

McDonells Solicitors

ABN. 695 337 08320

SENATE SELECT COMMITTEE
ON MINISTERIAL DISCRETION
IN MIGRATION MATTERS
18/7/03

Our ref.: PF/Senate

Your ref.:

14 July 2003

Secretary
Senate Select Committee on Ministerial Discretion in
Migration Matters
Parliament House
CANBERRA ACT 2601

Dear Secretary

**RE: THE COMMITTEE'S INQUIRY INTO THE MINISTER'S USE OF THE
DISCRETIONARY POWERS UNDER SECTIONS 351 AND 417 OF THE MIGRATION
ACT 1958**

I do not want to comment directly on the first term of reference, namely the use that the Minister has made of these powers except insofar as particular cases serve to explain my views about other terms of reference.

**REFERENCES 2 AND 4 – THE APPROPRIATENESS OF THE DISCRETIONARY MINISTERIAL
POWERS**

I submit that it is indisputable that these powers or suitably amended powers must remain an integral part of the migration system in this country. The concomitant of this is that it is also indisputable that Ministers must be willing to exercise these powers in appropriate instances.

Historically, the essentially discretionary system of migration decision-making that existed in this country for many years until the 1980s and early 1990s has been altered to remove of the discretions from the decision-making. I would not want to argue against this approach or the policy which underlies it as it allows those dealing with the Department of Immigration & Multicultural & Indigenous Affairs to hope that they will not be dealt with in an arbitrary or unfair way. It goes further to allow many of them rights of review if departmental officers deal with them in ways that they regard as wrong or unfair.

However, a largely discretionless system works hardship on individuals in many instances since it cannot address all the circumstances of all cases that come before departmental officers. It is necessary, therefore, to provide a mechanism to overcome this and the Ministerial discretions to grant visas are appropriate to achieve this end.

Level 5, Enterprise House
630-634 George Street
Sydney NSW 2000 Australia

Telephone: **+61 2 9264 2133**
Facsimile: **+61 2 9264 6729**

www.mcdonells.com.au

PRINCIPAL SOLICITOR
Anne MCDONELL
BA LLB
Anne.McDonell@mcdonells.com.au

SOLICITORS
John DAVIES
SSCJ (Eng)

Paul HENSE
BA LLB BSW
Paul.Hense@mcdonells.com.au

Paul FERGUS
LLB
Paul.Fergus@mcdonells.com.au

IMMIGRATION CONSULTANTS
Morris ESKIN JP
Morris.Eskin@mcdonells.com.au

Silvia P LEVAME
MA (UNSW) LLB (Arg.)
Licensed Conveyancer
Silvia.Levame@mcdonells.com.au

At the same time, I think the Ministerial discretions are too rigidly tied to the pre-condition of a review decision by the relevant tribunal. Two cases where I successfully requested the Minister to intervene illustrate my point. In the first case, a father deserted a teenage boy and the boy's mother in their homeland in North Africa. When the mother came to Australia, she left her son in the care of his paternal grandmother. The Australian Embassy would not grant the boy a visa to travel to Australia with his mother. In Australia, the mother applied for and was ultimately granted a protection visa. Meanwhile, her son's grandmother died. The Embassy then granted him a visa to join his mother in Australia as she had become the only person able to and willing to care for him.

The son could not be joined to his mother's protection visa application because the Department had already taken its decision on her application when he arrived in Australia. Everyone recognised that he did not have an arguable case for a protection visa himself but there was no other suitable visa for which he could apply. He had, therefore, to go through the whole process of applying to the Department for a protection visa and to the Refugee Review Tribunal for review of the inevitable refusal. Otherwise, the Minister lacked power under section 417 of the Migration Act to intervene on his behalf.

In the second case, an elderly woman applied for an aged parent visa during a visit to Australia. The Department made a preliminary assessment of her application and placed her in the queue for a visa when her turn came in about four years. Before she reached the top of the queue, she suffered a massive stroke and was admitted to a nursing home in Sydney. When the Department eventually began to process her for the grant of a visa, she was so incapacitated that she could not even attend Health Services Australia for her medical and X-ray examinations. The Medical Officer of the Commonwealth went to her to conduct the necessary examinations.

Although she could never leave the nursing home, the Minister could not intervene to grant her a visa until the Migration Review Tribunal had affirmed the departmental decision to refuse her a visa on medical grounds. The Tribunal expedited the review to affirm the departmental decision. Everyone involved knew from the outset that the Tribunal could do nothing else.

In other instances, the Minister has discretions to allow certain actions in "compassionate and compelling circumstances". I submit that these two cases and others like them show that a similar discretion ought to be available to the Minister under sections 351 and 417 of the Act. I do not envisage that a "compassionate and compelling circumstances" discretion would be exercised often but it would be available to save the unnecessary costs and waste of resources caused by cases such as these.

REFERENCE 3 – THE OPERATION OF THE DISCRETIONARY CRITERIA

As the Committee will know, the Minister has published guidelines for the exercise of these discretions. I submit that this is an appropriate way in which to bring to the notice of the public the considerations that the Minister will take into account when considering individual cases.

Since the intention of the provisions relating to Ministerial intervention is to relieve occasional cases where the largely non-discretionary system causes unreasonable hardship to individuals, the discretion should be kept as free as possible. Provisions in the Act or the

Regulations constraining the Minister would run the risk of creating another source of rigidity and hardship for individuals.

I submit that the current Ministerial guidelines are appropriate as they place emphasis on the "public interest" in granting a visa to a person who is not otherwise eligible for a visa. In placing this emphasis, the guidelines also point appropriately to some factors – such as compliance with treaty obligations – which might give rise to a public interest. For these reasons, I would not favour attaching further conditions or criteria to the exercise of the powers.

At the same time, I acknowledge recent criticism of the current Minister's use of the powers in particular cases and suspicions that he has exercised the powers for improper purposes. Those criticisms, even if correct, are not arguments against the discretions but the way in which a particular person has used them. I do not think removal of the discretions is the appropriate remedy to prevent their misuse. That solution would merely deprive needy individuals of the benefit of a discretionary decision along with the undeserving.

In my submission, the reporting provisions contained in subsection (4) of sections 351 and 417 are a more appropriate means to prevent misuse of the powers by a Minister for Immigration. The reporting provisions allow essentially political questions of alleged misuse of statutory powers by the Minister to be dealt with in the political arena.

OTHER DISCRETIONARY POWERS UNDER THE MIGRATION ACT 1958

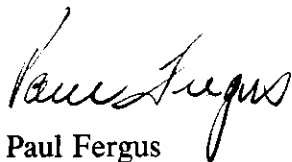
Finally, I note that the terms of reference are restricted to discretions under sections 351 and 417 of the Migration Act 1958. However, there are equivalent discretions under sections 391 and 454 in respect of decisions of the Administrative Appeals Tribunal. My comments apply to those discretions also.

CONCLUSION

I am happy to provide further information about these matters should the Committee wish me to do so.

Yours sincerely

McDonells Solicitors



Paul Fergus
Solicitor