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Mr Jonathan Curtis
Secretary
Senate Legal & Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Mr Curtis

MARION LE: SUPPLEMENTARY SUBMISSION CONCERNING MIGRATION AMENDMENT (DESIGNATED UNAUTHORISED APPROVALS) BILL 2006

Thank you for allowing me to make a supplementary submission to the Committee (my initial submission is numbered 115, and has 8 attachments).

I am informed that my work from late 2003 to late 2005 on behalf of asylum seekers resident in Nauru was raised on two occasions on Friday 26 May 2006 during the Committee's hearings.

David Manne of the Refugee and Immigration Legal Centre (RILC) referred to our work, although not by name, and took a question on notice from Senator Trood as to the size of our Nauru caseload. I am told DIMA also took on notice several questions from Senator Bartlett relating to our work. In the course of questioning, I understand Mr Peter Hughes of DIMA hazarded an estimate that our work concerning asylum seekers held on Nauru constituted no more than '10% of cases'.

In those circumstances it seems appropriate for me to clear up questions relating to the number, proportion and significance of the caseload we undertook. I will not repeat the detail of what is stated in my original submission and its attachments concerning the nature of the flaws, defects and errors in the cases handled by our team.

Please note that in view of the other excellent submissions the Committee has received, I have not sought to address the wider questions relating to this deeply disturbing legislation and policy. In particular, I strongly support the arguments contained in the submission of the ACT Refugee Action Committee (ACT RAC - Submission No 95).

Number and proportion of cases handled by my Consultancy

Paragraphs 53–59 of the ACT RAC submission (No 95) were prepared in consultation with me; they stated that the number of asylum seekers on Nauru represented by my Consultancy was over 280.

In fact the number was 284, but the two Iraqi refugees who remain on Nauru were assessed by DIMA and ASIO without any submissions about their individual claims

from me.[1] The only input I had in relation to their cases was generic, except that at the request of the two men, I also made a number of inquiries to DIMA about the delays in the release of their visa decisions, by phone and in writing, once they had been told their final decisions were still "pending." My understanding is that they were found to be refugees but entry to Australia was dependent on security clearance by ASIO.

The majority of the 284 asylum seekers on Nauru in December 2003 were Afghans, but there was also a significant number of Iraqis, some Iranians and a small number of others. We represented these asylum seekers, unfunded by the Australian Government, although we received many donations from individuals and others to help with expenses. The representation resulted from requests in December by all the Nauru Afghans that I represent them as their legal representative and Hassan Ghulam as their spokesperson.

I made generic submissions to the DIMA concerning my clients' cases on numerous occasions, as well as more detailed submissions concerning the systemic errors we uncovered on individual files. Ultimately, all but two of our original clients (the two Iraqi men mentioned above) were resettled in Australia or New Zealand as refugees or humanitarian visa holders.

These successful outcomes represent the following proportions respectively of (a) the total offshore cases processed between 2001 and 2005, and (b) the total of those resettled from 'offshore processing centres' to Australia or other countries:

(a) 282 of 1509 cases processed[2] = 18.7%

(b) 282 of 1062 persons resettled (985 refugees & 77 others)[3] =26.6%

I am therefore able to speak with very considerable authority concerning the quality of decisions made by DIMA and in some cases by UNHCR.

A further important statistical point concerns the comparison between the rate of decisions in favour of and against refugee or humanitarian status occurring under the offshore system and that occurring under the onshore system. DIMA's submission gives the following figures:

- Offshore refugee approval rate for those not returning voluntarily: 94%
- Onshore protection visa rate mid–1999 to mid–2005: 89%

This gives the impression that the offshore process was slightly more beneficial to bona fide refugees than the onshore one.

Apart from other differences in the two sets of circumstances, let me stress that **the above offshore figure of 94% includes the 282 cases for which we obtained favourable outcomes.** Given how hard and long we had to press the case for most of those 282 to achieve that result, and the number of times the cases had previously

[1] See Attachment D to Submission 115.
[2] See DIMA, Submission 118 to this inquiry at p 5.
[3] DIMA Submission 118 at p 7. I note that the *DIMA Annual Report 2004–2005* at p 138 states that the total figure resettled was 1030, but have accepted the higher figure as the more recently provided.

been reviewed, it seems to us utterly improbable that anything like that number would have been successful without the involvement of legal representatives of these people. The proposed system has no provision for such assistance.

Without those 282 ultimately favourable decisions, which included 259 refugees the approval rate would have been much lower.[4] On that basis the following figures would apply:

 Overall offshore approval rate of refugees (excluding those who returned) (985:1062) = 93% (94% according to DIMA, above)

 Overall offshore approval rate of refugees (excluding those who returned), but assuming unfavourable outcomes in all our cases (985-259) = 726:1062 = 68%.

So the real figure would have been somewhere in between, we suggest towards the lower end of the range, certainly far less than the 94% which the Department gives compared to 89% for onshore.

Similarly, if all our caseload had been rejected, there would have been a significant difference in the percentage of favourable outcomes overall (refugee + humanitarian outcomes) as a percentage of the total processed, namely 52% (1062-282 = 780:1509) as against 70% with the inclusion of our cases (1062:1509).

There is no basis for confidence in the system that has been used thus far or that is proposed.

There is also reason to think that the kind and volume of errors and flaws we found wrongly filed in the 282 cases we dealt with would have been found in a significant proportion of the earlier negative decisions which resulted in some 482 asylum seekers[5] being persuaded to return 'voluntarily' to their country of origin.

In fact, on a number of the files I examined of persons rejected in May 2004 we found wrongly filed crucial documents, photos and letters belonging to people who had "given-up" and returned "voluntarily." This appears to indicate that the processing of some of those people who were removed was also fatally flawed.[6]

I am therefore extremely concerned that a significant proportion of those who returned 'voluntarily' after being pressured to do so, were genuine refugees. I have spoken to several Afghans by phone who fled again to Pakistan and Iran from Afghanistan after their return from Nauru and their situations are distressing.

We are, as a Nation, guilty of refoulement.

[4] Of the Afghans, all but one family were granted refugee status. I think a total of 25 of my clients were granted visas other than protection visas.
[5] *DIMA Annual Report 2004–2005* at p 138.
[6] See attached examples.

Manne and Corlett report that the Nauru Hazaras believed that most of the four hundred or so who had returned to Afghanistan 'voluntarily' had already again fled to neighbouring countries shortly after return.[7]

A deeply flawed process

My initial Submission contains considerable detail concerning the flawed decision-making processes that our team found had affected the caseload as a whole. In very broad terms, these defects consisted of:

(1) processing defects that rendered the decisions affected by them completely invalid: **see the list including such matters set out on pp 5–6 of Submission No 95**;

and

(2) fundamental and systemic failures to:

a. take account of all relevant and available evidential materials (in particular up to date Country of Origin Information (COI), and other factual information relating to the up to date situations in particular provinces of the country of origin, the nationality of asylum seekers and so on); and

b. properly apply those materials to the cases that were being decided.

The first category of defects shows all the hallmarks of a system in which the decision makers know that their work will never be scrutinised in any way.

These flaws and defects, undoubtedly and demonstrably, negatively affected the outcome of the earlier decisions and reviews.

Among the most serious defects was the failure of officers of the Department to place submissions from my office on the files of asylum seekers, and to then claim that they had been taken into account in making relevant review determinations. Had we accepted that without challenge, instead of pressing for the files under FOI, a larger number of refugees would have been wrongly returned (refouled).

This kind of sloppiness and error is inevitable in non-reviewable and non-accountable system of decision making and should never be allowed to happen again.[8]

My initial Submission utilised the decision making concerning the Iraqis on Nauru as a case study of the second category of defect where the failures resulted in many of those concerned being kept in limbo on Nauru for two or three years more than they ought to have been. Had they been processed onshore it is obvious from RRT decisions that they would almost certainly have been recognised as refugees. As I say in the initial Submission (at p 8):

> … if the broader context of international discourse about Iraq in mid–2002 had been properly included in the range of country information

[7] See note 2 above at p 55. This issue is discussed at much greater length in David Corlett, *Following them Home: The fate of the returned asylum seekers*, Black Inc: Agenda, 2005.

[8] I note that many files released through FOI since the release of the Nauru files now contain an instruction sheet about responsible filing techniques.

used to inform the decision, it is possible that many more of the Iraqi applicants on Nauru would have been accepted earlier as refugees.

Different, but similarly inexcusable, errors occurred in the processing of the cases of the large number of Afghans on Nauru, and especially the Hazaras. In particular, these errors related to the true identities of our clients as Afghans and not, as was often contended, Pakistanis, and concerned the real chance they faced of persecution (not only by Taliban) in the areas from which they came.

Significance of the major problems shown in decision making

The general significance of the undeniably poor decisions concerning asylum seekers who were the catalyst the original 'Pacific Solution' must be clear to Senators who examine the material referred to in my initial Submission and its attachments.

Let me emphasise the following specific points:

- The dangers of *refoulement* in practice are enormous where there is no outside scrutiny of decisions.
- On the basis of the defects in the cases we examined, there is no doubt that many of the Afghans who were rejected and then 'persuaded' to go back to Afghanistan (see Elaine Smith's submission, No 53) should have been recognised as Convention refugees.
- The processing system we encountered was ramshackle and incapable on its own of producing fair and just results. The Government and DIMA cannot boast of a successful processing system on Nauru and Manus last time. Their complacency on this question should alert the Committee against accepting that perpetuation of a non-reviewable system in future will be any better.
- It was eventually possible to have the flawed decision-making as discovered in our caseload, overturned, but only by an extraordinary amount of unpaid work by my office on behalf of the asylum seekers remaining on Nauru at the end of 2003. This should not have been necessary and such an outcome cannot be guaranteed in the future unless robust due process is built into the system.
- **It is absolutely vital that asylum seekers have proper representation by lawyers or qualified migration agents in making their claims for refugee status and in conducting appeals. The system is too complex and intimidating for asylum seekers to negotiate without assistance. Representation would prevent a large proportion of the procedural errors found in the former system but would not be sufficient to ensure that the evidential basis of decisions is adequate without access to independent review.**
- The difference once such representation is involved can be seen in the ultimate success of our clients, despite the fact that many of them had been written off as completely undeserving cases. The submission of the Refugee and Immigration Legal Centre (No 91) makes similar points based on the processing of the 43 West Papuans.
- The simplest and most principled way to guarantee the quality of future decisions on the asylum claims of 'boat people' is to bring them under the normal Australian merits and judicial review system. The RRT already

provides a more restricted merits review than the AAT and the Government has placed some restrictions on what it considers excessive judicial review in the *Migration Litigation Reform Act 2005*. There is no good policy reason to reject the existing onshore system in relation to any category of asylum seekers.

- We don't need a new and inferior offshore external review system. To establish one would inevitably produce the sort of inconsistency and unjustified discrimination we found between offshore and mainland decisions, this time at the Review level.
- We do need HREOC jurisdiction in relation to the conditions under which asylum seekers are held and the periods for which they are held, whether onshore or offshore, but HREOC is not the appropriate body to review refugee claim decisions.
- It was only when we obtained the original documents on the case files that we could identify the real nature and extent of the widespread poor decision making. Our experience of trying to obtain documents through the FOI process, twenty months to obtain them all!! evidences the need for a statutory system for reviewing decisions under which the relevant documents are made available as a matter of course to the Review Tribunal and the applicant. The RRT procedures provide this.

I again urge the Committee to reject this Bill.

Yours sincerely,

MARION LE, OAM

2 June 2006

Attachment One – Merging of identities and personal information on client files on Nauru:

Introduction:

The client files of individual applicants detained on Nauru for almost four years included numerous examples of material filed on the wrong client's files. The confusion created by wrongly filed material directly impacted on the quality of DIMA decision making processes. The files indicate that the wrongly filed material, which consisted of letters, documents, photos and even the notes DIMA interviews with clients, had the effect of undermining clients' personal credibility and the veracity of their claims.

It was not until late 2003 that any of the rejected applicants had access (through me) to legal representation and their cases were analysed by anyone outside of the DIMA. When the files were released to me under FOI the full impact of wrongly filed material on the rejected cases was immediately obvious.

In my 2004 and 2005 submissions on behalf of a number of individual applicants I asked the DIMA repeatedly, "*if the case officers could not even differentiate one applicant from another, how could they make a finding about the refugee status of either?*"

Unfortunately, many of the applicants whose personal material ended up on the wrong files were part of the Afghan caseload who eventually gave up trying to have their refugee claims acknowledged and ("so-called") voluntarily returned to Afghanistan.

Anecdotal evidence reports that many of those repatriated "failed asylum seekers" were unable to remain in Afghanistan and re-fled immediately to other countries.

The following question needs to be answered: If those people had been able to stay on Nauru and wait until the re-examination of the Afghan cases occurred, would they have been successful in their search for protection?

After the files for those people who remained on Nauru in January 2004 had been released to me under FOI, it was discovered that information vital to the original claims of many of the Afghan applicants who returned to Afghanistan had not been placed not on their own files but had been mistakenly placed on the files of others.

This meant that material, which would have assisted their refugee claims if it had been properly considered in 2001 and 2002, was not taken into consideration because it was filed incorrectly.

The DIMA has stated that 482 persons voluntarily returned from Nauru.

Has the DIMA examined the files of those who returned to Afghanistan to ascertain whether similar flaws in processing are evident as I have highlighted in the cases I was representing, in those cases?

Importantly, has the DIMA followed up any of **the specific people** I mentioned by name in my submissions to the Minister and DIMA whose details appear wrongly in the files of Nauru applicants I represented?

If not, why not?

I include extracts from **only two** of my many submissions that contain explicit examples of file mis-management that directly prejudiced the decisions of my clients in their previous processing and without doubt also disadvantaged the applicants who were refouled.

(1) Flawed Processing Yields Flawed Decisions:

"Minister … [In all the earlier decisions] …This man's identity has been totally confused with another man, and the earlier negative decisions should be totally discounted and his case reopened immediately …

After the re-examination process in the first half of 2004, the applicant received another rejection of his application to be recognised as a refugee.

After the May 2004 decision I put a quantity of new material before the DIMIA Refugee and Humanitarian Section. Unfortunately the new material did not appear to be considered. In fact, the receipt of the documents was never acknowledged in writing and they were not placed on the applicant's file …

AH was interviewed by Michael Gordon from The Age (April 16th, 2005) and through an English speaking friend, he explained his confusing journey through Australia's refugee determination process:

> "The thing he wants to tell you is that there was a misunderstanding in his case …he was mistaken for another person with a similar name … the interviewing officer told him names of sister, brothers, father and mother and the name of the place he was living and it was all wrong.
>
> Hussaini told the officer that he had the wrong person but his case was rejected. He does not know whether the mistake has been recognised … and says he can prove his identity and Afghan nationality …"[9]

The applicant's file has made riveting reading. The fact is that serious errors in the early stages of his assessment process remain unaddressed. Certainly anyone reading this file in its entirety would be left unsure if the applicant is DRA 168, a farming tailor from WW WW,[10] or GRU 119, a cookie-baker from VV,[11] or one and the same individual.

The applicant was correct when he told me that he had been confused by the DIMIA with another applicant. DRA 168 is still residing on Nauru in May 2005; **the whereabouts of GRU 119 remain unknown.**

[9] The Age, *The home is where the broken heart is*, April, 16, 2005.
[10] Folio 30
[11] Folio 65

SUBMISSION

In order to illustrate the extent of the problem, I will begin the submission by tracking the progress of the two individuals DRA 168 and GRU 119 through the file of AH (DRA 168).

Folio 1 depicts DRA 168 photographed on 28/12/2001, addressed to B. S. in DIMA Perth OPV.

The first DIMIA officer dealing with the applicant appears to be J. S., and she begins the record of her involvement in the applicant's case on 18/2/02. DRA 168's signed declaration is filed on Folio 2 and his Driver's License ID Document is photocopied on Folio 3.

Folios 4-13 contain the photocopied pages of an Afghan ID document. The photograph on Folio 11 is unclear. Folios 14-18 are made up of the Unauthorised Boat Arrivals Bio-data Questionnaire for DRA 168.

DRA 168 is a Hazara Shi'a called AH.

[Two paragraphs of specific Bio-data deleted]

First Client registration Form – 18/2/02

The **first** Client Registration form makes up Folios 19 to 34 and is filled out on 18/2/02 by the case manager J. S., with a Dari interpreter (Reg # deleted) assisting.

Primary Decision:

The personal identification information on the **REFUGEE STATUS ASSESSMENT RECORD** includes DRA 168, NR …, DOB …[12]

The decision record itself is signed by J. S., but is undated.[13] The decision letter is both unsigned and undated.[14] The decision letter stated that the applicant failed to meet refugee criteria because:

- *"You have not established that your fear is well founded.*
- *You have not established that there is a reasonable possibility you would experience the harm you fear if returned to your country of origin (and)*
- *You have not established that your fear relates to a violation of human rights sufficient to amount to persecution."*[15]

The applicant's core claims related primarily to the Taliban and to conflicts between tribal groups in his home area. The applicant claimed to be from the minority YY tribe, which was in conflict with the dominant ZZ Tribe.

[12] Folio 43 – the file that was released to me as AH's file was CLF2002/XX.
[13] Folio 37
[14] Folio 46
[15] Folio 47

[Paragraph with specific refugee claim deleted.]

The first decision maker rejected the claim that the applicant still needed protection but stated that "*the claimant claims to be an Afghan national, an ethnic Hazara and a Shia Muslim. He has provided his driver licence and birth certification issued during the time of the Taliban. He stated that he paid a bribe to obtain the documents. Based on the evidence presented by the claimant I am prepared to accept them as genuine.''*[16]

In addition, the case officer stated that she was "*satisfied that no fraud or effective protection checks are necessary in relation to this person* … [she was] *satisfied that persecution is feared for a convention reason* … [and that the] … *claimant's evidence concerning his fear of the Taliban was consistent and plausible."*[17]

Second Client Summary Sheet (18 March 2002)[18]

Following the primary decision, quite remarkably, a second "*primary decision maker"* appears to have interviewed the applicant again. The new case officer is identifiable by his hand-writing and Login ID name (XXXXX), even though he did not sign any of the pages.[19]

Case officer A. G. interviewed the applicant, (DRA 168), on 18/3/02, using the interpreter (Reg # deleted).

It appears however, that Mr G. was scheduled to interview another client, someone with the boat identification number GRU 119.

The client summary sheet has DRA 168's details, but GRU 119's Client ID number at the top. DRA 168 had already had his first interview on 18 February 2002 with Jung Shu.

On the bottom of the Client Summary sheet, Mr G. listed "*Hazara Infighting and Tribal"* as the three core issues and then wrote "*N PLaus"* underneath. Another thing that is not on J. S.'s Client Summary Sheet is the date of arrival – 31/12/02.

J. S. filled out her summary sheet on 18/2/02 by typing in the answers[20] – Mr G. hand-wrote the answers.

The information verification tables on folios 32-33 and folios 58-59 also illustrate the arbitrary and subjective nature of the information verification process.

The first case officer, J. S. did not suggest that Effective Protection/Nationality - ID checks were needed for DRA 168.[21]

[16] Folio 42
[17] Folio 39
[18] Folio 60
[19] Folio 60
[20] Folio 34
[21] Folio 33

Yet only a month later, the same applicant, **now mistakenly reinterviewed as GRU 119** is listed as someone who is "*Pakistan suspected*" and therefore he needs *"Effective Protection - Nationality/ID checks, Effective Protection – Offshore entry/residency rights checks and a medical and an X-Ray."*[22]

There are hand-drawn maps of the applicant's home area on folios 48, 53 and 54. Folio 48 depicts the town of WW WW, folio 54 depicts where one tribe lived in relation to the other and folio 53 where the applicant's village was placed in relation to WW WW and other villages.

Folio 50 and 51 contain lists in another person's hand-writing, whom I assume is the interpreter working with this case officer. The lists of names include the applicant's family details and a list of village names as well as naming a number of powerful people who are well known to have had an impact in that part Jaghuri during that time period.

Folios 49 and 55 contain answers the applicant gave to various questions and the case officer's comments on the applicant's answers. For example the case officer has written:

- *"Mistakes on Bio-data"* - Please note: the bio-data form placed on the file next to these notes **is actually the bio-data form for another person GRU119** and as such it contains the bio-data for a 22 year old cookie- baker and not a 23 year old farming tailor (DRA 168).[23]
- The next question establishes that whether the applicant's brothers and sisters go to school, (brothers yes and sisters no) but on the bio-data form filled out by the real GRU 119, it is clear that GRU 119 has brothers not sisters.
- The case officer then challenges the applicant over the mistakes and the confused applicant is recorded as answering *"How can I forget?"*[24]
- The case officer's own hand-written notes state that he then puts to the applicant, *"I've seen other maps of WW WW and yours is different,*" and asks him to describe a well-known WW WW personality called CXXXX who lived in WW WW.[25] [Please note: I represent another Afghan applicant still on Nauru who was interviewed by this case officer on 17/3/02, the day before this interview (GRU 118). That other applicant (GRU 118) did draw a remarkably detailed map of WW WW, and while it is a better map, the map produced by GRU 119 (who is actually DRA 168) contains most of the same buildings, in roughly similar locations. I do not consider it fair to compare one applicant to another, when GRU 118 appears to have a visual memory which I believe is much better than average.]
- The rest of the case officer's hand-written notes contain questions and answers about agricultural issues like how a cow scratches its head and when different crops are planted. I can't vouch for the information

[22] Folios 58-59
[23] Folios 62-66
[24] Folio 55
[25] Folio 55

about when different crops are planted but the applicant has certainly observed the difficulties a cow faces trying to scratch both on top and under its head![26]

- The second case officer (Mr G) has used the "Word Association" tables to question the applicant. Extra notes are written in the top right hand corner of the page referring to questions and answers about who the local leaders of different Hazara parties are.[27]

When the second primary decision case officer stated that there are "*mistakes on Bio-data"* it is obvious that he was looking at the REAL GRU 119's bio-data form, and NOT at the bio-data form for DRA 168 which is filed at the beginning of the file.

If the case officer was comparing the answers to his questions on 18/3/02 with the bio-data at the beginning of this file, he would have seen that the applicant gave consistent answers to all the questions!

The case officer appears to have in his hand the bio-data form for the real GRU 119, but he is questioning DRA 168, and has not even looked at DRA 168's real bio-data form, filed as folios 14-18 in this file!

The case officer has then filed the extra bio-data form on top of his notes in the file,[28] despite the real bio-data form already being filed.[29]

Extraordinarily, a photo of the applicant GRU 119 is filed **in the file of DRA 168** alongside the Unauthorised Boat Arrivals Bio-data form for GRU 119.

Both those items should be at the beginning of GRU 119's own file and not wrongly placed in the file of applicant DRA 168.

The photo of GRU 119 is attached to a baggage check/air movement ticket. The folio also has GRU 119's Nauru ID number y129 written on it.

The photo is very obviously NOT of the same person whom the case officer has just been interviewing (DRA 168's Nauru Number is nr02-0075).

The rest of the Client Registration Forms filled out for DRA 168, with the details matching the form that case officer J. S. did for DRA 168 are then filed on top of GRU 119's photo ID and under the Client Identifier number of GRU 119!

All the personal details collected from applicant DRA 168 by Mr G. were identical to the details that case officer J. S. collected from him exactly one month before (18/2/02) except that she included his correct boat number on the top of the form (DRA 168 not GRU 119) and she did not accuse him of having the wrong details and not matching "his" bio-data form.

[26] Folio 49
[27] Folios 56-57
[28] See folios 62-66
[29] Folios 14-18

Mr G. took exactly two hours to interview applicant DRA 168, **(while all the time mistakenly thinking he was GRU 119)** and the Declaration on the final page of the Client Registration Form is signed in the same manner as the one done by case officer J. S. one month earlier.

Someone has later drawn a line through the Client Identifier number on the top right hand side of the Declaration, and crossed out GRU 119, replacing it with the number DRA 168 – using a totally different felt tipped pen not used anywhere else on this file up until this point in time.[30]

There is no primary decision from Mr G. generated out of his intensive and I imagine, very confronting interview. At least there is no decision from him on THIS file. I imagine a written decision, based on an interview with the wrong person, has been filed on the file of GRU 119!

I submit that the primary decision for GRU 119 should be located and analysed as a matter of urgency if my submission is not sufficient to satisfy DIMIA of the veracity of my concerns. I do not know where GRU 119 is now residing.

The file then contains email correspondence (dated 25/5/02) between the original case officer J. S. and the Refugee and Humanitarian Section about language analysis results that are still awaited.[31]

MISSING FOLIO

There is a missing folio between the Declaration Form (folio 83) and J. S.'s emails (folio 85) which is listed in the FOI Decision as exempted under Section 24A of the Act.

Articles are exempted under Section 24A when "*reasonable steps have been taken to find that document and the agency is satisfied that document cannot be found."* It is unfortunate that folio 84 cannot be found, because its contents may have cast some light on whether the case officers had any insight that two applicants had been wrongly interviewed and wrongly filed together in one person's file.

The next folios contain the applicant's request for a review of his primary decision dated 23/6/05. The review request has been filled out and counter-signed by a *"receiving officer."* All the personal details on the review request form belong to DRA 168 and the form is signed in the normal manner in which he has signed the other Declaration Form.[32]

Review Decision – R. M. – 18/9/02:

The next document filed on this applicant's file is the Review Decision by case officer R. M., dated 18/9/02.

[30] Folio 83
[31] Folio 85
[32] Folios 88-89

There are no hand-written notes of interview filed with the decision and the photocopied audio cassette tape contains NO identifying information whatsoever.

The review officer R. M. begins his Review Decision Record with the Person Identifier DRA 168 but writes ***"so stated"*** after the name AH. After Date of Birth, Mr M. has written *"unsure – 22 years old at time of interview."*

The body of the decision contains information from a language analysis which has not been placed on the file.

The Language Analysis stated that "*the analyst was unable to conclude with certainty that the claimant originated in Afghanistan, rather that his language was most similar to that spoken in Central Afghanistan, however Quetta Pakistan could not be excluded as a possibility."*[33]

Mr M. then stated:

> *"There are serious credibility issues surrounding the claimant's account of his background … on the basis of the information available to me I cannot accept that he originates in Afghanistan. I consider it probable that his parents originate in Afghanistan, however I am satisfied that the claimant himself has resided outside of that region for a very significant period of time, probably his entire lifetime."*[34]

Mr M.'s decision record then lists the core claims at the Primary decision interview from 18/2/02. This is the date of the interview done with case officer J. S., and the claims listed do reflect the details of the applicant's case. He then lists the information the applicant gave to him at the review interview.

In particular, the review officer focused his decision on the applicant's membership of the minority group of the YYYY tribe. The applicant is quoted as stating that in his village there are three YYYY families, eighty-five ZZZZ families and eight UUUU families.

There appears to be a typo in the review decision where the **review officer wrongly stated** that the applicant *"is from the ZZZZ tribe."*[35]

Without seeming to notice the inherent contradiction in his text, the review officer then lists the other claims about the feared persecution at the hands of the ZZZZ tribe, because the applicant is a member of the YYYY (sic) tribe, a minority in the applicant's village area.

Later in the review decision record Mr M. stated that he was **unable to find** Country of Origin information (COI) that referred to the two tribes YYYY and ZZZZ.[36]

[33] Folio 97
[34] Folio 97
[35] Folio 96
[36] Folio 95

References to the YYYY and ZZZZ tribes can be found at the following web addresses: (web address deleted) (reference to the YYYY Jaghuri tribe) and (address deleted) (references from Askar Mousawi about the ZZZZ Hazaras.)

However, even the Hazara expert Askar Mousawi has acknowledged the difficulties scholars face accessing reliable and accurate information about the population of Afghanistan in general, let alone the population numbers in the tribal divisions within the Hazara population.[37]

Given that the review officer was spelling YYYY tribe wrongly when he was unable to verify its existence, it is quite possible he was also spelling the ZZZZ tribe's name incorrectly.

Minister, I am personally able to vouch for the existence of the tribal grouping ZZZZ in the applicant's area. I myself travelled through the Jaghuri District in 2003, coming within a few kilometres of WW WW before turning South off the WW WW road into the remote mountainous area which was my destination.

In addition, I have represented a number of people from this area who identify as members of the ZZZZ tribe from this area, so I can assure you that such a group of people do exist. I was recently asked to represent ten clients from this tribe in their applications to sponsor their wives but I was simply too busy to travel back to assist them all.

The last few paragraphs of Mr M.'s decision contain a number of illogical statements which reflect a profound lack of understanding of the traditions of rural Afghanistan. For example: Mr M. asserts that the applicant can easily relocate to another part of his area should he fear for his safety, when it is common knowledge that it is impossible to relocate when you are part of a minority group, and you have no close family members living in other locations.

Mr M. also refuses to recognise that retributive acts could be perpetrated against people who have tribal affiliations and not just familial affiliations, without giving any objective evidence upon which to base his opinion.

I refer to the large body of COI which exists about systems of customary law which exists in rural Afghanistan that effectively codify acts of revenge that spans generations, tribal groupings and ethnic groupings. In fact the International Commission of Jurists did a report on revenge systems practiced in rural areas of Afghanistan as recently as 2002.[38]

The most significant statement made by Mr M. in his review decision was that the applicant ***"was not a credible witness."***[39] Given Mr M. has not filed any notes taken during the interview there is no evidence (other than references to questions raised in the language analysis), to back up the review officer's assertions.

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[37] See http://members.tripod.com/~ismat/population.htm

[38] www2.law.columbia.edu/faculty_franke/Gender_Devel/Rights,%20Culture%20and%20Crime%20-%20Afghanistan.pdf

[39] Folio 94

Without having access to the review interview audio-tape I cannot be certain that the applicant lacked credibility in the evidence given at this interview.

Minister, as opposed to the notion that the applicant was inherently lacking in credibility, I submit it is much more possible that Mr M. drew negative inferences from the mix-ups between the two applicants GRU 119 and DRA 168 made by previous case officers which are evident by the placing of the vastly different details about the two applicants on DRA 168's file.

Re-examination Decision 2004 – A. L.:

The applicant was interviewed by the re-examination officer A. L. on 14/2/02 and a photocopy of the audio-tape has been placed on the file.[40]

He was again rejected for refugee status. After stating that the applicant did not meet the definition of a refugee the 2004 re-examination case officer made the following comments:

> *"The review officer (R.M.) recommended that further fraud and effective protective checks were necessary in relation to AH in order to confirm that his nationality is not Pakistan or that he has not resided for some time outside of Afghanistan.*
>
> ***The findings were based on the fact that the applicant did not have any identifying documents to identify himself, had a scant knowledge of the local area and also gave weight to the language analysis.***
>
> *Having considered the applicant's claims individually and cumulatively I am satisfied that AH does not have a real chance of Convention-based persecution if returned to Afghanistan and that his fear of persecution on return is consequently not well-founded."*[41]

FLAWED PROCESSING YIELDS A FLAWED DECISION:

Minister, the 2004 decision is totally flawed for the following reasons:

- The re-examination case officer's findings were based on the fact that she believed the applicant **did not have any identity documents to identify himself.**
- **I**dentity documents containing photographs of the applicants are at the beginning of the file and have been accepted by the primary decision maker, J. S. in 2002.
- The 2002 case officer stated "*He has provided his Driver's licence and birth certification issued during the time of the Taliban. He stated that he paid a bribe to obtain the documents. Based on the evidence presented by the claimant I am prepared to accept them as genuine.''*
- The 2002 decision also stated that the first case officer believed the applicant was an Afghan national. They wrote: "*taken cumulatively, on the evidence presented by the person, that he is a Shia Hazara and that he is a citizen of*

[40] Folio un-numbered, but filed above folio 101
[41] Folios un-numbered, but filed above folio 106

Afghanistan … I am satisfied that no fraud or effective protection checks are necessary in relation to this person.'[42]

Minister, I submit that the entire decision-making process for this applicant has been cast into disrepute due to the mix-ups that are evident in the DIMIA file itself.

I interviewed the applicant in January 2005 and I found him "*very credible, a lovely kid … confirmed all the statements prepared by witnesses.*"[43]

Given the absolute debacle in the processing of this applicant, I submit that the only fair outcome is for him to be given a chance to be assessed in his own right, without having his identity merged by the DIMIA into that of another applicant.

Minister, I recommend you deal with the issues raised in this submission as a matter of urgency.

Thank you very much for your consideration.

Yours sincerely,

MARION LE, OAM
27/05/2005"

[42] Folio 42
[43] Notes from my interview with the applicant in January 2005

Example Two -

A letter from another Afghan JH was wrongly placed on applicant AM's file:

"…An undated hand-written letter was placed on the AM's file just before the 2002 review decision. The letter is predominantly in Dari, is addressed to Msr (sic) B., and has the name JH - 72 in the top right hand corner. Under JH's name is the boat number – DRA 145. This boat number belongs to the applicant AM, but the letter belongs on the file of "JH."

I have shown the applicant the "JH" letter and he is absolutely certain the letter has been filed in this file by mistake. JH is known to the applicant and he has even been able to send me a photo of JH.[44]

Mr JH arrived on the same boat as the applicant, but his initial ID number was DRA 72 **not** DRA 145. Both men were initially on Christmas Island and they were transported to Nauru at the same time. Please see accompanying this submission two examples of the applicant's ID. DRA 145 was his ACM ID on Christmas Island and Nr03-0096 is the Nauru ID provided by IOM.

According to the applicant AM, the young Afghan JH had a completely different case to himself.

Mr JH apparently came from Uruzghan, the applicant AM was born in Jaghuri, Ghazni.

Mr JH had a father who was imprisoned by the Taliban, hence the explanatory letter. The applicant AM has no idea of his own father's circumstances during the Taliban regime.

The applicant reported to me that Mr JH *"gave up and left Nauru."* Perhaps the case of Mr JH would have been assisted if his letter of evidence had ever made it to his own review officer "Msr (sic) B." instead of becoming an irrelevant document on another applicant's file.

Unfortunately for Dra 145, this applicant, the contents of JH's letter were taken into consideration and *"the treatment of the applicant's father"* was even been referred to in the 2002 review decision of applicant AM. I am surprised however, that the review officer did not mention the fact that the applicant suddenly coming forth with evidence about his father constituted a complete contradiction to everything the applicant had ever said about his knowledge of his family of origin.

It is absolutely astounding to me that a letter containing evidence from someone else's case can just be slipped into not only a file but also woven into the fabric of a decision where it has no place and is in fact out of step with everything else this applicant has ever said. Yet the letter has just sat there on the file and for three years no-one has even noticed how incongruous it is, or highlighted it as an example of procedural sloppiness.

Although the JH letter is not nearly as serious as other examples of confusing of applicants that I have found on other files, it is still inexplicable to me how the cases of two completely different applicants can be confused by case officers without them even realising what has happened …

[44] Please see attached photo of the real JH.

TOTAL CONFUSION WITH ANOTHER APPLICANT:

The review officer found that the Taliban did not "*constitute a political threat or a threat to civilian life"* anymore.[45] She also stated that ***"past mistreatment of the applicant's father do not [sic] impact on the applicant and are not [sic] indicative of future harm, and thus accorded no weight."***[46]

In actual fact, the above comment has NO RELEVANCE to the applicant AM, as the evidence about the Taliban was submitted by applicant JH and should have been made available to B. F. for JH and not placed on applicant AM's file. Nor should it have been referred to by C. L., in applicant AM's re-examination decision.

According to the notes of the primary decision maker, and the answers the applicant gave on forms, he had in fact **never raised the Taliban as an issue** …

Minister, I commend this young man for your urgent consideration.

His need for protection has gone unrecognized for nearly four years. If not for the careful examination of the 2002 interviews done by the 2004 case officer and her interpreter, the DIMIA would not even recognize that he was a "*metal turner"* and not a "*car mechanic."*

The debacle of mixing him up with another applicant (JH) went undetected until his DIMIA file was released to me under FOI last month.

The strong prejudice against the applicant as a suspected Pakistani national (as expressed by the early interviewers and the 2002 primary decision maker), was proven incorrect by the recognition of the Afghan Embassy of his right to be considered a citizen of Afghanistan.

A.M. is a refugee and I urge you Minister, to recognize him as such and grant him immediate protection in Australia.

Minister, I thank you for your attention to this young man's case.

Yours sincerely,

MARION LE, OAM

3/6/2005"

[45] Folio 94
[46] Folio 94