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Senate Ministerial Discretion in Migration Matters Committee

18 August 2003

The Secretary
Parliamentary Committee on
Ministerial Discretion in Migration Matters
Parliament House
CANBERRA ACT 2600

Dear Secretary

As a practitioner with considerable experience in the immigration area, I am happy to provide the following submission to the Parliamentary inquiry. For further information in relation to myself, I refer to the further information in relation to my firm and myself contained on my firm website at www.ppilaw.com.au.

I write this submission in my personal capacity and not on behalf of the various organizations with which I am associated.

1. Since the inception of the current regulatory regime, I have been concerned about the implications of vesting unfettered discretion in the Minister. Whilst I recognize the policy reasons underlying the removal of the former section 6A(1)(e), I note that at the time the regulations were introduced with effect from 19 December 1989, the government had previously indicated that the previous regime would be enacted in full in the new regulations. The glaring omission to provide a regulatory regime for change of status under the "strong humanitarian or compassionate" grounds has in large part in my view resulted in the current problems.

   The government then introduced a so-called "humanitarian visa" – the Subclass 812 visa. However, this had limited duration and was not in the same terms as the previous section.

   An oft unreferred to very serious consequence of the new system was the direct channelling of all applicants seeking the exercise of humanitarian or compassionate discretion essentially through the protection visa system. This led to a significant blow-out in the number of applicants who sought refugee status and in my view, a bastardization of the term "refugee" in the public mind. This in turn has played a significant role in the problems affecting the refugee determination system in Australia, a fact too little acknowledged. It is time to de-link the compassionate and humanitarian program from the onshore refugee program.

I note the Refugee Council of Australia has for a considerable period advocated the introduction of a complementary protection system and I fully endorse the Council's submission in this regard. It is my understanding, that Australia stands unique in the developed world in having no effective system for complementary protection.

2. The Committee would be aware of the significant jurisprudential developments relating to the former Section 6A(1)(e) culminating in the important cases of *Pesava* and *Dahlan*, amongst others. There was a proliferation of applications seeking judicial review in respect of the interpretation of these words. However, that proliferation pales into insignificance against the current level of applications for judicial review in large part resulting from firstly, concerns generally with the refugee status determination system in Australia, more particularly with the poor quality of decision-making by too many members of the RRT, and secondly, because of the perception by many applicants that unless they are able to succeed as refugees, the prospect of success under, in particular Section 417 appeals to the Minister is very limited.

This view is in fact borne out by my professional experience. Although my firm has acted for a large number of applicants seeking Ministerial intervention under Section 417, I cannot recall one case where Ministerial approval has been granted on "humanitarian grounds" absent the compassionate grounds of a nexus to Australian citizens. It would be indeed interesting to know how many persons were approved under Section 417 on truly humanitarian grounds identified in paragraphs 4.2.1 and 4.2.4 of MSI 225. The current Parliamentary reporting provisions do not enable ready identification of such information.

3. The current system involves no meaningful transparency or accountability. In consequence, persons seeking to access Ministerial discretion are unable to determine the consistency of the exercise of Ministerial discretion pursuant to the published guidelines. The fact that there are no meaningful reports or explicit regulatory guidelines acts in fact as an incentive to applicants to pursue applications for the exercise of Ministerial discretion which has been in large part a reason for the blow-out in the number of applications.

As a practitioner in the area, it is difficult to understand what factual circumstances are likely to enliven a positive determination from the Minister, notwithstanding the existence of the published Ministerial guidelines. Whilst the existence of dependent minor children who are Australian citizens or permanent residents commonly results in a favourable decision, this is not always the case. Also the Minister seems to ignore pregnancy. Another glaring exception to this principle applies in the circumstances where applicants are step-parents of Australian citizen children. This would appear to be inconsistent with both the regulatory definition of the term "child" contained in the Migration Regulations and also the provisions of the Family Law Act which extend the definition of a child of the marriage to children of either party to the marriage who are living with the married couple.

4. The current legislative regime also contains the essential requirement that access is only available to persons who have first to obtain a determination from a review

tribunal. This leads to the lacuna where clearly deserving applicants who would otherwise meet the Ministerial guidelines are denied the ability to access Ministerial discretion where, for example, an appeal was filed out of time through no fault of the applicant. Committee members would be aware of the frequency of this particular problem. It is one that as a practitioner I encounter commonly. If Parliament considers that the Ministerial discretion plays an important catch-all role, then it seems hard to understand why the ability to access this discretion should be precluded to deserving applicants because of a strict legislative schema as an essential eligibility requirement.

In my practice I have regularly encountered persons whose claims would otherwise be eligible for Ministerial intervention with a strong likelihood of approval given previous decision-making examples in the light of the Ministerial discretion MSI, who have however been prevented from making the relevant application. A current example I have includes an Indian applicant who had made an application for a protection visa who had not received the Department's refusal letter and was out of time in lodging the RRT appeal. In the meantime, he has married an Australian woman and a child was born who is an Australian citizen. He finds himself effectively unable to access the Ministerial discretion. I query whether Australia's inflexible law here runs foul of its obligations under the Convention on the Rights of the Child.

5. Another problem which occurs with repetitive frequency relates to the inability of a repeat applicant for Ministerial discretion to be able to maintain lawful status by the grant of a bridging visa pending determination of that repeat Ministerial request. Whilst it is understandable that the regulations were amended to remove this right to overcome perceived abuse, the consequence remains serious for many applicants with meritorious potential Ministerial claims. Again, my office sees frequent examples of this problem and to cite just three recent cases:

Example 1 – A Bangladeshi applicant who had resided in Australia since 1984 arriving just after he turned 18, completing an engineering degree in Australia and establishing and running a successful restaurant employing some Australians until told to cease employment by the Department, had in the meantime seen all his family migrate to Australia through various migration programs, resulting in him being the only person in the family not an Australian citizen or resident. In the meantime, he had married an Afghan permanent resident and former refugee who had children from an earlier failed marriage who were his stepchildren. They had no relationship with their father and he played an important role in loco parentis to the children. As previous appeals to the Minister under Section 417 and Section 351 had been declined, he found himself ineligible to pursue any further Ministerial appeal and maintain bridging visa status, and he was denied a bridging visa by the Department on an extended departure basis pending an attempt to re-access the Minister's discretion. He had to leave Australia causing considerable distress to his spouse and her children and his elderly parents, as well as consequential significant disruption to his life and the life of those around him.

Example 2 – Applicant from the Philippines who had come to Australia on a temporary 457 employer-sponsored visa. Whilst here, he had met and married an Australian citizen of Filipino background who had migrated to Australia on the sponsorship of her then husband. She had two children under the age of 10 who lived with her and the applicant. He lost his employment and following an unsuccessful MRT appeal, sought to access Ministerial discretion under Section 351 on the basis of his spouse relationship, his obligations to his wife's two children from her first marriage and on the basis that his wife was now pregnant to him. It should be noted that the wife's former husband had no contact with his children and provided no financial support, leaving her alone with the two children and with no other family members in Australia. For some reason, the Minister declined the Ministerial appeal two weeks before the wife was scheduled to give birth. In fact, she gave birth to twins, one of whom had feeding difficulties post-birth. She is accordingly left with 4 Australian citizen children all under the age of 10, including twins, one of whom has feeding problems. We have been attempting to obtain Departmental agreement to refer the case back to the Minister. As at the date of this submission, we are still unsure as to whether the Department will agree to do so. The applicant's bridging visa is being extended on a weekly basis until a decision is taken as to whether or not to agree to resile to the Minister. By way of further problems for this family, the Department's Compliance unit, in what I consider to have been a very heavy-handed action, has twice turned up at the applicant's home unannounced, the first time shortly after the Minister declined to exercise his discretion and just after the wife had returned from hospital with her twins, and before the applicant was aware of the Minister's decision, to demand the applicant's immediate departure from Australia. Members can appreciate the great distress that this action caused the family.

Example 3 – A Filipino applicant who had applied for residence as the special need relative of her parents, both of whom are elderly and suffering from chronic and serious life-threatening illnesses requiring constant support of a member of the household, in the absence of which they would both require permanent hospitalization at great expense to the community. The special need relative application was refused, as was the MRT appeal on a legal technicality arising from the way in which the application had been prepared. The Tribunal found as a matter of evidence that but for this technicality, the applicant met all the other legal criteria and should have been granted the visa. An appeal to the Minister was unsuccessful and took an extended period. In the meantime, the only other relative of the applicant in Australia, a married sister with 3 young children who herself could not care for the elderly parents, had arranged to move with her husband to Queensland and the parents' health had deteriorated. We are still fighting with the Department to accept a repeat Ministerial request and the problem of her eligibility to be granted a bridging visa pending this determination remains undecided.

6. As will be evident from the above examples, another not uncommon and related problem relates to the difficulty of accessing the Minister under the current guidelines where an earlier application had been made. In this regard, it is significant to note that the regulations do not require a decision to be taken on that

earlier application. Thus if it was withdrawn, the eligibility to be granted a bridging visa pending the repeat application is not available.

7. Further, while the Act clearly countenances the Minister exercising the discretion in an unfettered way, current Departmental policy effectively vests the power as to whether or not the Minister will in fact see the application at initial application stage and in the event of there being a repeat application, to Departmental officers applying general guidelines in a manner which is both arbitrary and not transparent. Not uncommonly, worthy cases are not even referred to the Minister, because for example of the ineptitude or ignorance of the applicant or adviser. "Pot luck" should not be part of the system.

I am happy to attend the Committee to provide further submissions. As I am away for two weeks my secretary is signing this submission on my behalf.

Parish Patience Immigration

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