APPENDIX 9

THE 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, 351, 391, 417, 454 OF THE *MIGRATION ACT 1958* ([1])

1 Purpose

1.1 The purpose of these Guidelines is to:

- inform Department of Immigration and Multicultural Affairs officers of the unique or exceptional circumstances in which I may consider exercising my public interest powers under s345*, 351*, 391*, 417 or 454 of the *Migration Act 1958* ([2]), as the case may be, to substitute for a decision of the relevant decision maker, a decision more favourable to the person concerned in a particular case;

- set out the unique or exceptional circumstances in which I may wish to consider exercising those powers;

- inform Department of Immigration and Multicultural Affairs officers of the way in which they should assess whether to refer a particular case to me so that I can decide whether to consider such intervention;

- inform people who may wish to seek exercise of my public interest powers of the form in which a request should be made.

2 Legislative Framework

2.1 I have power, but no duty to consider whether to exercise that power, under sections 345, 351, 391, 417 and 454 of the *Migration Act 1958* (the Act), as the case may be, to substitute a more favourable decision, for a decision of the Migration Internal Review Office (MIRO), the Immigration Review Tribunal (IRT), the Administrative Appeals Tribunal (AAT) in respect only of IRT or RRT reviewable decisions, or the Refugee Review Tribunal (RRT), if I consider such action to be in the public interest. For example:

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1 "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, 351, 417 or 454 of the Migration Act 1958" - was issued on 4/5/99. The Guidelines were signed by the Minister on 31/3/99 and have effect from that date.

2 * Note: MIRO and the IRT will cease operations on 31 May 1999. All references to MIRO and the IRT and the relevant sections of the Act should be read as references to the Migration Review Tribunal (MRT) from 1 June 1999.

2.2 Section 417. Minister may substitute more favourable decision

417. (1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or any other person, or in any other circumstances.

3 When the public interest power is not available

3.1 As my public interest powers only allow me to substitute a more favourable decision for a decision of MIRO, the AAT (in respect of an IRT or RRT-reviewable decision) IRT or the RRT, I am not able to use this power until the relevant review authority has made a decision in a particular case. I cannot use this power to grant a visa when the review authority has not yet made a decision or when an application to the review authority has not been made.

3.2 Where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, I am not able to use my public interest power as there is no longer a review decision for me to substitute.

3.3 Officers must advise me of the commencement and outcome of Court proceedings challenging a decision in relation to any case that has been referred to me.

3.4 It would not usually be appropriate to consider substitution of a more favourable decision for that of a MIRO officer while an IRT application were in progress. Unusual circumstances would need to be established to suggest that exercise of my public interest power should be considered prior to the IRT making a decision on the matter.

4 Unique or Exceptional Circumstances

4.1 The public interest may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances. My public interest powers provide me with a means of doing so.

4.2 Cases may fall within the category of cases where it is in the public interest to intervene if a case officer is satisfied that they involve unique or exceptional circumstances. Whether this is so will depend on various factors and must be assessed by reference to the circumstances of the particular case. The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

4.2.1 Particular circumstances or personal characteristics that provide a sound basis for a significant threat to a person’s personal security, human rights or human dignity on return to their country of origin, including:

- persons who have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or

- persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for a Convention reason;

4.2.2 Substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin, in contravention of the International Convention Against Torture (CAT). Article 3.1 of the Convention provides:

"No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture."

[Torture is defined by Article 1 of the Convention as follows:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."]

4.2.3 Circumstances that may bring Australia's obligations as a signatory to the *Convention on the Rights of the Child* (CROC) into consideration. Article 2 of the Convention provides:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[3]

4.2.4 Circumstances that may bring Australia's obligations as a signatory to the *International Covenant on Civil and Political Rights* (ICCPR) into consideration. For example:

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3 Note: This should be balanced against any countervailing considerations. See 5 – Other Considerations.

- the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her human rights, such as being subject to torture or the death penalty (no matter whether lawfully imposed);

- issues relating to Article 23.1 of the Convention are raised. Article 23.1 provides:

"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.[4]

4.2.5 Circumstances that the legislation could not have anticipated;

4.2.6 Clearly unintended consequences of legislation;

4.2.7 Intended, but in the particular circumstances, particularly unfair or unreasonable, consequences of legislation;

4.2.8 Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) or an Australian citizen;

4.2.9 Exceptional economic, scientific, cultural or other benefit to Australia;

4.2.10 The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community;

4.2.11 The age of the person; or

4.2.12 The health and psychological state of the person.

5 Other Considerations

5.1 Cases identified as involving unique or exceptional circumstances will sometimes raise issues relevant to my consideration of whether or not it may be in the public interest to substitute a more favourable decision in the case. If relevant, countervailing issues that case officer should draw my attention include, but are not limited to:

5.1.1 Whether the presence or continued presence of the person in Australia would pose a threat to an individual in Australia, Australian society or security or may prejudice Australia's international relations (having regard to Australia's international obligations).

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4 Note: This should be balanced against any countervailing considerations. See 5 – Other Considerations.

5.1.2 Whether there are character concerns in relation to the individual, particularly in relation to criminal conduct.

5.1.3 Whether the person need not return to the country in which a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they have rights of entry and stay in another country.

5.1.4 Whether the person is likely to face a significant threat to their personal security, human rights or human dignity only if they return to a particular area in their country of origin and they could reasonably locate themselves safely, elsewhere in that country.

5.1.5 The degree to which the person co-operated with the Department and complied with any reporting or other conditions of a visa.

Outcome of my Consideration

5.2 If I decide to consider a person's case I may ask, amongst other things, that certain health and character assessments be made or that an assurance of support or other surety be sought before I make a final decision about whether or not I wish to substitute a more favourable decision.

5.3 I may decide not to substitute a more favourable decision for that of a review authority.

5.4 If I decide to substitute a more favourable decision for that of a review authority, I will grant what I consider to be, in the circumstances, the most appropriate visa.

6 Application of these Guidelines

6.1 I direct that the following procedures be applied to ensure the effective and efficient administration of my powers under s345, 351, 391, 417 and 454 (hereafter referred to as my public interest powers):

Post decision procedures

6.2 When a case officer receives notification of an IRT, RRT, or AAT[5] decision that is not the most favourable decision for the applicant they are to assess that person's circumstances against these guidelines and:

- bring the case to my attention in a submission so that I may consider exercising my power because the case falls within the ambit of these Guidelines, OR

5 Concerning a decision otherwise reviewable by the IRT or RRT.

- make a file note to the effect that the case does not fall within the ambit of my Guidelines.

6.3 When a MIRO review officer or Tribunal member is of the view that a particular case they have decided may fall within the ambit of these Guidelines they may refer the case to the Department and their views will be brought to my attention using the process outlined in 6.5 below.

- comments by members of review authorities do not constitute an initial 'request' for the purposes of 6.6 below.

Requests for the exercise of my public interest powers

6.4 Requests can be made in writing to the person seeking my intervention, their agents or supporters.

6.5 When a written requests 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.

'Repeat' requests for the exercise of public interest powers

6.6 If a written request for me to exercise my public interest powers is received after the case has previously been brought to my attention as the result of a previous request (in a schedule or as a submission) a case officer is to assess the request and:

- for cases then falling within the ambit of these Guidelines, bring the case to my attention as a submission so that I may consider exercising my power; OR

- for cases remaining outside the ambit of these Guidelines (because the letter does not contain additional information provided, in combination with the information known previously, does not bring the case within the ambit of these Guidelines) reply on my behalf that I do not wish to consider exercising my power.

No limitation of the Minister's powers

6.7 My ability to exercise my public interest powers is not curtailed in a case brought to my attention in a manner other than that described above.

6.8 Where appropriate, I will seek further information to enable me to make a decision whether to consider exercising, or to exercise, my public interest powers.

6.9 Every person whose case is brought to my attention will be advised of my decision, whether it is a decision to refuse to consider exercising my public interest powers or a decision following consideration of the exercise of those powers.

7 Removal Policy

7.1 Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizen detainees who are not either holding or applying for a visa. A request for me to exercise one of my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal position.

Phillip Ruddock

31 Mar 1999