The Senate
Parliament House
Canberra ACT 2600
AUSTRALIA

2 November, 2003

Alistair Sands
Secretary

Ministerial Discretion in Migration Matters - Select Committee

Attention : Peta Leeman

Dear Mr Sands

Please find enclosed additional information I have collected in response to Senator Humphries' questions during the hearing I attended on 22 October, 2003.

Although I did not relish the extra work, the experiences of former RRT members do provide further evidence of the claims of Bruce Haigh and the concerns of the Coalition for the Protection of Asylum Seekers. Some members of the Coalition's network have also offered information.

The Coalition proposes that one of the Senate Select Committee's recommendations be that the Senate establish a similar inquiry into the impact of Ministerial and Departmental influence and intervention on the decisions of the RRT. Meanwhile, the Coalition will canvass its membership whether, in the light of the information that the RRT is influenced by the Minister and Department, the power of full judicial review be restored to the Courts or, more importantly, to a specialist Refugee and Humanitarian Court. Clearly the RRT should be reformed. There should be three Tribunal Members at a hearing for instance, and the discussion and recommendations of the Senate Legal and Constitutional References Report "Sanctuary under Review"(June 2000) should be implemented as a matter of urgency.

Yours sincerely

Frances Milne
Convenor of Working Group
Coalition for the Protection of Asylum Seekers

grant protection to asylum seekers opens the way to their eventual removal to countries which grossly and systematically abuse human rights.

Additional Information

Relating to Lack of Independence of the Refugee Review Tribunal (RRT)

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Note : Hard copy documents will be sent to the Senate Select Committee by mail.

Bruce Haigh

On 23 October, 2003, I spoke by telephone with Bruce Haigh, who lives on a property outside Mudgee, to redress Senator Humphries' concerns that I had not met and did not know anything about Bruce Haigh's life.

Bruce Haigh talked very openly about his experience as both a full time and part-time member of the RRT, and indicated he was still a Member of the RRT in 2000. Prior to his RRT experience, he had been a Diplomat in Pakistan, Afghanistan, the Gulf states including Yemen, Iran, Saudi Arabia, Sri Lanka and South Africa.

Bruce Haigh explained that the influence of the Minister was subtle, but there was an unwritten consensus among RRT Members that only about 20 % of applicants should be found to be refugees. This unwritten rule was further validated when any member whose record of approvals for refugee visas climbed to around 35%, would be 'counselled' by the Principal Member or senior Members about the way they made their decisions.

Bruce Haigh refused to comply with this absurd 20% rule of thumb and in late 1996 or 1997 when his own approvals were much higher, the Principal Membe[redacted], drew him aside and went through Bruce Haigh's decisions arguing against the evidence which supported the applicant's claim to be a refugee. Bruce argued back that this was only [redacted] opinion and he had no intention of changing the way he assessed applications. He also pointed out to [redacted] that he had far fewer appeals from those cases he did not approve to the Courts, and very few of his decisions overturned in the Courts compared with other RRT Members who kept the 20% rule.

At meetings within the RRT Chetty would indicate to members the Minister's thinking on issues, such as the set aside rate and government policy in relation to the processing of East Timorese refugees.

[redacted]e the following Principal Member would also pass on the Minister's thoughts and perceptions as to the framework which the RRT ought to be operating.

When I asked him what was the response of the RRT Members when Courts did overturn their decisions, he said that the RRT Members took note of every court appeal, and when their cases were overturned their response was that courts were wrong.

Bruce had known [redacted]y as Diplomat in South Africa whom he helped out of South Africa. Sadly, however, he saw him change under pressure to conform to the RRT culture of compliance to government expectations that the RRT should not be a backdoor to onshore claims for protection. Bruce Haigh noticed this same change in other independent thinkers and human rights advocates once they became RRT members. He observed the insidious way these highly paid RRT Members became trapped by their mortgages and standards of living, so that they gradually complied with the culture of rejecting most refugee claims. In 1999 RRT Members positions became more tenuous with 2 an 3 year contracts subject to review by the Minister and Cabinet. Many part-time members have now been appointed. Those who do not meet expectations do not get cases, and the expectation is that they will leave the RRT.

Bruce Haigh also mentioned that any RRT Member that did not use DFAT Country Reports to at least balance the Amnesty International or other Human Rights reports, would have that matter drawn to their attention. RRT Members read each other's reports so there was no chance of remaining unnoticed if the protocols were not observed. Bruce Haigh noted that not all RRT members have succumbed to this pressure, which means that the RRT is of variable quality in terms of decision making. He also noted that many RRT members have no direct experience of the countries which they deal with.

Eventually in 2000 Bruce Haigh's application for re-appointment to the RRT was not approved by the Minister.

Dr Lyn Fong

Dr Lyn Fong was appointed as a Member to the RRT from 1993 when it was first established, to 1997. Dr Fong had been a medical practitioner who, prior to joining the RRT, had worked in the Attorney-General's (A-G) Department on Refugee Status Review Committee (RSRC), the forerunner to the RRT and other projects including the blueprint for the establishment and operations of the RRT.

However, even prior to its establishment in 1993, how to make the RRT an independent body was always a difficult issue. Dr Fong was of the view that while the RRT was positioned in the Immigration Portfolio, she could not be confident that that the RRT could ever be entirely independent of the influence of the Minister and Immigration Department. The task of the A-G's Department was to decide how to make the RRT as independent as possible within these structural limitations. One issue was the suggestion was that Tribunal Members should only serve one term of office to prevent members seeking to ingratiate themselves to the Minister for Immigration to attain re-appointment. In hindsight Dr Fong would have more vigorously supported that proposal.

Dr Fong said that she was never aware of any direct Ministerial intervention in the way Members made their decisions especially under the first Principal RRT Member, [redacted]. In fact, she said that although she and other Members felt that the first Principal Member showed a lack of leadership to the Members, that in hindsight this may have been preferable to the more directive style of a later Principal Member, [redacted]. [redacted] seemed very willing to serve the Immigration Minister by interfering in the conduct of cases related to East Timorese refugee applicants. Members dealing with these cases were instructed to put decisions 'on hold' in 1997 pending a political resolution to the East Timor situation. Dr Fong observed that [redacted] lack of influence on the decisions of the RRT Members was unpopular with the Minister and [redacted] stepped down from the position when it was made clear that he did not have the support of the Minister.

During her term of office at the RRT. Dr Fong remained concerned that the RRT was operating too closely with the Immigration Department and its Minister. She witnessed the development of a group mentality among the RRT Members who were desirous of re-appointment to the RRT. Members were very aware that the Minister had the power to hire and fire, and the reality was, Dr Fong explained, that for a lot of Members this job was their future, and they were unlikely to find another job with equivalent status and salary. She believes that the low rate of successful refugee applications coming before the RRT is in part because of the pressures upon Tribunal Members to make decisions rejecting refugee applicants that would make them popular with the Immigration Minister.

Dr Fong also commented on the acceptance of 'country' information collected by the Department of Immigration & Multicultural and Indigenous Affairs (DIMIA) and the Department of Foreign Affairs as fact based evidence. The degree to which such material reflected the Departments and Government's own prejudices was generally ignored by Members. For example, the official government line about countries like Cambodia, Afghanistan, Iraq and the former Yugoslavia is that subsequent to war, these countries became politically stable and it is safe for refugees to return when in reality these countries remain extremely unsafe, and have unstable government, judicial and security structures in operation to protect returned refugees. Unfortunately for asylum seekrs and people on Temporary Protection Visas from these countries, Australia's has a policital vested interest in portraying the regime changes it helped to negotiate to be 'successes' .The country evidence provided by the Department of Foreign Affairs and Trade portrayed these countries as 'safe' to further successful trade and diplomatic relations with these 'new' nations and does not provide a balanced view of safety issues for returning refugees.

Dr Fong was disappointed that the RRT relied so heavily on governmental sources for information and did not have the will, or the resources, to obtain current independent country information from NGO aid agencies like Community Aid Abroad, Oxfam etc who could provide valuable insights into real state of affairs in those situations. The RRT was armed with governmental sourced information and public domain information while refugee applicants, with little financial capacity, were expected to be able to refute those sources. To achieve a more balanced and fairer hearing, Dr Fong's believes that the applicants should have access to a well resourced 'public defender' organisation to help bring vital current country information to the Tribunal's deliberations and it is essential that the Immigration Minister be denied the position of 'Big Brother' over the Tribunal's operations.

Dr Fong concluded that the current structure and positioning of the RRT within the framework of the Immigration Portfolio will always predispose the RRT to Ministerial influence on the decision making of its Members.

Dr Ken Chan

Dr Ken Chan was a career diplomat from 1972-1993, and then was appointed a Member of the RRT between 1993 – 1997. He provided me with the information below plus the attached copy of a statement he made to the Senate Standing Committee on Foreign Affairs, Defence and Trade on 24.3.99.

Page 190 of the statement is evidence of Ministerial intervention in the processing of the East Timorese asylum seekers in 1997. Dr Chan also observed that the two structures which are responsible for the primary and review stages of the refugee determination process are both located under the Minister for Immigration's portfolio and this systemically mitigates against the RRT operating as an independent review body. The primary decision maker is a Department of Immigration Officer ultimately answerable to the Minister, and RRT members are very aware that their appointment and re-appointment are subject to the Minister's decision.

No credible claim to conduct independent reviews can be made by a Tribunal which is in the portfolio of the same Minister who is responsible for making and implementing the policies and legislation concerning the treatment and assessment of on-shore asylum seekers.

As well, the RRT relied on information and research that came from the Department of Immigration and from Foreign Affairs in regard to political and social issues on various countries. Thus, these Departments were able to feed information to RRT members making decisions. I'm not arguing that this always created a bias but it had potential to shape the assessment of members when they conducted hearings and wrote decisions.

A genuinely independent process would have seen such sources of information kept at arms length. Furthermore, in the period that I worked in the RRT there were a large number of research/support staff who were previously connected to Immigration, having worked there for some time before transferring to the RRT when it was set up. In my opinion that also detracted from the independence of the RRT.

Finally, a comment on the role of Principal Member. He/she must always ensure the integrity of the RRT's independence and defend the Tribunal from pressures whether from ministerial officers or the Minister himself. The current set-up and the lines of authority make it too easy for staff in Ministerial offices to pick up the phone and speak directly with the Principal Member of the RRT claiming, when they do so, to speak for the Minister for Immigration.

Ken Chan

Inserted here : Submission to Senate Standing Committee on East Timor -hard copy in mail.

Tony Gibbons

Barrister Tony Gibbons was appointed to the RRT between 1993 - 1996. He outlined two instances of pressure from the Minister on RRT Members in a phone conversation.

The first situation involved Mr Gibbons being given East Timorese asylum seekers to review.

He was allocated two of the first cases from East Timor and found that they were not Portuguese and were refugees. The Minister referred his decision to the Attorney-General's dept for evaluation and Burmester, counsel for the A-G responded to his decision by producing a written argument against the decision which was circulated in the RRT (see Peter Mares 'Borderline' pp214-215).

Members of the RRT specialised in various countries though all did some Chinese as they were numerous. Tony Gibbons specialised in cases from South America and East Timor. He knew there were more East Timorese cases in the pipeline. So, when he had a slow period he went to the Principal Member and asked to do some more East Timorese cases but was refused and given no reason. He was never given another East Timor case. A very similar case to the one mentioned above was given to another member. That member upheld the department. The applicant took the matter to the Federal Court and won. Gibbons' decision was never taken to the Federal Court by the Minister. Gibbons takes it as a reasonable inference that there was pressure exerted so that he did no more East Timorese cases.

The second situation Mr Gibbons referred to, was the regular briefing meetings for RRT Members where the Principal Member, who had just returned from Canberra, would indicate the Minister's stated concerns. Such things as the need to speed up decisions, that particular groups could have no satisfactory grounds for protection visas. While no groups were named specifically, the message was that the Minister clearly thought that certain types of cases should not be given visas.

Mr Gibbons also took up the issue of the set back rate. He checked and found the average rate of RRT decisions which overturned the primary Departmental decision to refuse a protection visa averaged approximately 15% at the time. There was a wide discrepancy between members, some setting aside 6% and others over 30%. This did not appear explicable on the basis of the types of cases they were doing.

Since that time Tony Gibbons has spent 6 years in the Federal Court, much of the time appearing against decisions of the RRT. He considers the decisions have become even more appalling, badly argued and inadequately researched. He considers that an important factor in this happening is that many of the members of the RRT have had no legal training and are dealing with a difficult and complex area of law. Certainly it was true during his time at the RRT that those members who had legal training had to spend time helping those who had not.

A further factor supporting poor decision making is that nine years ago the Federal Parliament passed s.476(2) of the Migration Act. This law rules out any appeal to the Federal Court on the following grounds:
(a) that a breach of natural justice has occurred.
(b) that a decision is so unreasonable that no reasonable person would make it.

The member is thus protected if unreasonable or failing in natural justice. The Federal Court has, on numerous occasions, had to say to asylum seekers that the decision of the RRT was so unreasonable that no reasonable person would make it but we can do nothing.

The law was also an invitation to lawyers to find ways of overcoming it, and this helped to increase the cases before the Federal Court.

Debby Nicholls

For Alastair Sands, Secretary

You may recall that when I attended Frances Milne's presentation at the Hearings on Wednesday, I asked for permission to give support to a couple of her statements. In response, you said Committee rules would make that difficult, but you would welcome an emailed submission. I therefore make the following comments:
The statement "We are therefore completely unsurprised at the allegations of Bruce Haigh etc"

Most of us who have been involved in the RRT process in the past couple of years have heard of Ministerial interference in the decision making process. I myself have been told about it by former members of the Tribunal and individuals who work there. The interference does not come directly from the Minister by way of a phone call or memo, rather it filters down through the network but in ways where there is no real doubt about the source.

Reading RRT decisions is another clue. The conclusions reached at the end are often quite surprising, given the evidence that has been presented, but in the end it is the Tribunal Member who is allowed to decide on his/her consideration of that evidence what actual fact has occurred. Once this fact is recorded in the decision, it cannot be challenged in the Federal Court unless it actually misquotes details. It is not unreasonable to conclude that the Member has taken care to cast doubt on statements wherever the opportunity has occurred.
The statement "We also believe that not all applicants for a a s417 determination have an equal chance of attracting the Minister's attention" and "it is a matter of whether an asylum seeker can obtain the support of someone with sufficient influence etc"

The initial statement is well supported by the situations reported recently in the press, which refers to s417 applications in general. As for the second portion of the statement regarding asylum seekers, I know of only a handful of asylum seekers who have been successful in obtaining Ministerial intervention, an substantially smaller percentage of the total number of applicants than in the cases recently noted in the press. As Ms Milne noted, because no reasons need to be given for rejection of requests for intervention, we can only surmise why one application is successful and a myriad fail, and tend to attribute it to the type of support which has been given.

The frustration experienced in connection with the s417 process was clearly stated by the previous speakers, Ms Lesick, Ms Newell and Mr Duffield. As someone who has been involved in a number of these requests to the Minister, I wholeheartedly support everything they said.

Thank you for including this in the Select Committee papers.

Yours sincerely,
Debby Nicholls

24.10.2003

Timorese asylum claims blocked by secret freeze
By Helen Signy and Cynthia Banham, SMH November 18 2002

The Australian Government issued a secret directive that refugee applications from the East Timorese community should be put on hold, documents obtained by the Herald claim.

About 1800 East Timorese have been waiting for up to 10 years for their applications to be processed. They face deportation to East Timor because the Federal Government says it is safe for them to return. The Immigration Minister, Philip Ruddock, has blamed the delay on litigation by the applicants and advocacy groups.

"If you have migration rules that operate on that basis, every unlawful [immigrant] that comes to Australia would simply say, 'all I've got to do is outwit you and stay in a community long enough and eventually you'll say it's all too ... hard, I'm entitled to stay'," he said.

But an internal Refugee Review Tribunal memo obtained by the Herald claims there was a secret moratorium which prevented any of the East Timorese cases from being finalised.

The memo, sent in 1995 from a former tribunal member to the acting principal member, says the moratorium was followed by similar directions given verbally and by internal mail.

"Members have been kept in total ignorance of the existence of this official moratorium even though it was a general talking point that no Indonesian/East Timorese cases appeared to be coming through the constitution system," the memo says.

"When the existence of this moratorium ... was raised with you, your reaction was to tell members we were not supposed to know about it, commence a hunt to establish how it was we came to know about it, presumably with the object of punishing someone and a crackdown on the staff of Client Services, who were probably unaware of the explosive effect knowledge of this secret instruction might have both within the RRT as well as outside it."

The moratorium, allegedly imposed by the Labor government in 1995, appears to have been kept by the present Government, which did not start processing East Timorese claims until April this year.

A spokesman for the East Timorese Government, Abel Guterres, said East Timor would respect the decision to repatriate the asylum seekers but that the country was in no position economically to take them.

Lawyers for Australia's East Timorese community say most of the applicants would have qualified as refugees if their applications had been processed promptly.

"We knew the East Timorese cases were not being processed, but here is documentation from within the RRT ... [showing] it was the government or agencies of the government that have underhandedly interfered with and undermined their due process," said Andrew McNaughtan, of the Australia East Timor Association.

A spokeswoman for Mr Ruddock said the reason claims were not processed was because the East Timorese in Australia had been entitled to apply for Portuguese citizenship, but had declined to.

However, the Federal Court found against the Immigration Department's stand on Portuguese nationality in three cases in 1997, 1998 and 2000.

Attachment 2 : Document relating to [redacted], RRT Member was supplied by Dr Andrew McNaughtan, of the Australia East Timor Association.

Article supplied by Sister Susan Connolly, Mary MacKillop Institute for East Timorese Studies.

Humanitarian Intervention in the Public Interest?

A Critique of the Recent Exercise of s 417 *Migration Act* 1958 (Cth)

Johanna Stratton
[johannastratton@hotmail.com]

A paper submitted for the LLB Honours Programme,
Faculty of Law, The Australian National University

Tale of Contents

Appendices: ss 417 & 415; Ministerial Guidelines; Visa Types 50

Parts 2 & 3 & Conclusion

2.4 Comparison between Minister Bolkus and Minister Ruddock

There are two key differences in the way the current and preceding Ministers have exercised s417 discretion. The first disparity relates to the types of visas granted. As discussed in 2.2, Minister Bolkus granted only permanent Protection Visas while the incumbent has granted an array of temporary and permanent visa types. The other salient difference is in the respective styles of making statements to Parliament.

2.4.1 Statements to Parliament

Section 417(4) requires the Minister to provide to each House of Parliament a statement containing:

a) The RRT's decision
b) The decision substituted by the Minister
c) The reasons for the Minister's decision, and the Minister's reasons for believing the decision to be in the public interest.

The two Ministers have interpreted subsection 4(c) differently. The statements made by Minister Bolkus frequently provided detailed information about the nature of the case decided upon, and the impetus for exercising discretion in that particular case. For example,

While not refugee-Convention related, the applicant would suffer intense personal hardship should she return to her country of origin. I have also taken into account the interests of the applicant's Australian citizen infant child. To separate the family especially as the child is a baby, would go against the interests of the child. [7/8/95]

The applicant's circumstances are such that a return to their home country would mean that the family would be subjected to harassment and intimidation by both the authorities and the general populace. The applicant's religious beliefs are in conflict with the state religion which also dominates the laws of the country. The two children of the applicant have spent their formative years in Australia having arrived in Australia at the ages of 13 years and 3 years in 1984 and would have extreme difficulty in adjusting to strict religious codes in place in their home country. [7/8/95]

The applicant was subjected to the trauma of a horrific and racially motivated sexual attack as a consequence of which she continues to suffer mental and physical health problems, and would be likely to suffer further trauma if returned to her country.' [16/10/95]

Minister Bolkus often made reference to the applicant's Œcontinuing subjective fear,' or the Œexceptional personal hardship,' and Œdiscrimination and prejudice' that the applicant would face if returned. He even cited Œthat it is in the interest of the applicant and his family that he should remain as opposed to it being Œin the public interest' as the basis for making a decision.

A study of Minister Ruddock's statements in his first two years in office suggest that a similar‹though much less descriptive‹style to his predecessor was adopted. Statements tabled from November 1998 to August 2002 however, evince a standardisation of the reasons provided.

Having regard to the applicant's particular circumstances and personal characteristics, I think it would be in the public interest to allow him to remain in Australia.

As a result, the only information to glean from these pro-forma type documents is the date of decision and the type of visa class granted. Surprisingly though, DIMIA carelessly breached s417(5) on two occasions by publishing the name of the applicant in the tabled statement.

Of concern is not only the consequent dearth of information available to the public, especially applicants and advocates who wish to better understand ministerial reasoning for positive decisions, but also Minister Ruddock's patent disregard for the legislative requirement in s417(4)(c) to set out Œthe Minister's reasons for thinking that his or her actions are in

the public interest.[1] The nebulous phrase replicated in every statement is inadequate and meaningless. Yet, there is no parliamentary review of specific cases reported by the Minister, nor any effective regulation in place to ensure that the Minister complies with his legal duty to disclose substantive reasoning. The importance of properly complying with the statutory criteria is heightened by the fact that the Minister is not required to table reasons in Parliament for refusing or not considering cases.

Significantly, Minister Ruddock's s351 Statements to Parliament set out case-specific reasons for why it is in the public interest for the Minister to substitute a decision of the Migration Review Tribunal. The discrepancy between s417 and s351 statements is not justified by the sensitive Œhumanitarian claims' of s417 applicants. Minister Bolkus proved that it is possible to provide detailed reasons for decisions without jeopardising the safety of the applicant or associated persons.

3 Key deficiencies in the s417 process

The current Minister cites four objectives that influence and shape Australia's refugee determination system: public accountability of government; compliance with international obligations; administrative justice for the individual; and practical, efficient and lawful administration. Presumably, these objectives also extend to s417 ministerial intervention even though applicants have not been recognised as refugees. Interestingly the Government occasionally refers to the s417 process as a discrete stage of Œreview' for failed asylum seekers.

Ironically, the key deficiencies in the s417 process correspond in many ways to the Minister's said objectives. In this section, the restricted avenues of review from s417 decisions and lack of accountability mechanisms, together with the politicisation of the s417 process are considered against the concept of the rule of law. In addition, the dearth of information on ministerial discretion, inadequacies of the Guidelines and weaknesses in the administrative procedural regime are also addressed.

3.1 Lack of Accountability

If the underlying idea of accountability can be expressed simply as Œgiving an account or explanation,' without any mention of the varied forms or processes of accountability, then minimal effort is needed to be deemed accountable' in some way. Yet, it appears that the current practices of the Minister relating to s417 ministerial discretion might arguably be falling short of meeting even basic notions of accountability.

The most alarming observation is that the current Minister may be evading his legislative duty under s417(4)(c) to provide *reasons for believing* the decision to be in the public interest. Section 417(4) is the only check on the exercise of s417 power. Thus a Minister who only partially complies with the sole mechanism of accountability to Parliament and the wider public, is acting irresponsibly and with excessive autonomy. The absence of Parliamentary review to scrutinise s417 decisions contributes to the unaccountable state of affairs regarding ministerial discretion.

Avenues for judicial review are practically non-existent. Given the Minister is not required to make public his reasons for refusing or not considering certain cases, the difficulty in accessing ministerial reasoning in rejected cases hinders the effectiveness of judicial review for the largely Œnon-reviewable' s417 discretion. Another evidential problem is that the blandness of the Minister's pro-forma statements for refusing or not considering certain cases, may not reveal any error on which to base a claim against the Minister. Given the s417 caseload of several thousand requests being lodged each year, and the enormous potential for litigation, the drive to curtail judicial review may be due to administrative ease and economic efficiency, as well as seeking to ensure the immunity of the Minister's decisions.

The inquiry by the Senate Legal and Constitutional References Committee recommended positive reforms for s417 ministerial discretion in its report, *Sanctuary Under Review*. In short, the recommendations aimed at improving transparency, accountability and compliance with international obligations. The Government dismissed as unnecessary all of the major recommendations, or otherwise insisted that certain recommendations were already current practice. None of the recommendations were actually implemented. The lack of substantive impact of the Senate's report highlights the fact that public inquiries with non-binding recommendations offer no real safeguard against a government intent on persisting with its policies. Although the Inquiry was valuable in providing a forum for scrutiny and debate, there has been virtually no counteraction to the Government's inertial response to the Report.

The Minister is not accountable to the Commonwealth Ombudsman as s5(2)(a) of the *Ombudsmans Act 1976* (Cth)

precludes the independent government agency from investigating action taken by a Minister. However, the actions of DIMIA officers are subject to investigation. The Ombudsman will act if the administrative action investigated is deemed unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise Œwrong'. For instance, if there has been unreasonable delay in processing a s417 request. The Ombudsman has recommendatory powers and political clout but cannot legally enforce its findings.

An international law remedy for failed s 417 applicants with a genuine treaty-based claim is to lodge a complaint to the United Nations. A successful outcome would result in adverse media attention and political embarrassment for the Minister and Government, and probably act as a good accountability mechanism. However, communications to the UN are rare as domestic remedies must first be exhausted, and there is considerable expense and time involved in the process. To date there have been two communications made to the Human Rights Committee and Committee Against Torture by failed s417 applicants that have resulted in favourable decisions for the complainants.

The above overview of avenues of appeal from the s417 process suggests a regime that is largely devoid of effective and reliable accountability mechanisms. It is argued that judicial review of administrative decisions is considered internationally to be a human right, and should therefore extend to every person *physically* in Australia. The right arises from Australia's international obligations that require member states to treat people equally before the law and to provide access to courts. The absence of external review is incongruous with one of the fundamental rule of law principles, that every action of government must be justified by, and testable against, pre-existing law. Moreover, the lack of accountability in the s417 process reflects negatively on Australian society, and its identity as a liberal democracy that supposedly believes in the rule of law and a fair go' for all.

3.2 Politicised nature of s417 decisions

DIMIA has stressed the centrality of the Minister in the s417 process by stating, irrespective of the processes, the administrative chain of events, the whole raft of considerations that are taken into account, at the end of the day, the decision is the Minister's and it is the Minister's personally. And in a sense, it is possibly arguable that regardless of what underpinning processes you have, in a sense, they count for nought if the Minister decides he will not even consider considering to exercise his power.

Consequently, the underlying presumption in the s417 process is that the Minister's interpretation is always right and that he/she always acts in good faith. This is problematic. The Minister is influenced by a host of factors, other than the merits of the individual case, when exercising his/her discretion. These factors may be as diverse as: international obligations; the Guidelines; immigration policy; foreign policy; migration quotas; political expediency; economic policy; and personal bias. The High Court has noted that the Minister functions in the arena of public debate, political controversy, and democratic accountability' and pointed out that [m]inisterial decisions are not the subject of the same requirements of actual and manifest independence and impartiality as are required by law of the decisions of courts and tribunals.' As a politician, the Minister is not an independent decision-maker free from political interests and agendas. Given such a lack of impartiality, it is questionable whether the Minister alone should be entrusted with the task of acting as the safety net' against breaches of Australia's international humanitarian obligations.

Without any built-in' protection against political influence or interference, the Minister's ability to act as a safety net' is often compromised. Anecdotal evidence suggests that certain advocates are able to conveniently bypass the MIU stage and access the current Minister to discuss s417 requests, often with favourable results. This claim is also supported by the Refugee and Immigration Legal Centre:

Defects in the process are apparent given the Minister's reliance upon informal recommendations by persons known and respected by the Minister outside the Department, who contact or are contacted by the Minister on an informal basis to discuss individual cases. The politicisation' of these decisions is a serious problem and undermines the credibility of the process.

Crock also criticises the *ad hoc* manner in which the politicised decision-making of the Minister takes place and cites changing public opinion as one of the factors that clouds the assessment of individual cases. . She rightly claims that without consistent and impartial decision-making, it is difficult to envisage a system that produces decisions that are accurate, efficient or acceptable.'

3.3 Problems stemming from the Ministerial Guidelines

The Guidelines are instrumental throughout the assessment of requests but especially when the case manager and MIU

officer are determining whether or not to refer a case to the Minister. Although the Guidelines are useful and reasonably comprehensive, they are also deliberately broad and open to a multitude of interpretations. There is no examination of the quality of the decision-making by the case manager or MIU officer, and it is virtually impossible to challenge a DIMIA officer's interpretation of the Guidelines. There is also no way of ensuring consistent application of the Guidelines between the three MIU offices because of the large number of requests made to each office annually. For instance, each year the Sydney MIU handles approximately 7000 requests, the Melbourne MIU deals with approximately 1800 requests and the Perth MIU comprises just one person to handle approximately 800 requests per year, 80 per cent of which emanate from detainees. It is improbable that uniform standards of application can be achieved given the logistical and time management difficulties of comparing requests.

The lack of clear and legally binding criteria against which humanitarian claims can be assessed results in a lack of consistency in the administrative and ministerial stages of decision-making. The suggestion that a proper codification of all of Australia's obligations arising under human rights treaties be incorporated into the Guidelines, has not received due consideration by the Government.

3.4 Lack of Transparency

It is of serious concern that information about the operation of ministerial discretion is not widely available. Aside from the Senate's Report, which contains incomplete statistical data from 1993‹1999, and the occasional reference to s417 Protection Visa grants in the DIMIA Annual Report, it is necessary to personally request information about ministerial intervention. The multitude of DIMIA internet resources, including *Fact Sheets* and *Media Releases,* provides no substantive information as to how many visas are granted each year, what types of visas are issued or useful information outlining procedural issues.

Many advocates are poorly informed about the administrative procedure and potential time frame regarding a request, as well as the range of visas being granted, and the chance of a positive outcome. Some advisers rely on hearsay to gauge the likelihood of the Minister intervening in a certain type of case, and may consequently design the request based on this (mis)information. Preferably, advocates should seek the client's file from the Minister's Office under the *Freedom of Information Act* 1982 (Cth) in an effort to better understand the reasoning process behind the decision. Still, there is no guarantee that the decision-making rationale can be easily grasped.

DIMIA does not collect statistics on the number of s417 requests that have legal or other assistance for their preparation, or the percentage of requests with expressions of support from others in the Australian community. Information about the number of applicants in detention compared with those in the community is not publicly available. It is not even possible to find out how many cases requesting ministerial intervention are lodged in one year, or the corresponding country of origin information.

The reluctance to make public statistics which help demonstrate the way the minister's discretion is being exercised is symptomatic of a wider problem: a lack of transparency in the process of ministerial intervention. When asked why information regarding the reasoning process behind s417 decision-making is not accessible, DIMIA simply regurgitated a statutory description of s417 and stressed the importance of keeping personal information confidential for the security of certain people at risk. The apparent culture of secrecy and bureaucratic evasiveness lends itself to a sense of distrust and suspiciousness in the community. Is the Department afraid of its internal proceedings being made public? To adopt Lord Hewart's words, Œit is a queer sort of justice that will not bear the light of publicity.'

3.5 Other Deficiencies

It is beyond the scope of this paper to deal with all of the weaknesses in the s417 process however, it is important to briefly acknowledge some issues relating to [a lack of] procedural fairness and administrative [in]efficiency, in response to the Minister's objectives for Australia's protection regime.

A current practice in some states is for the same DIMIA official to act as both a primary decision-maker in determining refugee status and a s417 PIGA' case manager. To avoid a problem of bias and possibly also the rejection mentality' of some decision-makers, there is a sound argument that an individual officer should not be involved more than once in any case.

It is not known what qualifications DIMIA officers dealing with s417 cases have regarding Australia's humanitarian

obligations under international law. There is evidence that the Attorney-General's Department provided DIMIA officers with educational training relating to *non-refoulement* obligations when the Guidelines were introduced. However, there is also evidence that some DIMIA officers do not demonstrate a comprehensive understanding of Australia's non-Convention obligations given their rejection of patently deserving cases. Clearly, such administrative decision-makers ought to be fully conversant with the range of international humanitarian obligations that Australia is required to comply with.

All s417 cases are determined by assessment of documentary evidence only. It is possible that the applicant may be contacted by DIMIA if the Minister requests additional information in order to consider the case, although this practice could be described as the exception to the rule.[1] Significantly, applicants do not have any opportunity for hearings, interviews, the right to access adverse information, or other measures of procedural fairness.

Finally, there is no right to legal assistance for applicants in preparing s417 requests. The effectiveness of the ministerial discretion appears to rely on a premise that an applicant has the knowledge and resources to make a written request. Due to factors such as cultural and language barriers, legal costs and geographical isolation for the majority of people in detention, applicants do not have equitable access to the Minister. Most advocates have advised that there is a heavy reliance amongst clients on word of mouth[1] to find out about the ministerial intervention review option and seek legal advice.

Conclusion

The empirical research undertaken from July<November 2002 has convinced the author that there is much potential for the current system of s417 ministerial intervention to be improved.

There is a clear exigency amongst failed refugee claimants and throughout the refugee advocacy community for explanatory material on making s417 requests. DIMIA should disseminate an information sheet in various languages to explain the provisions of s417 and the Guidelines, and publish statistical information on ministerial discretion in the DIMIA Annual Report. Not only is the existing documentation on ministerial intervention cursory and vague, it is not easily accessible. An applicant should not be disadvantaged by the Government's failure to equip him/her with the necessary knowledge and resources to lodge a request.

Pivotal to the concepts of the rule of law and accountable government, is the need for the Executive to fully comply with their statutory duties. The current Minister falls short of satisfying 417(4)(c) by declining to provide case specific reasons for each instance of ministerial intervention. Such form is both indolent and remiss, and should be rectified so that the public can better identify the reasoning process behind s417 decisions.

Although it cannot be shown conclusively that the s417 discretion is being exercised to disproportionately assist applicants with claims that are *not* based on Australia's international humanitarian obligations, the statistical data in Part 2 strongly suggests that applicants with immediate family ties are the overwhelming beneficiaries of the Minister's discretion. The displacement of permanent Protection Visas with temporary Spouse Visas seems to signal that political considerations are weighing heavily on Ministerial reasoning. Most alarming of all the findings, is that the s417 humanitarian safety net[1] regime of ministerial intervention is neglecting to provide protection to deserving recipients, notably the deceased Bilal Ahad, and the authors of the two successful communications to UN Committees.

Regrettably, the parameters of this study have prevented examination of alternative mechanisms to address Australia's international humanitarian obligations, such as on-shore humanitarian visas and other forms of complementary protection. It is hoped however, that this report contributes in some way to a better understanding of Australia's protection regime. In an ideal Australian society, those individuals who face a significant threat to their personal security, human rights or human dignity if returned to another territory will receive the protection they deserve.