

Sent: Thursday, 9 October 2003 11:34 AM  
To: Sands, Alistair (SEN)  
Subject: MINISTERIAL DISCRETION INQUIRY: QUESTIONS ON NOTICE

Dear Alistair,

Under cover of my letter to you of 19 September 2003, we forwarded responses to Questions on Notices asked of the Department of Immigration and Multicultural and Indigenous Affairs at the hearing of the Inquiry on 8 September. Those responses addressed questions in Groups B, C and D as listed in Attachment A of my letter.

I am now forwarding, in attachments below, responses to questions in Groups E, F, G, I, J, L, M and N (as listed in Attachment A of the earlier letter).

Responses to Groups A, H, and K questions remain outstanding. I am advised that these will be available for onforwarding to the Committee later today.

We apologise for the delay in finalising these responses, due to the unavailability over the past week of senior DIMIA officers involved in briefing the Incoming Minister.

Thank you for your assistance.

Yours sincerely

Andrew Endrey  
Director  
Parliamentary Coordination  
DIMIA

## **E. Assessment of cases against the guidelines**

### **Question E1**

What training do DIMIA officers receive on applying the guidelines on ministerial intervention?

### **Answer**

#### **351 Cases**

In the ACT Regional Office, introductory training includes examination of the Minister's Guidelines as well as on the job training combined with mentoring. To ensure that the application of the Guidelines is consistent and adhered to, the team manager, MIU manager and Territory Director clear all submissions and schedules. Migration Branch, Central Office, and the ACT Regional Office liaise regularly, and in that context, identified training issues are incorporated into training for MIU staff.

#### **417 Cases**

Training on Ministerial intervention issues is included in a centrally coordinated national induction program for protection visa case managers. Two induction courses were provided in 2001, and one in early 2003.

Further training is provided on a needs basis. For example, on the recently released (14 August 2003) MSIs 386/387, training on the current Ministerial and Administrative Guidelines took place in Victoria on 9 September 2003, in NSW on 12 September 2003, and will take place in Perth on 8-10 October 2003, in conjunction with training on the assessment of Australia's obligations under CAT/ICCPR/CROC. This training is supplemented by well-developed State Office training and supervisory arrangements.

In NSW, Victoria and Western Australia State Offices, experienced protection case managers mentor and coach new case managers on total case management in the on-the-job training context. This includes management of Ministerial Intervention cases.

A response to this question was also provided to the Senate Committee on 5 September 2003, at pages 23 and 27 of Hansard.

Training on regulations or other policy changes includes training on Ministerial intervention guidelines.

Ministerial intervention staff also attend protection visa training to maintain their skills and levels of knowledge.

**Question E2**

Is there formal guidance available to DIMIA officers on interpretation of the guidelines on ministerial intervention?

**Answer**

Yes. In addition to the Administrative Guidelines, relevant policy areas as well as sections within the Legal Services and Litigation and Visa Framework Branches can provide assistance.

**Question E3**

Is the department aware of concerns expressed by lawyers and advocates that the guidelines are not sufficiently clear, and result in inconsistent and unpredictable decision making?

**Answer**

The Minister's Guidelines are not criteria for intervening. Rather they are guidelines for the types of cases that the Minister has asked DIMIA to refer to him for possible consideration for intervention. The Guidelines include a general provision requiring DIMIA to refer to the Minister any information that may be relevant to his consideration of the exercising of his powers (paragraph 5.1 Attachment 9 of DIMIA submission).

The sole criterion for the Minister's intervention is that it be in the public interest. It is intentionally flexible to pick up cases that are inherently not able to be codified as part of normal visa classes.

It is inappropriate to benchmark the processes for the use of such a power against those in place for decision making where there are codified provisions which contain detailed objective criteria, and where importantly people have a right to apply for and be granted a visa where the criteria are met. The Ministerial intervention process differs fundamentally from the visa determination process, in that the Ministerial intervention consideration focuses on the extent to which the characteristics of the case raise the public interest, whereas a visa determination focuses on whether the individual is able to meet the codified criteria for the grant of a visa.

**Question E4**

What procedures are in place to improve/ensure consistency of decision making within the department in assessing requests for ministerial intervention?

**Answer**

The intervention process does not involve decision making at the departmental level. Rather it is a process in which intervention requests are assessed against the Minister's Guidelines as to whether the request falls within the ambit of the Guidelines. In the end, all of the information in a case is weighed by the Minister to form a view of what he decides is in the public interest. This includes contemplation of information other than the individual's circumstances. Different outcomes for apparently similar individuals do not denote inconsistency, but a different judgement by the Minister concerning the public interest.

## **F. Cases not referred to the Minister**

### **Question F1**

Is a decision not to refer a case to the Minister reviewed by another officer within the MIU?

### **Answer**

There are two aspects to this question.

All first requests for intervention are referred to the Minister either on a schedule if it is assessed departmentally that the case does not fall within the ambit of the Ministerial Guidelines, or on a submission if the assessment is that the case does fall within the ambit of the Guidelines.

For repeat requests and Public Interest Guidelines Assessments (PIGA\*), an assessment by the relevant DIMIA officer as to whether or not to refer such cases for the Minister's consideration is done under normal supervisory arrangements. Cases are not generally referred to the Minister unless they contain information which brings them within the ambit of the Minister's Guidelines. Staff are not required to seek their supervisor's endorsement for every assessment that falls outside the Guidelines. However, their work is under review through the normal supervisory arrangements. In addition, staff can and do consult with their peers and supervisors and help desk support is available to staff making these assessments.

\*Note: PIGA is the automatic assessment of all affirmed cases following RRT consideration, and was referred to in the Department's submission at Attachment 11.

### **Question F2**

Does the officer responsible record reasons for *not* referring a case to the Minister?

### **Answer**

Yes. All first requests are referred to the Minister on either a schedule or a submission. In relation to PIGAs and repeat requests, the staff person makes a file note where the request falls outside the ambit of the Minister's Guidelines.

### **Question F3**

Is the person concerned notified of specific reasons why their case was deemed not to fit within the guidelines for ministerial intervention?

### **Answer**

No.

**Question F4**

How many times has the Minister asked for a submission to be prepared on a case included on a schedule of cases not recommended by the Department for intervention?

**Answer**

See answer to QON Senator Wong (Hansard page 81 of 5 September 2003).

## **G. Refusal to consider matters where there is current litigation in process**

### **Question G1**

What is the rationale for the guideline that it is inappropriate to consider cases where there is migration litigation that has not been finalised (as in paragraph 183 of the submission)?

#### **Answer**

The general requirement that a case not be considered under the Ministerial discretion where there is litigation in progress ensures that the one consideration does not complicate or frustrate the other. For example, if a Court sets aside the Tribunal decision, then sections 351 or 417 cannot operate to allow the Minister to intervene and grant a visa.

It should be noted that a bridging visa may be available to applicants for judicial review, and that usually a person is not removed whilst seeking judicial review of a substantive visa or the exercise of the Minister's discretionary powers.

Occasionally, the Minister has, where appropriate, exercised his Ministerial discretion powers where litigation has been on foot.

### **Question G2**

Does the need to wait until all related litigation and review processes are complete involve extra cost and/or time for the applicant (and department) in cases where ministerial discretion could possibly be exercised earlier?

#### **Answer**

The Minister is not required to wait until all litigation is resolved. It is a general practice of the Minister not to consider the use of his intervention powers where individuals are engaged in litigation. However, the Minister applies this approach flexibly and makes exceptions.

The creation of an intervention power from the primary decision point may create potentially duplicating and delaying processes and could create potential for misuse of the process by those wishing to prolong their stay in Australia and frustrate their removal from Australia.

### Question G3

Are you aware of any cases where the Minister has chosen to intervene while judicial proceedings are underway? Can you provide details of such cases?

#### Answer

The Minister has chosen to intervene in 21 cases during 2000/01 to 2002/03 while judicial proceedings were underway. In all 21 of these cases the Minister used his s417 power.

|    | <b>Intervention Date</b> | <b>Nationality</b> |
|----|--------------------------|--------------------|
| 1  | 18/03/03                 | Afghan             |
| 2  | 3/12/02                  | East Timorese      |
| 3  | 14/08/00                 | East Timorese      |
| 4  | 18/03/03                 | Afghan             |
| 5  | 3/12/02                  | PRC                |
| 6  | 3/12/02                  | PRC                |
| 7  | 18/03/03                 | Afghan             |
| 8  | 20/03/03                 | Indian             |
| 9  | 2/05/01                  | Indian             |
| 10 | 2/05/01                  | Indian             |
| 11 | 12/10/01                 | East Timorese      |
| 12 | 5/02/02                  | East Timorese      |
| 13 | 8/08/01                  | East Timorese      |
| 14 | 24/01/02                 | East Timorese      |
| 15 | 1/08/01                  | East Timorese      |
| 16 | 13/05/02                 | East Timorese      |
| 17 | 5/03/01                  | Iranian            |
| 18 | 5/03/01                  | Iranian            |
| 19 | 18/03/03                 | Afghan             |
| 20 | 28/02/01                 | Somalian           |
| 21 | 12/03/02                 | East Timorese      |

Data prior to 2000/01 is not readily available, as departmental systems are not set up to capture and report on this information.



## **I. Class of visa issued**

### **QUESTIONS/ANSWERS**

#### **Question I1**

Why would the Department recommend a different visa class to that originally applied for by the applicant?

#### **Answer**

A response to this question was provided to the Senate Committee on 5 September 2003, at page 57 paragraph 10 of Hansard.

Departmental submissions to the Minister outline possible visa options in light of the specific circumstances of the case. People who lodge requests for Ministerial intervention do so because they have had their application for a particular visa refused, both by the Department and by a merits review tribunal. The Minister may, therefore, choose to grant a visa which is more appropriate to the person's particular circumstances, rather than the class of visa for which they originally applied.

A visa type might be selected by the Minister for a range of reasons. It may be that the visa is similar to that originally being sought by the individual; it may be that the public interest grounds identified by the Minister warrant the grant of a particular visa; or it may be that the visa might provide the appropriate visa terms and/or benefits to match the needs of the individuals.

#### **Question I2**

Can the Department provide figures on what visa subclasses have been granted under both s351 and s417 powers (disaggregated) since the sections were included in the Act?

#### **Answer**

Disaggregated figures on the number of visas granted by persons, for the period 2000/01 to 2002/03 are provided at Question I2 Attachment A. DIMIA systems do not record this data for earlier years in a manner which enables the Department to report.

#### **Question I3**

What is the reason for the decline in the proportion of protection visas granted under s 417 relative to other types of visas since 1998?

**Answer**

The type of visa granted is a matter for the Minister to decide. However, the Department became aware as the 1990s progressed of the proliferation of a view that intervention was a form of merits review of the decision – a view contributed in part by the grant of a protection visa following Ministerial intervention. Given the wide range of circumstances which might enliven the public interest, the Department has in recent years, usually provided a number of visa options to the Minister.

A visa type might be selected by the Minister for a range of reasons.  
See response to I1.

**Question I4**

Are DIMIA staff encouraged to substitute another visa category even where the applicant has applied for a protection visa?

**Answer**

The Minister's intervention powers enable him to substitute for a decision of a Review Tribunal a decision that is more favourable to the individual.

In using this power, the Minister is not limited in his choice of visa subclass to grant. DIMIA's practice is to flag for the Minister a number of possible visa subclasses that may be relevant.

**Question I5**

On how many occasions has the Minister granted a different visa subclass to that recommended by the departmental officer?

**Answer**

The Department does not make recommendations but, as noted in paragraph 170 of the Department's submission to the Committee, sets out a range of visa options that may be appropriate to the particular circumstances of the case, if the Minister decides to exercise his public interest powers and substitute a more favourable decision. Instances where the Minister has granted a visa outside of the range presented are not available from DIMIA electronic systems and could not be obtained without an examination of many thousands of case files where the Minister has chosen to exercise his intervention powers.

**Question I6**

Does the Minister give the Department reasons for substituting a different visa type to that suggested by the Department?

**Answer**

No. The type of visa granted is a matter for the Minister to decide. The Minister is not required to provide an explanation for his decision other than in the information tabled in Parliament, nor is the Department required to report on his decision.

### Question 17

Can you provide detailed examples of cases where a different visa category was substituted?

### Answer

A response as to why a different visa category may be granted was provided to the Senate Committee on 5 September 2003, at page 57 paragraph 10 of Hansard.

The Department does not record in a reportable form instances where the Minister has chosen to grant a visa that was different from that originally applied for. However, as an indicator, the Department is able to provide this information in relation to the Top 10 Parliamentarians and the Top 10 Individuals/Community groups.

### Visa Subclass Applied For by Visa Subclass Granted Through Ministerial Intervention (Cases)

| Subclass Applied For | Subclass Granted | Cases | Subclass Applied For | Subclass Granted | Cases |
|----------------------|------------------|-------|----------------------|------------------|-------|
| 100                  | 100              | 1     | 820                  | 820              | 2     |
| 103                  | 103              | 1     | 831                  | 820              | 1     |
| 105                  | 832              | 1     | 832                  | 832              | 1     |
| 457                  | 820              | 1     | 838                  | 838              | 1     |
| 686                  | 802              | 1     | 866                  | 50               | 1     |
| 785                  | 449              | 1     |                      | 100              | 1     |
|                      | 785              | 4     |                      | 202              | 3     |
|                      | 786              | 1     |                      | 685              | 1     |
|                      | 820              | 2     |                      | 785              | 3     |
| 801                  | 801              | 1     |                      | 786              | 1     |
|                      | 820              | 6     |                      | 801              | 5     |
| 804                  | 685              | 1     |                      | 802              | 1     |
|                      | 804              | 2     |                      | 804              | 2     |
| 806                  | 155              | 1     |                      | 820              | 29    |
|                      | 801              | 3     |                      | 832              | 7     |
|                      | 806              | 2     |                      | 835              | 10    |
|                      | 820              | 5     |                      | 838              | 1     |
|                      | 832              | 3     | 851                  | 1                |       |
|                      | 836              | 2     | 856                  | 3                |       |
| 817                  | 820              | 2     | 858                  | 1                |       |
|                      | 832              | 1     | 866                  | 27               |       |
|                      | 836              | 1     | Other *              | 2                |       |
|                      |                  |       |                      | Total            | 147   |

\*Includes cases where the subclass granted varies within the case.

Note: The above table covers 147 cases. This figure is the total number of cases where the Minister intervened, covered on the two Top 10 lists provided on 19 September 2003 and 23 September 2003, once adjusted for double counting of cases that appear on both lists.

Question 12 Attachment A

Number of Visa Grants (persons) by Subclass 2000/01 to 2002/03  
Under ss 345, 351, 391 (Non-Humanitarian) and 417, 454, 501J (Humanitarian) of the Migration Act 1958

| Visa Subclass                        | 00/01            |              | 01/02       |                  | 02/03        |             |                  |              |             |
|--------------------------------------|------------------|--------------|-------------|------------------|--------------|-------------|------------------|--------------|-------------|
|                                      | Non-Humanitarian | Humanitarian | Total 00/01 | Non-Humanitarian | Humanitarian | Total 01/02 | Non-Humanitarian | Humanitarian | Total 02/03 |
| 050 (Bridging E)                     | 0                | 0            | 0           | 0                | 0            | 0           | 1                | 0            | 1           |
| 51 (Bridging-PV Applicant)           | 0                | 0            | 0           | 1                | 1            | 0           | 0                | 0            | 0           |
| 100 (Spouse)                         | 0                | 0            | 0           | 0                | 2            | 2           | 0                | 1            | 1           |
| 101 (Child)                          | 0                | 0            | 0           | 0                | 3            | 3           | 3                | 0            | 3           |
| 102 (Adoption)                       | 0                | 0            | 0           | 0                | 0            | 0           | 2                | 0            | 2           |
| 103 (Parent)                         | 4                | 1            | 5           | 0                | 0            | 0           | 8                | 0            | 8           |
| 104 (Preferential Family)            | 2                | 0            | 2           | 0                | 3            | 3           | 0                | 0            | 0           |
| 105 (Skilled Australian linked)      | 2                | 0            | 2           | 0                | 14           | 14          | 4                | 0            | 4           |
| 114 (Aged Dependent Relative)        | 2                | 0            | 2           | 0                | 0            | 0           | 0                | 0            | 0           |
| 115 (Remaining Relative)             | 3                | 0            | 3           | 0                | 0            | 0           | 1                | 0            | 1           |
| 116 (Carer - offshore)               | 0                | 0            | 0           | 0                | 1            | 1           | 2                | 0            | 2           |
| 117 (Orphan Relative)                | 0                | 0            | 0           | 0                | 1            | 1           | 0                | 0            | 0           |
| 120 (Labour agreement)               | 5                | 0            | 5           | 0                | 0            | 0           | 0                | 0            | 0           |
| 121 (Employer Nomination Scheme)     | 5                | 0            | 5           | 0                | 0            | 0           | 0                | 0            | 0           |
| 126 (Independent)                    | 6                | 0            | 6           | 0                | 0            | 0           | 0                | 0            | 0           |
| 138 (Skilled-Australian Sponsored)   | 0                | 0            | 0           | 0                | 0            | 0           | 0                | 0            | 0           |
| 139 (Skilled-Designated Area)        | 0                | 0            | 0           | 0                | 0            | 0           | 0                | 2            | 2           |
| 151 (Former Resident)                | 3                | 0            | 3           | 0                | 0            | 0           | 1                | 0            | 1           |
| 155 (Five year Resident Return)      | 2                | 0            | 2           | 0                | 3            | 3           | 0                | 0            | 0           |
| 202 (Global Special Humanitarian)    | 0                | 7            | 7           | 0                | 8            | 8           | 9                | 0            | 9           |
| 309 (Spouse - Provisional)           | 0                | 0            | 0           | 1                | 0            | 1           | 0                | 1            | 1           |
| 410 (Retirement)                     | 1                | 0            | 1           | 0                | 0            | 0           | 3                | 0            | 3           |
| 422 (Medical Practitioner)           | 0                | 0            | 0           | 0                | 0            | 0           | 0                | 0            | 0           |
| 427 (Domestic Worker Temp Exec)      | 0                | 0            | 0           | 0                | 2            | 2           | 5                | 2            | 7           |
| 430 (Supported Dependant)            | 0                | 0            | 0           | 0                | 0            | 0           | 0                | 0            | 0           |
| 449 (Humanitarian Stay-Temporary)    | 0                | 0            | 0           | 0                | 0            | 0           | 0                | 1            | 1           |
| 457 (Business - Long Stay)           | 0                | 1            | 1           | 3                | 3            | 3           | 13               | 1            | 14          |
| 560 (Student)                        | 1                | 0            | 1           | 0                | 4            | 4           | 1                | 0            | 1           |
| 685 (Medical Treatment Long Stay)    | 0                | 1            | 1           | 0                | 0            | 0           | 2                | 0            | 2           |
| 686 (Tourist Long Stay)              | 1                | 0            | 1           | 0                | 0            | 0           | 1                | 1            | 2           |
| 785 (Temporary Protection Visa)      | 0                | 8            | 8           | 0                | 0            | 0           | 0                | 0            | 0           |
| 786 (Temporary Humanitarian Concern) | 0                | 1            | 1           | 3                | 3            | 3           | 0                | 17           | 17          |
| 801 (Spouse)                         | 4                | 11           | 15          | 2                | 15           | 13          | 18               | 4            | 22          |

| Visa Subclass                             | 00/01            |              | 01/02            |              | 02/03            |              |
|---|------------------|--------------|------------------|--------------|------------------|--------------|
|   | Non-Humanitarian | Humanitarian | Non-Humanitarian | Humanitarian | Non-Humanitarian | Humanitarian |
| 802 (Child)                               | 2                | 2            | 1                | 0            | 1                | 3            |
| 804 (Aged Parent)                         | 6                | 6            | 10               | 4            | 14               | 5            |
| 806 (Family)                              | 8                | 0            | 75               | 2            | 77               | 0            |
| 814 (Interdependency)                     | 0                | 0            | 0                | 0            | 0                | 0            |
| 816/818 (1 November)                      | 12               | 3            | 10               | 0            | 10               | 0            |
| 820 (Spouse)                              | 39               | 143          | 47               | 131          | 178              | 131          |
| 825 (Temporary Entry Processing)          | 0                | 1            | 0                | 0            | 0                | 0            |
| 826 (Interdependency)                     | 0                | 0            | 1                | 0            | 1                | 0            |
| 830 (1 November)                          | 0                | 0            | 0                | 0            | 0                | 0            |
| 831 (Prospective Marriage)                | 0                | 0            | 0                | 0            | 0                | 0            |
| 832 (Close Ties)                          | 43               | 66           | 21               | 61           | 82               | 25           |
| 835 (Remaining Relative)                  | 4                | 47           | 0                | 15           | 15               | 11           |
| 836 (Carer)                               | 0                | 9            | 2                | 4            | 6                | 15           |
| 837 (Orphan Relative)                     | 0                | 0            | 1                | 0            | 1                | 0            |
| 838 (Aged dependent relative)             | 2                | 4            | 0                | 1            | 1                | 2            |
| 840 (Business owner)                      | 1                | 0            | 6                | 0            | 6                | 0            |
| 841 (Senior Executive)                    | 0                | 0            | 0                | 3            | 3                | 0            |
| 845 (Established business in Australia)   | 1                | 0            | 9                | 0            | 9                | 3            |
| 851 (Resolution of Status)                | 3                | 9            | 0                | 5            | 5                | 4            |
| 855 (Labour Agreement)                    | 0                | 0            | 0                | 0            | 0                | 4            |
| 856 (Employer Nomination Scheme)          | 5                | 4            | 19               | 14           | 33               | 30           |
| 857 (Regional Sponsored Migration Scheme) | 0                | 0            | 6                | 4            | 10               | 1            |
| 858 (Distinguished Talent)                | 8                | 3            | 0                | 7            | 7                | 0            |
| 859 (Designated Parent)                   | 0                | 0            | 0                | 0            | 0                | 0            |
| 866 (Protection)                          | 1                | 93           | 0                | 21           | 21               | 1            |
| 880 (Skilled-Independent)                 | 0                | 0            | 0                | 0            | 0                | 17           |
| 882 (Skilled-Designated Area- Student)    | 0                | 0            | 0                | 3            | 3                | 0            |
| 890 (Skilled Business Owner)              | 0                | 0            | 0                | 0            | 0                | 0            |
| <b>Total</b>                              | <b>176</b>       | <b>420</b>   | <b>265</b>       | <b>303</b>   | <b>568</b>       | <b>416</b>   |
|   |                  |              |                  |              |                  | <b>282</b>   |
|   |                  |              |                  |              |                  | <b>698</b>   |

In the combined table provided at Attachment 19 of the Department's submission, the total for 2002/03 was 694. This figure has since been amended to 698 to include 4 visas that were omitted from the original spreadsheet.

## **J. Australia's international humanitarian obligations**

### **Question J1**

How many applications have been made to the relevant UN committees by individuals claiming that Australia has not met its obligations under these treaties?

### **Answer**

Since June 1993 there have been 39 communications to UN Committees by individuals claiming that Australia has not met its obligations under various international treaties.

### **Question J2**

Have there been any rulings which have found Australia to be in breach of its treaty obligations?

### **Answer**

There have been five findings against Australia from UN Committees:

1. Applicant 'A' - On 3 April 1997, the UN Human Rights Committee (UNHRC) found breaches of Articles 9(1) and 9(4) - the Australian Government did not accept that finding. However, applicant 'A' was subsequently granted a protection visa on 21 January 1994 through marriage to another protection visa holder.
2. 'SE' - On 15 May 1999, the UN Committee Against Torture (UNCAT) found that Australia would be in violation of Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment if Mr SE were returned to Somalia. However, new information came to light since the Committee delivered its views such as the fact that Mr SE had previously made a claim for refugee status in Italy in 1991. Mr SE voluntarily departed Australia on 22 January 2002 and was due to enter Dubai on 23 January 2002. The Complaint was withdrawn on 24 January 2001.
3. Winata - On 26 July 2001, the UNHRC found that Australia would be in breach of the ICCPR Articles 17(1), 23(1) and 24(1) if the Winata family were returned to Indonesia. The UNHRC requested a response to these views. The Government is currently considering its response. The Winata family remain in Australia unlawfully.
4. 'C' - On 28 October 2002, the UNHRC found that Australia had breached Articles 7, 9(1) and 9(4) of the ICCPR. The Government is currently considering its response. Mr C is currently in home detention in the care of his family.
5. 'BB' - On 29 August 2003, the UNHRC expressed the view that Australia's detention of Mr BB and his son and possible return to Iraq would breach Articles 9(1) and 9(4) of the ICCPR. On 26 March 2001, Mr BB and his son escaped from Villawood IDC and have not yet been located. Mr BB has not departed Australia as far as we are aware.

**Question J3**

Does a person whose request for ministerial intervention is based on these grounds have recourse to any remedy or right of review where the decision is taken by a departmental officer not to refer the case to the Minister?

**Answer**

In all cases where there is an adverse finding from a UN Committee the Minister is provided with extensive briefings drawing on advice from the Attorney General's Department. These briefings include seeking the Minister's views on whether he wishes to use his Ministerial Intervention powers.

**Question J4**

What proportion of requests for Ministerial intervention cite Australia's non-refoulement obligations under the ICCPR, CAT or CROC treaties?

**Answer**

The Department does not collect in a reportable format detailed information on which requests for Ministerial intervention cite Australia's non-refoulement obligations under the ICCPR, CAT or CROC. Accordingly DIMIA is unable to supply the requested information.

**Question J5**

In how many cases where the Minister has exercised his power to substitute a more favourable decision than the MRT or RRT have these obligations been cited as a reason?

**Answer**

The intervention powers are personal to the Minister and he is not required to provide reasons for his decision, other than in the information tabled in Parliament, where he decides to exercise his public interest powers and grant a visa, nor is the Department required to report on his decision.

**Question J6**

What visa classes have been granted in those cases?

**Answer**

See response to J5.

## **L. Matters referred by the RRT**

The Refugee Review Tribunal states that it notified DIMIA of 1,010 cases potentially raising humanitarian considerations in the period 1 July 1999 to 30 June 2003.

### **Question L1**

How many of the cases referred by the RRT to DIMIA as raising humanitarian considerations were referred to the Minister by the department?

### **Answer**

In early September 2003 the RRT advised DIMIA that there were 930 such cases referred from the Tribunal from 1 July 1999 to 30 June 2003.

The total number of cases differs from the 1,010 cases identified by the RRT in their submission to the Senate Committee. The Tribunal has advised DIMIA that this is because the figures in their submission inadvertently included cases referred in July and August 2003.

Subsequent to the Department's letter of 15 September 2003 to the Committee, which identified 930 cases as having been referred by the RRT, the RRT notified DIMIA that one duplicate record had been identified, and a further 12 cases have not been successfully linked back to DIMIA records.

As at 15 September 2003, of the 917 cases where DIMIA action can be tracked, 711 have been referred to the Minister for consideration of the use of his public interest powers, 116 cases were still being processed by the Department for initial referral to the Minister. 90 were not referred to the Minister.

### **Question L2**

In how many of these cases did the Minister intervene?

### **Answer**

As at 15 September 2003, of the 711 cases referred for possible consideration, the Minister intervened in 166 cases.

A further 378 of the cases referred are either still before the Minister or are undergoing further processing to obtain additional information such as health and character checks preparatory to their referral back to the Minister .



### Question L3

Where the Minister did intervene on humanitarian grounds, what visa type was issued in most cases?

### Answer

Please also see Question 17.

| Visa                                      | Total |
|---|-------|
| 115 (Remaining Relative)                  | 1     |
| 119 (Regional Sponsored Migration Scheme) | 2     |
| 202 (Global Special Humanitarian)         | 85    |
| 685 (Medical Treatment-Long Stay)         | 1     |
| 785 (Temporary Protection)                | 1     |
| 801 (Spouse)                              | 3     |
| 802 (Child)                               | 2     |
| 804 (Aged Parent)                         | 3     |
| 820 (Spouse-Temporary)                    | 33    |
| 826 (Interdependency)                     | 2     |
| 832 (Close Ties)                          | 12    |
| 835 (Remaining Relative)                  | 5     |
| 836 (Carer)                               | 2     |
| 838 (Aged Dependant Relative)             | 4     |
| 856 (Employer Nomination Scheme)          | 1     |
| 857 (Regional Sponsored Migration Scheme) | 1     |
| 858 (Distinguished Talent)                | 1     |
| 866 (Protection)                          | 7     |
| TOTAL                                     | 166   |

Data source – Manual interrogation of departmental systems for the period 1999-2003.

### Question L4

Can you provide details of any cases where the RRT has recommended the use of ministerial discretion, and the Minister has declined to use his discretionary powers?

### Answer

| Year                           | 1999-00 | 2000-01 | 2001-02 | 2002-03 | Total 1999-03 |
|--------------------------------|---------|---------|---------|---------|---------------|
| Total RRT Referrals*           | 130     | 95      | 129     | 563     | 917           |
| Cases referred to Minister     | 96      | 89      | 106     | 420     | 711           |
| Minister declined to intervene | 40      | 36      | 46      | 45      | 167           |

Data source – Manual interrogation of departmental systems.

\*The total RRT Referrals as identified from DIMIA systems. Please refer to Question L1 for further explanation.

### Question L5

Can you provide details of any cases where the RRT has recommended use of ministerial discretion but the department has decided not to refer the case to the Minister?

### Answer

There is a total of 206 cases that have not been referred to the Minister. 116 of those cases are still being processed by the Department. A further 90 have not been referred. The details of these 90 cases not referred are provided below.

| Year   | 1999-00   | 2000-01   | 2001-02   | 2002-03   | Total 99-03 |
|--|-----------|-----------|-----------|-----------|-------------|
| - Judicial review in progress                  | 23        | 14        | 9         | 23        | 69          |
| - Withdrawal of intervention request by client | 1         | 0         | 2         | 4         | 7           |
| - No power to intervene                        | 0         | 4         | 6         | 4         | 14          |
| <b>Total Not referred to Minister by MIU</b>   | <b>24</b> | <b>18</b> | <b>17</b> | <b>31</b> | <b>90</b>   |

Data source – manual interrogation of departmental systems.

### Question L6

What is the rationale for having cases referred by the RRT to the department rather than directly to the Minister?

### Answer

The Minister has established guidelines for DIMIA officers to assess which cases are to be brought to the Minister's attention for him to consider whether or not he wishes to exercise his public interest powers. All cases affirmed by the RRT are considered as a matter of course by DIMIA to identify any cases which might fall within the Minister's Guidelines for referral to him.

### Question L7

Is the case officer who assesses cases referred by the RRT the same as the case officer who made the original decision to refuse a protection visa?

### Answer

In general, Public Interest Guidelines Assessments (PIGA)\* are done by the same officer who handled the original protection visa application or by members of the same

team. Requests for intervention are generally referred to MIU officers for assessment against the Minister's Guidelines and referred to the Minister.

\*Note: PIGA is the automatic assessment of all affirmed cases following RRT consideration, and was referred to in the Department's submission at Attachment 11.

**Question L8**

Is a decision not to refer such a matter reviewed by a higher level DIMIA official?

**Answer**

Please refer to Question F1.

## **M. Statements in parliament**

### **Question M1**

Have there been any changes to the reporting format for statements tabled in parliament on use of ministerial intervention powers since the relevant sections were inserted in the Act?

#### **Answer**

There may have been minor amendments to the words and/or language used in the tabling statements, but overall they have not varied to any great extent since 1994. The statements comply with the legislative tabling requirements. A response to this question was provided to the Senate Committee on 5 September 2003, at pages 33, 49, 50 and 51.

The Department is aware of assertions made to the Inquiry that there has been in the late 1990s a significant restriction in the amount of information provided in the reasons given in the tabling statements. DIMIA has examined these statements and can find no evidence to substantiate these claims. We understand that the Committee has also been provided with a full set of all the statements.

### **Question M2**

What was the reason for the change in the reporting format?

#### **Answer**

There have been no changes in the reporting format, only minor amendments to words and/or language used in the tabling statements.

### **Question M3**

Is a pro forma statement used now?

#### **Answer**

Yes, but there are minor language/word changes.

### **Question M4**

Who in the department is responsible for preparing the statements?

#### **Answer**

The statements are generally prepared at the same time as the Stage 2 submission by the case officer handling the request.

**Question M5**

Who approves the final form of the statement?

**Answer**

The submissions and tabling statements are cleared for submission to the Minister by State and Territory Program Managers, or State and Territory Directors.

## **N. Public information available on Ministerial discretion powers**

### **Question N1**

What information is available to visa applicants on the possibility of seeking ministerial intervention?

### **Answer**

A request to the Minister to exercise his public interest intervention powers is not a request for a visa, nor is it a formal application in any sense. The Minister's powers are non-compellable and therefore, there is no obligation on the Department to make this information publicly available. However, given the level of requests made to the Minister seeking the exercise of his public interest intervention powers, the information is clearly well known.

A person seeking the Minister's intervention does not have to know formally about the power in order to write to the Minister – various correspondence from individuals and supporters is classified as asking for Ministerial intervention even if they do not use those exact words, or refer to specific parts of the Migration Act.

Where the Refugee Review Tribunal (RRT) affirms an unfavourable departmental decision, there is an automatic assessment conducted by the Department against the Minister's public interest guidelines (known as PIGAs), making a lack of public information not an issue in this caseload.

This issue was addressed at paragraphs 210–213 of the DIMIA submission to the Committee. Unsuccessful applicants are advised of their review rights, and provided with literature detailing this information.

### **Question N2**

Is the current Fact Sheet 41 the same as the one referred to in the Department's response to recommendation 8.3 of the Senate report into the operation of Australia's refugee and humanitarian program? Why is there no reference to ministerial discretion in this document?

### **Answer**

No. Fact Sheet 41, *Seeking Asylum in Australia*, which was last revised 14 December 2000, has been renumbered and is now Fact Sheet 61, also entitled *Seeking Asylum in Australia*, (last revised 28 August 2003). The current Fact Sheet 41, *1 November 1993 Decisions*, was last revised 15 January 2003. Ministerial discretion is mentioned in the current Fact Sheet 61.

**Question N3**

There is one paragraph in Fact Sheet 61 that refers to the Minister's discretionary powers. Is this all the information currently available in the fact sheet series on ministerial discretion?

**Answer**

Yes.

**Question N4**

What other information on the use of these powers is available publicly?

**Answer**

In addition to Fact Sheet 61, other publicly available information includes the Migration Act, the Migration Regulations, LEGEND, which contains the MSIs, and the Minister's tabling statements.

**Question N5**

Is the department aware of concerns among lawyers and refugee advocates that there is insufficient public information on the operation of ministerial discretion?

**Answer**

The Department is aware of views expressed in other submissions to the Inquiry that there is insufficient public information in the operation of ministerial discretion. As explained in earlier evidence to the Inquiry the public interest intervention guidelines and other related information prepared by the department is publicly available.

It is inappropriate to benchmark the processes for the use of such a power against those in place for decision making where there are codified provisions which contain detailed objective criteria and where importantly people have a right to apply for and be granted a visa where the criteria are met. The Ministerial intervention process differs fundamentally from the visa determination process, in that the Ministerial intervention consideration focuses on the extent to which the characteristics of the case raise the public interest, whereas a visa determination focuses on whether the individual is able to meet the codified criteria for the grant of a visa.

Sent: Thursday, 9 October 2003 12:18 PM  
To: Sands, Alistair (SEN)  
Subject: MINISTERIAL DISCRETION INQUIRY: QUESTIONS ON NOTICE - FURTHER  
RESPONSES

Dear Alistair,

Further to my electronic message on the above earlier today, attached below are responses to a further three questions taken on notice by the Department at the hearing of 5 September 2003.

Of those questions, a further three remain outstanding, namely:

Senator Bartlett Page 36 (#13)  
Senator Wong Page 81 (#18)  
Senator Ludwig Page 86 (#20)

I am advised that the responses will be ready for onforwarding to the Committee later today.

Regards,

Yours sincerely

Andrew Endrey  
Director  
Parliamentary Coordination  
DIMIA



## QUESTION TAKEN ON NOTICE

### SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Senator Ludwig asked (Hansard page 13) – What I am at least looking for at the start is the number of representations in the top 10 and then, in terms of the correspondence, whether you can disaggregate that by the number of correspondents in relation to a representation of a person or an individual – in other words, can you tell us whether there are 500 representations by the one organisation in respect of one person or whether there are 500 separate representations in respect of 500 individuals, or by group or class?

*Answer:*

Information on numbers of pieces of correspondence and cases to which they relate has been provided under cover of the Department's letters of 19 September 2003 (top 10 parliamentarians) and 23 September 2003 (top 10 individuals/community groups).

## QUESTION TAKEN ON NOTICE

### SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Senator Bartlett asked (Hansard page 34) – Are you able to give an indication of what the numbers are (cases which present circumstances which are themselves fairly exceptional and which are hard to quantify in a formal visa decision process) when you say they are very small?

*Answer:*

Between 1991-92 and 2002-03 inclusive there were 60705 merits review decisions in which the Minister of the time was able to intervene. Over this period the relevant Ministers intervened in 2308 cases. This is an indication that successive Ministers have seen the intervention powers as applying in only small numbers of cases.

## QUESTION TAKEN ON NOTICE

### SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

Senator Wong asked (Hansard page 40) – Are there occasions on which a request goes directly from the Minister's office to the Ministerial intervention unit?

*Answer:*

Departmental systems do not enable reporting on any instances where a request may have been passed directly from the Minister's office to an MIU.

The general practice is for all correspondence from the Minister's office to be sent to the Department's Ministerial and Executive Services Section where it is recorded in PCMS and then assigned to the relevant MIU for assessment against the Minister's Guidelines. DIMIA is not aware of instances of a request being forwarded direct to an MIU.