, the former Guidelines for the exercise of the ministerial discretion were still in place. Paragraph 7 of those Guidelines stated:

> (7) When the department receives the decision regarding a rejected case from the Tribunal under s430(2) of the Act, a Departmental officer may, in accordance with these guidelines, refer the case for the Minister's consideration under this public interest provision although the Minister does not have a duty to consider whether to exercise his power.[65]

7.35 The former Guidelines did not specifically require DIMA officers to 'refer' cases for the Minister's consideration. They 'may' refer the case. There was no specific written requirement for case officers to 'assess' the case. Most importantly, the Guidelines provided relatively general information as to those circumstances that might attract the exercise of the ministerial discretion. Paragraph 5 stated that it was in the public interest to offer protection to persons who expect to face, individually, a significant threat to their personal security, human rights or human dignity on return to their country of origin. Further, it was also in the public interest to offer protection to persons with Convention related claims in the past and continuing subjective fear, persons likely to face treatment closely approximating persecution, and persons facing serious mistreatment which while not Convention related constitutes persecution.[66]

7.36 The revised Guidelines (March 1999) have provided more detail as to the circumstances that might attract the exercise of the ministerial discretion.[67]

7.37 On 23 June 1998, the Refugee Advice and Casework Service (Australia) Inc. (RACS)[68] submitted a formal request from Mr SE to the Minister to exercise his discretion under s417.[69] Some of the main points in the submission were that Mr SE, if returned to Somalia, feared action that would constitute persecution;[70] it would be in

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65 *Guidelines for Stay in Australia on Humanitarian Grounds*

66 *Guidelines for Stay in Australia on Humanitarian Grounds*, paragraph 5

67 By comparison, the revised Guidelines specifically require that case officers do certain things. Paragraph 6.5 states: 'When a written request for me to exercise my power is received, a case officer is to assess that person's circumstances against these Guidelines and: for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power; OR, for cases falling outside the ambit of these Guidelines, bring a short summary of the case in a schedule format to my attention recommending that I not consider exercising my power'. In addition, the revised Guidelines specifically refer to the Convention Against Torture, Convention on the Rights of a Child and International Covenant on Civil and Political Rights when indicating those circumstances that might constitute 'unique or exceptional circumstances' and so attract the exercise of the ministerial discretion: *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 942 being p. 6 of Attachment K, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/391/417/454 of the Migration Act 1958*

68 Later to become Refugee and Immigration Legal Centre

69 Department of Immigration and Multicultural Affairs File, Folios 103-108

70 This treatment would either 'closely approximate persecution' or constitute persecution in terms of the Guidelines. Department of Immigration and Multicultural Affairs File, Folios 104 – 105

the public interest to give sanctuary to those fleeing from war;[71] the smaller clans could not survive without appropriate protection; and clans based in Mogadishu could not live outside that city, as had already been recognised in another RRT decision.[72] Mr SE's claims therefore should be assessed against the situation in Mogadishu which, it was claimed, was still the site of much conflict.[73] The Committee notes that these claims by Mr SE's advisers appear to support earlier decisions that his situation was not related to Refugee Convention grounds.

7.38 On 22 July 1998 the Minister advised that he had declined to consider exercising his discretion in Mr SE's case.[74] Further requests were made to the Minister on Mr SE's behalf:

(1) A s417 request was personally made by Mr SE dated 25 September 1998.[75] A DIMA file note advised that the case does not fall within the humanitarian Guidelines and reiterated the RRT findings.[76] The Minister responded on 22 October 1998 that as there was no additional information provided his previous decision not to consider exercising his power still stood.[77]

(2) A further s417 request was made by the Somali National Organisation of Australia Inc. by letter dated 22 October 1998. By letter dated 28 October 1998, the Minister refused the request. A filenote repeated the previous assessments that the case was outside the Humanitarian Guidelines and referred to the Organisation's claims and the RRT's findings.[78]

(3) Another section 417 request was made by Mr SE by letter dated 28 October 1998 and the request was rejected the same day.[79]

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71 It would be an 'inhumane and degrading punishment' (Convention Against Torture) to return a person simply because he was only one of many fleeing war; Australia, as a signatory to the International Covenant on Civil and Political Rights, should take a more humane approach (Department of Immigration and Multicultural Affairs File, Folios 104 -105)

72 Department of Immigration and Multicultural Affairs File, Folio 106: See RRT V97/7494, Member J. Wood, 2 October 1997

73 Department of Immigration and Multicultural Affairs File, Folios 106 – 107. The Committee notes that this contradicts Mr SE's claims that he moved around Somalia between 1991 and 1997 but acknowledges that as the situation in Somalia is a complex one, there may be no value to be derived from such a contradiction

74 Department of Immigration and Multicultural Affairs File, Folio 110

75 Department of Immigration and Multicultural Affairs File, Folio 121

76 Department of Immigration and Multicultural Affairs File, Folio 122

77 Department of Immigration and Multicultural Affairs File Folio 123. The Minister's letter states that this case was referred to him for consideration under section 417 on 7 July 1998 but there is no document evidencing the referral on the file

78 See Department of Immigration and Multicultural Affairs File Folios 126-131

79 Department of Immigration and Multicultural Affairs File, Folios 143-145

(4) RILC[80] requested the Minister to exercise his power under s48B of the *Migration Act 1958* to allow Mr SE to make a new application for a Protection Visa.

(5) By letter dated 29 October 1998, the Minister informed RILC that he had decided not to consider exercising his s48B power in Mr SE's case.

(6) RILC responded to the Minister enclosing a detailed statement of the applicant's clan-related claims, alleging that the applicant's original statement used in the determination process had been inadequate. RILC also alleged that the RRT member had limited his inquiries to Mr SE's membership of the Shikal clan and not elicited information from him about the safety of clan members in Mogadishu. They argued that the RRT had therefore failed in its function of investigating the applicant's claims.[81] By letter dated 29 October 1998, the Minister again rejected RILC's section 48B request.

7.39 In October 1998, Mr SE was served with a notice that he would be repatriated back to Mogadishu, via Johannesburg, on 29 October 1998.[82]

Issues arising from the refusal of requests under s417

7.40 In total, at least four requests were made to the Minister to exercise his discretion under s417 of the *Migration Act* and at least one request (although pressed a second time) was made for the exercise of his power under s48B.

7.41 The non-compellability of the s417 discretion means that the Minister was not obliged to actually consider the requests at all. In Mr SE's case, the Minister refused to consider exercising the discretion on every occasion, replying that:

> Your request for the exercise of my power under s417 was referred to me. However, I have decided not to consider exercising my power in Mr [SE's] case.[83]

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80 Ms Graydon, a Refugee and Immigration Legal Centre solicitor, became involved in Mr SE's case as of 28 October 1998: See Department of Immigration and Multicultural Affairs File, Folio 438 where Ms Graydon's notation about her involvement is contained on p.4 of the Refugee and Immigration Legal Centre submission to United Nations Convention Against Torture, dated 17 November 1998

81 Department of Immigration and Multicultural Affairs File, Folios 158-159. See the High Court's comment in relation to this argument at paragraphs 7.32 – 7.33

82 It is not clear exactly when this notice was served although a copy of the notice addressed to Mr SE in the Department of Immigration and Multicultural Affairs File is dated 23 October 1998: Department of Immigration and Multicultural Affairs File, Folio 225. In the unsigned copy of the affidavit by Mr SE's solicitors (purportedly sworn on 30 October 1998 and filed in the High Court), paragraph 8 states: 'The applicant instructed me that he contacted Mr [XX] from my office on 22 October 1998 and advised that he had been told he would be removed on 29 October 1998.' See Department of Immigration and Multicultural Affairs File, Folio 188

The capacity of the ministerial discretion to meet Australia's obligations

7.42 The Law Council of Australia and Amnesty International contended that the case of Mr SE raised the whole question of the adequacy of a non-compellable, non-reviewable Ministerial discretion to ensure that no person is forcibly returned to a country where he or she faces torture or death:[84]

> The Law Council of Australia and Amnesty International are concerned that this so called "humanitarian safety net" may not be adequate because it is located in a Ministerial discretion that is neither compellable nor reviewable. We question whether Australia's treaty commitments and international obligations are capable of being met in these circumstances. This is because those commitments and obligations are effectively not subject to scrutiny nor the rule of law.[85]

7.43 Referring to Mr SE and Ms Z[86], the Refugee Council (WA) noted that there are few options for applicants who are determined by DIMA to be outside the definition of 'refugee'. For those people, judicial review is very limited and their only real option is to apply to the Minister under s417 of the *Migration Act*. The Council, however, questioned whether the ministerial discretion provisions satisfy Australia's international obligations:

> While the DIMA guidelines for making decisions under s.417 state that regard must be had to a number of issues including Australia's international obligations it is the Refugee Council's position that there should be some other procedure in place to ensure that we are fulfilling our international obligations and allowing for more transparency and fairness in the process.[87]

7.44 Without making any comment on Mr SE's claims under the previous Guidelines, the Committee notes that the Ministerial discretion has an important role in providing a means by which people affected by non-Refugee Convention situations are able to request consideration. Mr SE's case raises the question as to the appropriateness of the non-compellability of the ministerial discretion. Several requests had been made in this case for the exercise of the discretion, both by the applicant and by organisations acting on his behalf. Many of the submissions raised serious questions about the adequacy of Mr SE's former representation, focused attention on the situation of the Shikal clan in Somalia, and advised about recent judicial decisions that might have a bearing on the case.[88]

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83 See for example, letter from the Hon. Philip Ruddock MP, Minister for Immigration and Multicultural Affairs to Mr Martin Clutterbuck, Refugee and Advice Casework Service (Aust) Inc dated 22 July 1998, Department of Immigration and Multicultural Affairs File, Folio 110

84 *Submission No. 73*, Law Council of Australia, Attachment A, p. 1109

85 *Submission No. 73*, Law Council of Australia, Attachment D, p. 1123

86 See chapter 9.

87 *Submission No. 18*, Refugee Council of Western Australia, p. 97

88 See Chapter 8 for a more detailed discussion of Ministerial Discretion

Reliance on DIMA filenotes for the exercise of the ministerial discretion

7.45 Filenotes accompany each request to the Minister under s417.[89] The papers provided by DIMA in relation to Mr SE's case indicate that the filenotes are an attempt to summarise the main aspects of the case.[90] The Committee would be concerned if it ever were the case that the exercise of the Ministerial discretion was solely reliant on these filenotes.

Formal system of referral

7.46 A number of submissions proposed that there should be a formal referral system from the DIMA case officer or the RRT, or both, to the Minister to consider cases on humanitarian grounds.[91] The Committee has considered this matter further in the chapter on Ministerial discretion.

7.47 Under the revised Guidelines, when an RRT member is of the view that a particular case he or she has decided may fall within the ambit of the Guidelines, the member may refer the case to the department and his or her views will be brought to the Minister's attention using the process outlined below.[92] That process, however, involved the DIMA case officer making an assessment and either making a submission so that the Minister can consider exercising his power (if it falls within the Guidelines) or making a filenote to the effect that it does not fall within the Guidelines. It is arguable that, as there is no direct system of referral from the member to the Minister, the existing system is still inadequate.[93]

First attempted removal of Mr SE

7.48 As Mr SE arrived in Australia on a British Airways flight, that airline WAS responsible[94] for his subsequent removal at no cost to the Commonwealth if he was refused entry to Australia. That being the case, DIMA served notices on British

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89 Although this was not a specific requirement under the former Guidelines, the 'practice' of using filenotes to advise the Minister as to whether he should consider exercising his discretion has been formalised in the revised Guidelines as of March 1999: *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, pp. 941-942 being paragraph 6, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/391/417/454 of the Migration Act 1958*

90 In fact, under paragraph 6.5 of the revised Guidelines, Department of Immigration and Multicultural Affairs case officers are required to provide the Minister with a short 'summary' of the case where the officer has assessed the case as falling outside the ambit of the Guidelines. Although this may have been the *practice* under the former Guidelines, it was not a requirement specified in the Guidelines

91 See for example, *Submission No. 36*, Kingsford Legal Centre, U NSW, p. 307

92 See below, Paragraphs 7.48-7.49

93 *Submission No. 69*, Department of Immigration and Multicultural Affairs, Attachment K, p. 942 being *Ministerial Guidelines for the Identification of Unique or Exceptional Cases where it may be in the Public Interest to Substitute a More Favourable Decision under s345/391/417/454 of the Migration Act 1958*, paragraph 6.3

94 Under the provisions of the *Migration Act 1958*. See also Chapter 10

Airways advising them of their liability to remove Mr SE under section 217 of the Act.[95] British Airways made travel arrangements to remove Mr SE from Australia (Melbourne) to Somalia on Qantas flights, breaking the journey at Perth and Johannesburg.[96] The arrangements included retaining Protection and Indemnity (P&I) Associates, a company in South Africa, to acquire proper documentation to facilitate his removal from Australia and arrival in Somalia,[97] and to organise Mr SE's travel arrangements and escort him from Johannesburg to his destination within Somalia.[98] On 29 October 1998, Mr SE was taken to Melbourne airport in the company of a DIMA officer and escorts provided by Australasia Correctional Management (ACM).[99] Qantas had arranged for Mr SE to then be escorted by a security officer from Sydney Network Security from Melbourne to Johannesburg[100] where he was to be handed over to P&I Associates for his return to Somalia via South Africa.[101] While boarding, Mr SE refused to move into the aircraft and the captain of the Qantas airliner declined to carry him.

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95 See for example, Department of Immigration and Multicultural Affairs File, Folios 111-113. Also note, section 217 deals with vessels required to convey certain removees and states:

(1) If a person covered by subsection 193(1) is to be removed, the Secretary may give the controller of the vessel on which the person travelled to and entered Australia written notice requiring the controller to transport the person from Australia.

(2) Subject to section 219, the controller must comply with the notice within 72 hours of the giving of the notice or such further time as the Secretary allows

96 Department of Immigration and Multicultural Affairs File, Folio 137 being copy of facsimile message from Department of Immigration and Multicultural Affairs to QANTAS dated 23 October. Also, a copy of the notice to Mr SE dated 23 October advising of the flight arrangements in the papers provided by Department of Immigration and Multicultural Affairs. The arrangements then advised to Mr SE were that he would depart the Detention Centre at 0700 hours on 29 October 1998, depart Melbourne on QF485 at 0835 hours, arrive Perth at 0930 hours, connect with QF23 departing Perth at 1305 hours and arrive Johannesburg at 2040 hours. The advice stated that 'British Airways will advise flight details Johannesburg/Mogadishu when they receive confirmation': Department of Immigration and Multicultural Affairs File, Folio 645

97 Department of Immigration and Multicultural Affairs File, Folio 112 being facsimile from Department of Immigration and Multicultural Affairs to British Airways dated 17 August 1998

98 Department of Immigration and Multicultural Affairs File, Folio 140 being facsimile from P&I Associates to British Airways dated 27 October 1998 advising that flights had been organised from Johannesburg to Nairobi and from Nairobi to Kismayo. A facsimile, undated, from British Airways to Department of Immigration and Multicultural Affairs advised that P&I would take responsibility of Mr SE from Johannesburg: See Department of Immigration and Multicultural Affairs File, Folio 296

99 According to a sworn affidavit by a Department of Immigration and Multicultural Affairs officer, Australasian Correctional Management Services are officers within the meaning of the *Migration Act* pursuant to a notice published in the Government Gazette: A copy of the affidavit sworn 6 November 1998 was made available in the Department of Immigration and Multicultural Affairs File, Folio 246

100 These details are provided in an affidavit of a Department of Immigration and Multicultural Affairs officer sworn 6 November 1998: Department of Immigration and Multicultural Affairs File, Folio 248, paragraphs 16 and 17

101 These details are provided in the affidavit of a Department of Immigration and Multicultural Affairs Officer, sworn 6 November 1998, in an attachment being 'Exhibit JLR 15': Department of Immigration and Multicultural Affairs File, Folios 295-296

Issues arising in relation to the first attempt to repatriate Mr SE

The use and accountability of repatriation contractors

7.49 RILC questioned the accountability and safeguards associated with the contractual relationship between British Airways (the carrier) and P&I Associates to remove Mr SE and whether such removal satisfied the requirements under s217 of the *Migration Act*.[102]

7.50 RILC's arguments relating to the proposed removal of Mr SE should be weighed against the views of the High Court expressed on 30 October 1998 (in the course of an application for an injunction).[103] Kirby J considered an objection raised about the circumstances of the removal based upon the language of s198 of the *Migration Act* which provides for the removal of persons from Australia by certain authorised persons, being officers of the Commonwealth. Kirby J considered that the proposed arrangements were proper:

> The Court has been informed that, in the present case, it is the intention of the Minister to make arrangements, unless restrained to remove the prosecutor from Australia by use of British Airways, a reputable international air carrier, and using P&I Associates, a private security firm, to facilitate the removal of the prosecutor to Somalia in Africa. The view which the Minister has taken is that, after the prosecutor is placed upon an airline belonging to a foreign country, such as British Airways, the removal from Australia is concluded once the aircraft leaves Australia. At least for my present consideration of the matter I am inclined to agree with that understanding of section 198 of the *Migration Act.*[104]

7.51 The judgments of Kirby J and Hayne J support the proposition that the use of private contractors to assist the removal process does not conflict with any legal obligations under the Act. The Committee was told that DIMA began using private contractors to obtain travel documents for removees from certain countries, particularly African countries. DIMA advised that 'significant difficulties' had been encountered when seeking the cooperation of African countries to identify their nationals and to issue appropriate travel documents:

> DIMA began using a privately based South African company called Protection and Indemnity Pty Ltd (P & I) to overcome the difficulties in removing such people. P & I is part of a major South African Corporate group that has been the agent for Lloyds for over 100 years. P & I has also

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102 See below, Chapter 10

103 See below, Paragraph 7. 52

104 *Re: The Minister for Immigration and Multicultural Affairs and ANOR; Ex parte SE M99/1998 (30 October 1998) at p. 11:* See Department of Immigration and Multicultural Affairs File, Folio 185. The Committee notes that the arrangements made by British Airways were to transport Mr SE from Australia on QANTAS flights. See also the views of Hayne J in relation to the same matter at a later stage in the injunction proceedings in paragraph 7.52 below

> been awarded an ISO 9002 classification by the South Africa Bureau of Standards which means that it conforms to the highest standards of international professional service.[105]

High Court injunction, involvement of the UN and second attempt to repatriate Mr SE

7.52 Following Mr SE's refusal to board the aircraft, the removal was aborted and he was returned to Maribyrnong Detention Centre. RILC sent a request for the Minister to use s48B to allow Mr SE to make another application for a Protection Visa.[106] By letter dated 2 November 1998, RILC was advised by DIMA that the Minister had decided not to consider exercising his power under s48B.[107] A further notice of intention to remove Mr SE to Somalia was issued on 30 October 1998.

7.53 On receipt of the further notice of intention to remove Mr SE, RILC, on 30 October 1998, applied for an injunction in the High Court to restrain his removal. An interim injunction was granted restraining his removal for 5 days on the basis that, in the light of the *Abdalla*[108] decision, there could be a serious question to be tried. Kirby J found that on the balance of convenience (given that the applicant was in detention, the injunction period short and the possible consequences if the applicant were erroneously removed from Australia), the injunction should be granted.[109]

7.54 The injunction was later extended for a further five-day period until 9 November 1998 when Hayne J heard argument from Counsel on behalf of Mr SE and Counsel for the Minister. He reserved his decision, and, on 16 November he dismissed the application. One of the grounds for the application was that the proposed removal of Mr SE was unlawful because it involved detention in custody of a non-citizen by a private contractor. Haynes J said that while he would be prepared to find that British Airways required an escort for Mr SE to ensure there is no in-flight disturbance and had retained P & I to provide such a person, there was no evidence to suggest that the respondent (the Minister and the Department) had made or requested the arrangements:

> If the airline, or those engaged by the airline, were to seek to exercise some restraint over the applicant, beyond the confinements that are the consequences of being in an aircraft in flight and of being in the transit area of an international airport with no papers permitting entry to the country

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105 *Submission No. 69,* Department of Immigration and Multicultural Affairs, p. 839

106 The request was dated 29 October 1998. See Department of Immigration and Multicultural Affairs File, Folios 158-159

107 Department of Immigration and Multicultural Affairs File, Folio 168

108 The citation used by the High Court was *Abdalla v Minister for Immigration and Multicultural Affairs* Unreported, 20 August 1998. The decision is now reported as *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11

109 *Re: The Minister for Immigration and Multicultural Affairs Ex Parte SE* M99 (30 October 1998). As noted above in Paragraph 7.49, Kirby J did not consider that there was any merit in the objection about the proposed arrangements to remove Mr SE by placing him in the custody of a private security firm

> concerned, there is nothing in the material to suggest that this additional restraint would be imposed by or on behalf of the first respondent or at his direction. It would be entirely a matter for the airline and those whom it has engaged and would be done with no authority – actual or pretended – given by the first respondent. There is, in my view, no factual basis established for the grant of an order nisi for prohibition or the grant of an injunction restraining removal on the basis that the first respondent proposes removal of the applicant by a means which includes extra-territorial custodial restraint or his detention in custody by a private contractor.[110]

7.55 The injunction was lifted as of 11.00am on 16 November 1998 permitting the Minister to remove Mr SE in accordance with s198 of the Migration Act 1958. Counsel for Mr SE then applied for an extension of the injunction to provide Mr SE with the opportunity to seek special leave to appeal against Justice Hayne's decision to the Full Bench. This application was dismissed.[111]

7.56 On 17 November 1998, RILC approached the United Nations Committee Against Torture (UNCAT) to investigate the matter.[112] RILC submitted that Australia would violate article 3 of the CAT if Mr SE were forced to return to Somalia as there were substantial grounds for believing that he would be in danger of being tortured. RILC noted that Mr SE had exhausted domestic recourse to the courts and public authorities insofar as his financial resources allowed.[113] Although Hayne J had disallowed the further injunction, RILC contended that it was still possible for Mr SE to technically seek special leave from the High Court to appeal Justice Hayne's decision and that his imminent removal would defeat that application. The Immigration Department had advised that it would be removing Mr SE within the next few days.[114] RILC sought the following relief on behalf of Mr SE:

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110 *Re Minister for Immigration and Multicultural Affairs & Anor; Ex Parte SE* [1998] HCA 72: Department of Immigration and Multicultural Affairs File, Folios 391-403. The quote is at folios 397-398. In relation to the other grounds for the application, Hayne J also found that the Refugee Review Tribunal had properly considered what would happen to the applicant were he to be returned to Somalia and did consider whether the fears he held were well founded fears of persecution based on his membership of the Shikal clan. He referred to particular questions asked by the Refugee Review Tribunal member to elicit that information. Further, Hayne J said the case was very different to that of the case of *Abdalla.* Finding no serious issue to be tried, he discharged the injunction

111 Department of Immigration and Multicultural Affairs File, Folio 439, being Refugee and Immigration Legal Centre's submission to the United Nations Committee Against Torture, p. 5

112 Department of Immigration and Multicultural Affairs File, Folios 435-447

113 Refugee and Immigration Legal Centre advised the United Nations Committee Against Torture that Mr SE had sought review by the Refugee Review Tribunal but that funding under the Immigration Advice and Application Assistance Scheme contract ceases once the Refugee Review Tribunal has made a decision. They advised that Mr SE had no resources to engage legal representation to seek judicial review of the Refugee Review Tribunal's decision and was unable to secure Legal Aid assistance

114 Department of Immigration and Multicultural Affairs File, Folio 440: Refugee and Immigration Legal Centre's submission to the United Nations Committee Against Torture, p. 6

- UNCAT request the Australian Government to take interim measures to protect Mr SE and not expel him whilst his communication was under consideration by the UNCAT;

- a finding that expulsion of Mr SE, when he did not have the right to return to any country except Somalia, would constitute a violation of article 3 of the CAT; and

- recognition that under CAT Australia is obliged not to expel Mr SE to a country where he risks torture.[115]

7.57 By facsimile dated 18 November 1998, the UN High Commissioner for Human Rights officially notified the Australian Mission in Geneva of the complaint to UNCAT and requested that Mr SE not be removed while the communication was under consideration.[116] At approximately 6.30am (EST) on 19 November 1998, the Australian Mission in Geneva advised an Attorney-General's officer of the request and it was faxed to DIMA and the Attorney-General's Department.[117] Meanwhile, the pending removal of Mr SE caused Amnesty International to invoke its 'Urgent Action' process against the Minister's decision to return Mr SE to Somalia.

7.58 Despite the matters in train to challenge the proposed removal of Mr SE, DIMA proceeded to effect his removal on the morning of 19 November 1998. Under escort, Mr SE departed Melbourne airport on a flight to Perth that departed at 8.35am (EST). At about 8.42am (EST), the Attorney-General's officer telephoned and faxed notification to DIMA of the UN High Commissioner's request. The removal action was halted in Perth on arrival of the aircraft that carried Mr SE.

7.59 Mr SE was given the choice of proceeding to Somalia or staying in Australia to await the outcome of the UNCAT Committee's consideration.[118] He chose to stay. Later that day, RILC applied for a Federal Court injunction to stay the removal of Mr SE and that matter was adjourned upon the Minister's undertaking to await the outcome of UNCAT's investigations. A Federal Court Order was obtained on behalf

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115 Department of Immigration and Multicultural Affairs File, Folio 447: Refugee and Immigration Legal Centre's submission to the United Nations Committee Against Torture, p. 13

116 Department of Immigration and Multicultural Affairs File, Folio, 425. Geneva is approximately 10 hours behind EST at that time of year

117 See letter from JJ Bedlington, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs to the Secretary, Senate Legal and Constitutional Affairs References Committee dated 18 August 1999 with attached chronology accompanying the Department of Immigration and Multicultural Affairs File. Reference is made to the events surrounding the receipt of the United Nations High Commissioner's request

118 See letter from JJ Bedlington, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs to the Secretary, Senate Legal and Constitutional Affairs References Committee dated 18 August 1999 with attached chronology accompanying the Department of Immigration and Multicultural Affairs File. Reference is made to the events surrounding the receipt of the United Nations High Commissioner's request

of the Minister, to suppress Mr SE's names and any information that might identify him.[119]

7.60 On 20 November, Mr SE was transferred to an Immigration Detention Centre in Port Hedland, Western Australia. On 24 November 1998, RILC applied to the Federal Court seeking the removal of the suppression order on his name and his return to Maribyrnong. RILC argued it would be difficult for them to obtain proper detailed instructions from Mr SE were he to remain in Port Hedland. On 8 December, Kenny J lifted the suppression order and on 8 January 1999, Mr SE was transferred back to Maribyrnong. Mr SE withdrew his application in the Federal Court for transfer.[120]

7.61 On 25 November 1998, RILC, acting on Mr SE's behalf, filed an application for special leave to appeal to the Full Court of the High Court from the judgment of Hayne J.[121]

7.62 The Committee notes at this time that Mr SE had exhausted all avenues of application to remain in Australia on refugee and humanitarian grounds. His primary application for refugee status had failed, as had his application for review of that decision. Four requests (under s417) for Ministerial intervention had been unsuccessful, and the judicial processes that he had engaged in had not prevented him being eligible for removal from Australia.

Issues arising from the second attempt to return Mr SE to Somalia

7.63 Term of reference (i) arises primarily from the second attempt at removal, and several issues have been identified.

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119 Department of Immigration and Multicultural Affairs File, Folio 449: Copy of Federal Court Order made on 19 November 1998 by the Honourable Justice Kenny in the Federal Court of Australia. Victorian District Registry, General Division. The application for the suppression was contested by Mr SE's solicitors

120 See letter from JJ Bedlington, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural Affairs to the Secretary, Senate Legal and Constitutional Affairs References Committee dated 18 August 1999 with attached chronology accompanying the Department of Immigration and Multicultural Affairs File. According to the chronology, Mr SE's Federal Court application to contest his transfer to Port Hedland was withdrawn on 27 January 1999. According to the copy of the Court documents on the Department of Immigration and Multicultural Affairs File, however, it appears that the application in the Federal Court dated 24 November 1998 was dismissed by consent order on 20 January 1999: See Department of Immigration and Multicultural Affairs File, Folio 775

121 Department of Immigration and Multicultural Affairs File, Folios 452-455. It is noted on the chronology referred to in footnote 60 that the matter is to be listed for a hearing conference

Complaint: The secrecy of the attempted repatriation of Mr SE on 19 November 1998

7.64 RILC complained that the circumstances of the removal were 'inappropriate and shrouded in secrecy':

- Mr SE was not notified of the proposed removal although DIMA's usual practice is to give two days notice. RILC were notified after he was on the flight to Perth;
- Telephone calls from Maribyrnong detainees to advise RILC of Mr SE's removal were interrupted;
- DIMA provided misleading information about Mr SE's whereabouts;[122] and
- Amnesty International expressed concern that Mr SE may have been forcibly removed from the detention centre that morning, in the company of DIMA and private security officers, and denied telephone access to his lawyer.[123]

7.65 The Committee notes, however, that the matters complained of by RILC are not legal requirements under the removal provisions in the *Migration Act.* There is nothing that suggests that the Department, when effecting the removal of a non-citizen, must give two days notice of the proposed removal, advise the non-citizen's legal representatives or facilitate their notification. S198 of the Act simply requires that unlawful non-citizens be removed from Australia as soon as is reasonably practicable providing that the non-citizen is not holding or applying for a visa. s213, s217 and s218 of the Act provide that the removal of certain unauthorised arrivals is the responsibility of the airline or shipping line that brought the person to Australia.

7.66 Similarly, as discussed in chapter 10, there is no jurisdiction or power under the *Migration Act* for the Minister or DIMA officers to monitor the removal process once those persons are outside Australia. DIMA submitted:

> Australia has no obligation to monitor persons who are removed from Australia. There would be significant practical difficulties in doing so due to the number of relevant persons and geographical spread of destinations. Significant issues relating to international relations and issues of sovereignty within other nations' borders would also arise (DFAT is best placed to comment on the latter).[124]

Is a matter 'finally determined' notwithstanding a communication is on foot with the UNCAT?

7.67 s198(6) of the *Migration Act* provides that an unlawful citizen can be removed when his application for a substantive visa has been 'finally determined'. RILC asserts that DIMA considers an application to be 'finally determined' where the RRT

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122 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 339

123 *Submission No. 50*, Amnesty International, p. 482

124 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 840

decision is still within appeal time, where an application for judicial review has been lodged,[125] where a section 417 request has been lodged,[126] and where UNCAT proceedings have been commenced.[127]

7.68 In this case, RILC contends that the removal of Mr SE should have been deferred when the Minister received notification that the request to UNCAT had been made until after UNCAT had considered the communication:

> By removing people who have outstanding communications with the Committee, Australia could hardly be said to be taking its international obligations very seriously when it is not willing to even preserve the subject matter of the communication and is willing to risk being in breach of article 3 of the Convention Against Torture had the removal on 19 November 1998 gone ahead as planned despite notice of the communication having been lodged. The removal was interrupted only after the Minister had received a specific request from the Committee not to expel Mr [SE]. In our view, the Committee should not have had to make a specific request where Australia already had received notice that the communication had been lodged.[128]

7.69 The Jesuit Refugee Service similarly argued that notice that a communication has been taken to the UNCAT should be sufficient for Australia to suspend removal procedures, particularly where the case has prompted an 'urgent action' by Amnesty International.[129] The Service stated that to proceed with the deportation in these circumstances suggests that the Australian Government:

- Rates Australian legal rules and procedures above international law and procedure;[130] and

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125 Section 482(1) of the *Migration Act* provides that the making of an application to the Federal Court in relation to a judicially reviewable decision does not (a) affect the operation of the decision, (b) prevent the taking of action to implement the decision, or (c) prevent the taking of action in reliance on the making of the decision. The combined effect of s482(2) to (5), however, is that a Federal Court order can be obtained to stay the removal pending the making of a decision in relation to the application for judicial review. This means that removal can occur despite an application for judicial review except where a Federal Court order has been made restraining the Minister from removing that person: see *Submission No. 38*, Refugee and Immigration Legal Centre, p. 340

126 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 340. Refugee and Immigration Legal Centre submitted: 'See the Minister's Guidelines for the exercise of his discretions which states that: A request for me to exercise one of my public interest powers is not an application for a visa and, unless the request leads me to a grant of a bridging visa, such a request has no effect on the removal provisions.'

127 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 340

128 *Submission No. 38*, Refugee and Immigration Legal Centre, p. 341

129 *Submission No. 54*, Jesuit Refugee Service, p. 563

130 *Submission No. 54*, Jesuit Refugee Service, p. 563. The Service submitted that the fact that bodies like the United Nations Committee Against Torture are not courts of law and only deliver their 'views' on communications, does not justify an approach that belittles their significance. The United Nations Committees have authority to interpret the treaties. Australia should not persist with its own interpretation of a treaty in the face of a contrary view on the part of a relevant committee

- treats communications to human rights bodies as illegitimate 'delaying' tactics rather than bona fide attempts to protect an individual's human rights.[131]

7.70 The Committee notes that there is no legal requirement for Australia to take any action in respect of advice that a communication has been forwarded to UNCAT. There is also no legal requirement for Australia to agree to requests made by the UNCAT[132] even though it is recognised that a country's international reputation may be enhanced by cooperating with such requests. At the time of Mr SE's removal from the Detention Centre on 29 November 1998, however, the request for Australia to take interim measures in respect of Mr SE had not been received. As soon as it was received, the removal action was halted. In respect of Australia's response to requests from UNCAT the Attorney-General's Department noted:

> The Government has complied with 'interim measures' requests from United Nations committees whenever it has been in a position to do so. However, it is not for the Government to anticipate when, or if, such a request may be made by a United Nations Committee.[133]

Therefore, although the Government may be aware that a communication has been forwarded to UNCAT, the Government should not assume or predict that UNCAT will make particular requests one way or the other.

Factors other than the legislative and administrative arrangements prevented Mr SE's deportation

7.71 It was argued that Mr SE's case demonstrated that the arrangements in place to ensure that Australia's international obligations are met are inadequate. The Refugee Council of Australia (NSW) submitted that it was essentially a series of 'serendipitous events that prevented Mr SE from being deported' and that the procedures put in place by the Government had afforded him far from adequate protection.[134] It has been alleged by Amnesty that their campaign and other factors, including the petition to UNCAT, were responsible for the decision not to remove SE.[135]

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131 *Submission No. 54,* Jesuit Refugee Service, p. 564

132 The Committee notes that the communication to the United Nations Committee Against Torture on behalf of Mr SE was made under article 22 of the Convention Against Torture which states that State Parties may declare that they recognize the competence of the United Nations Committee Against Torture to consider communications about individuals who claim to be victims of a violation by a State Party of the provisions of the Convention. Article 22(7) merely states that the United Nations Committee Against Torture shall forward its views to the State Party concerned and to the individual

133 *Submission No. 75,* Attorney-General's Department, p.1142

134 *Submission No. 24,* Refugee Council of Australia, p. 276

135 *Submission No. 50,* Amnesty International, p. 481

The use of suppression orders in proceedings that may culminate in removal

7.72 As noted above, an order was obtained on 19 November 1998 on behalf of the Minister to suppress Mr SE's name and identity. The objective of the order was to ensure the privacy and confidentiality of applicants and preserve the integrity of the refugee and humanitarian program; a further objective was not to facilitate a "sur place" claim'.[136] This application was opposed on the grounds that publication of Mr SE's name would assist him in the international community in terms of his seeking protection in other countries were he to be expelled from Australia.[137]

7.73 Following the making of the order on 19 November 1998, correspondence from the Minister to Amnesty International advised that, in accordance with the court order, Mr SE's name and identity should not be disclosed. In the course of the inquiry, the Committee was told that Australia's international reputation was not enhanced by the 'threats' against Amnesty International.[138] The 'threats' complained of were contained in letters that stated:

> You would be aware that serious consequences could flow from failure to observe such an order.[139]

and

> I once again draw your attention to the terms of the confidentiality order made by her Honour Justice Kenny on 19 November 1998 in the above application to the Federal Court of Australia. The order extends not only to the suppression of the name of the applicant but also to any information which might identify the applicant. I note that Mr [name excluded] again provided details concerning Mr SE which could serve to identify him. I reiterate my earlier advice that serious consequences could flow from failure to observe the order.[140]

7.74 On 1 December 1998, Amnesty International in London issued a statement expressing 'outrage' at the Australian government's warning that it could face 'serious consequences' should it continue to name or publish information identifying a certain Somali asylum seeker. The Committee notes that the relevant letters warned Amnesty

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136 Department of Immigration and Multicultural Affairs File, Folio 529, in particular paragraphs 2, 4 and 5 of an Affidavit filed in the Federal Court in relation to the suppression order and sworn 7 December 1998

137 Department of Immigration and Multicultural Affairs File, Folios 472 – 479 being the Affidavit of Mr SE's solicitor, sworn 4 December 1998 (although mistakenly dated 3 December in the preamble). See paragraphs 14, 15 and 26

138 See *Submission No. 50*, Amnesty International, p. 483 and Amnesty International, *Transcript of evidence*, 21 July 1999, pp. 207-209

139 Department of Immigration and Multicultural Affairs File, Folio 468 being a copy of a letter from the Australian Government Solicitor to Amnesty International, Sydney, dated 19 November 1998

140 Department of Immigration and Multicultural Affairs File, Folio 448 being a copy of letter from the Australian Government Solicitor to Amnesty International, Sydney, dated 1 December 1998

International of the terms of the suppression order and advised that consequences can flow to those who break that order.

The views of UNCAT in relation to Mr SE's case

7.75 RILC approached the UNCAT on 17 November 1998 seeking the UNCAT's views as to whether Australia would violate article 3 of the CAT if Mr SE was forced to return to Somalia. Article 3 obliges states not to repatriate (*refoule*) individuals to a country where they are likely to suffer torture. RILC claimed that there were substantial grounds for believing that he would be in danger of being tortured.

7.76 The Government's response in respect of RILC's claims was that the communication to UNCAT was inadmissible *ratione materiae* because the consequences that would allegedly befall Mr SE if returned to Somalia are not within the CAT's definition of 'torture'.[141] Further, it was contended there were no substantial grounds for believing Mr SE would be tortured by the Hawiye or other clans.[142]

7.77 By submission dated 29 April 1999, RILC, on behalf of Mr SE, responded to the Government's arguments relating to admissibility of the communication before UNCAT and the merits of the case.[143]

The views of UNCAT

7.78 On 20 May 1999, the UNCAT issued a statement (views) in Mr SE's favour.

7.79 The UNCAT concluded there were substantial grounds for believing that Mr SE would be at risk if returned to Somalia and that any forced repatriation of Mr SE to Somalia would be in breach of article 3 of the CAT. The UNCAT requested that Australia notify it within 90 days of any measures taken in response to the Committee's views. [144]

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141 The Government response is dated 11 March 1999. The Communication advised that Mr SE would be subjected to torture by members of armed Somali clans. By contrast, State parties in negotiating the Convention had arrived at an agreement that ' "torture" extends to those acts committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity'. The Australian Government's response noted: 'It was not agreed that the definition should extend to private individuals acting in a non-official capacity such as members of Somali armed bands.' See Department of Immigration and Multicultural Affairs File, Folio 785

142 Department of Immigration and Multicultural Affairs File, Folio 779. The discussion of the Government's arguments on the merits is contained in folios 784-794

143 Department of Immigration and Multicultural Affairs File, Folios 806 - 923 being copy of *Author's Response to Australian Government Submission on Admissibility and Merits to the United Nations Committee Against Torture*

144 Views of the Committee Against Torture Under Article 22, Paragraph 7, of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – Twenty-Second Session concerning Communication No. 120/1998, p. 13: Department of Immigration and Multicultural Affairs

Issues arising from the UNCAT stage

CIS information and the way it is used

7.80 The main issues that arise in relation to the UNCAT stage of Mr SE's case concern the Country Information Service (CIS), and, in particular, the extent of information available to DIMA; the ways in which this evidence is weighed; and the use made of it by decision makers.

Content of CIS

7.81 In relation to the content of country information, the Protection Visa Decision Record indicates that the country information suggested the situation in Somalia had changed since 1997, that is, since the time the applicant had said he left. The CIS provided information that Somalia generally was moving towards a settlement of the clan based warfare. This information contrasts sharply with that information apparently available to the UNCAT during its deliberations. In addition, the UNCAT, referring to the existence of gross, flagrant or mass violations of human rights in Somalia noted that:

> … the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her latest report the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs.[145]

7.82 The Committee notes UNHCR information that repatriation to Somalia was not to be encouraged. The DIMA file contains a copy of a facsimile from the UNHCR[146] to one of Mr SE's solicitors, dated 7 September 1998, which states:

> While it is true that UNHCR facilitates voluntary repatriation to so-called Somaliland, we neither promote nor encourage repatriation to any part of Somalia. In respect of rejected asylum-seekers from Somalia, this office does urge States to exercise the utmost caution in effecting return to Somalia.[147]

7.83 The Committee is aware that all information must be assessed carefully, but believes that it is crucial to the proper determination of refugee status applications that

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File, Folio 939. The United Nations Committee Against Torture requested notification within 90 days pursuant to rule 111, paragraph 5 of United Nations Committee Against Torture's rules of procedure

145 Views of the Committee Against Torture Under Article 22, Paragraph 7, of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – Twenty-Second Session concerning Communication No. 120/1998, p. 13: Department of Immigration and Multicultural Affairs File, Folio, 989

146 The facsimile was sent from the Office of the United Nations High Commissioner for Refugees' regional office for Australia, New Zealand, Papua New Guinea and the South Pacific

147 Department of Immigration and Multicultural Affairs File, Folio 119

both DIMA and the RRT have available accurate and up-to-date country information and that such information should equate, where possible, with the standard of that available to international bodies like the UNCAT.

Weighting and use of information

7.84 The Committee also notes that it is important that information is used to support a claim, where this is justified. For example, in the Protection Visa Decision Record it was noted that 'more recent information' indicated that:

> Deaths due to power struggles and clan warfare is limited almost entirely to Mogadishu. It is not true of Somalia as a whole. "Away from Mogadishu, there is a remarkable commitment to peace and reconciliation." … [148]

7.85 As Mr SE was from Mogadishusuch a report *might* have meant that he could return to Somalia but not to Mogadishu. However, on behalf of Mr SE, RILC advised the Minister that one of the dangers of the proposed forced repatriation of Mr SE to Somalia was that if he were not returned to the exact village where he belonged there might be grave consequences:

> We note with alarm that a fax was sent (most likely from P & I Associates to British Airways) cautioning of the need to obtain detailed instructions from Mr [SE] regarding his clan membership as if he "lands up in the wrong village he won't last 24 hours."[149] (Emphasis in original)

Subsequent events

7.86 Following the UNCAT's decision, RILC wrote to the Minister on 28 May 1999 asking him to use his s417 power to grant a visa and release Mr SE from detention.[150]

7.87 The Minister exercised his power under section 48B and allowed Mr SE to reapply for a Protection Visa. That process is as yet unresolved.

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148 CX 2299 (Document dated 1997)

149 Department of Immigration and Multicultural Affairs File, Folio 202 being letter from Refuge and Immigration Legal Centre to the Minister, the Hon. Philip Ruddock dated 28 October 1998. Refugee Advice and Casework Service (the earlier name of Refugee and Immigration Legal Centre) claimed that: 'The nature of the clan system makes it near impossible for Somalis to relocate to other parts of the country. Whilst the situation in Somaliland remains relatively stable, relocation to Somaliland by members of clans from the South would be to create a situation of persecution for them. As such the applicant's claims must be reassessed against Mogadishu': Department of Immigration and Multicultural Affairs File, Folio 106 being a copy of a letter from RACS to the Hon. Philip Ruddock, Minister for Immigration and Multicultural Affairs, dated 23 June 1998

150 *Submission No. 38,* Refugee and Immigration Legal Centre, p. 339. The Refugee and Immigration Legal Centre noted that at the time of writing its submission, the Minister had not responded. The Committee notes that the Department of Immigration and Multicultural Affairs File papers do not indicate whether a response to that request has been forwarded yet as the file ends with the United Nations Committee Against Torture views in May 1999

Discussion in relation to the early identification of cases such as Mr SE

7.88 Under the terms of reference, the Committee is required to inquire:

> (j). why cases such as the Chinese woman and that of Mr SE are not being picked up early enough by the Department of Immigration and Multicultural Affairs and the Refugee Review Tribunal.

7.89 The Committee's consideration of Mr SE's case has been limited, and its conclusions restricted, for the following reasons: as Mr SE's case remains on foot following the Minister's decision to allow him to reapply for a Protection Visa, the Committee limited its examination to the decision-making processes that took place between October 1997 and May 1999; and as new information received confidentially by the Committee may have a bearing on the progress of Mr SE's current protection visa application, it would be inappropriate for the Committee to comment upon the content or otherwise make any use of that material.

7.90 The suggestion that the case of Mr SE should have been 'picked up' earlier indicates that either the existing processes did not deal adequately with his situation, or that they are inappropriate – that perhaps Mr SE's case should have bypassed the primary decision-making and the RRT phase because it could not succeed under the Refugee Convention, and been submitted for earlier consideration by the Minister under s417.

7.91 The Committee has considered both views carefully. It believes that overall Mr SE enjoyed a high degree of access to the administrative and judicial processes of the refugee determination system and to the humanitarian process. There may have been some difficulties in respect of his representation – although the Committee has made no determination on this matter – and the publicity engendered by the case may have caused some problems. Overall, however, the Committee does not believe the issue is one where a particular situation should have been identified and the system failed to do so.

7.92 With the above-mentioned constraints on this particular case in mind, the Committee has made recommendations in other chapters of the report that would serve to improve the decision-making process in refugee and humanitarian matters. These recommendations, however, are not to be seen as referring to any one case in particular. Further, some of the recommendations are made in the context of the Committee suggesting changes to the status of both CAT and ICCPR. In this light, other recommendations are intended to deal in the interim with identified problems of processing, evaluation, and the responsibilities of officials.