SUBMISSION

TO THE SENATE COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

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August 2003

INTRODUCTION

We are seeking political asylum in Australia since 1997. We hope that your consideration of our personal experience with the Minister and his Department could assist you in your inquiries about an appropriateness of use of the Ministerial power to intervene in immigration matters. All facts set out in this submission are well documented. Please do not hesitate to contact us if you need any

BACKGROUND

1. We, Sergey and Olga Dranichnikov,[1] had been working in Russia in our legal company that provided real estate and legal services. We tried to draw an attention of the authorities to widespread lawlessness and endemic corruption in the city. Our actions provoked a serious assault upon Sergey in which he was stabbed at the entrance of our apartment in 1994. He was so severely injured that he had to be admitted to hospital for urgent surgical operation. Our persecution by reason of our outspokenness and activity continued until we, including our minor daughter, fled Russia in January 1997.

2. In April 1997 the application for a Protection visa was lodged by Sergey Dranichnikov with the Department of Immigration and Multicultural Affairs. In his application Olga pointed out that she wants her separate refugee claims to be assessed under *the 1951 Refugees Convention* in her own right. On 14 April 1997, despite the Department's awareness about our new address, the letter requesting an additional information was sent to our previous address.

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[1] Please note, there is no need for disclosure of our names. Our motion to prevent publication of our names made in 1999 in the Federal Court matter *Dranichnikov v Minister for Immigration and Multicultural Affairs [2002] 60 ALD 482,* was strongly opposed by the Minister and, it affected other Court decisions in this respect.

3. On 20 May 1997 the opened letter was returned to the Department. At that very day the decision to refuse a protection visa, was made by a delegate of the Minister - without proper consideration of Sergey's refugee claims and ignoring the fact of an existence of Olga's refugee claims. Interestingly, the decision of a delegate states that our family should be sent back to Albania (?).[2] This decision was sent to our new address. As stated the finding of the Commonwealth Ombudsman investigation, the Department was not able to give any reasonable explanation of this incident.[3]

4. In 1997 the application was made to the Refugee Review Tribunal. At that time we sought an assistance of a migration agent and a solicitor Thomas Drakopoulos. A number of translated documents in support of our refugee claims was forwarded to Mr Drakopoulos shortly. He was asked to prepare a proper submission to the Tribunal emphasizing the fact that out claims were based mainly on political opinion. We asked also to provide the Tribunal with the precedents of common law supporting our claims. However, as states his rather anecdotal advice given on 23 July 1990, *'system of precedents is not applicable here'.*[4] He also gave a wrong advice that Olga could not apply her own refugee claims for consideration by the DIMA.[5]

5. The Migration Registration Agents Authority in its decision of 14 September 1999 found Mr Drakopoulos in breach of main clauses of the Migration Agents Code of Conduct in representation before the RRT. As we became aware later that Mr Drakopoulos was in direct conflict of interests with the Minister by being one of the owner of the Migration Institute of Australia Pty Ltd, which was appointed by the Minister to perform functions as a watchdog of immigration industry.

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[2] Decision of the DIMA of 20 May 1997.

[3] Letter from Commonwealth Ombudsman dated 28 April 2002;
DIMA Internal File Note of 10 April 2000.

[4] The letter from Russian-English Interpreter T. Downs dated 23 July 2000.

[5] Drakopoulos' File Note of 4 June 1997.

6. At the Tribunal hearing on 7 August 1998 Olga asked to be an applicant for a PV in her own right because she had her own history of persecution. The Tribunal Member assured that she will be treated as an applicant. At the same time, he refused to accept the documents presented at the hearing in support of the application.[6]

7. On 11 August 1999 the Tribunal made its decision affirming the decision of a delegate of the Minister without given an opportunity to submit the additional documents and submission in support of Olga's claims. It its decision she was referred as to a wife and a witness despite the Tribunal's statements at the hearing.

8. Aggrieved with the Tribunal decision which was delivered only in two working days after the hearing without providing any opportunity to submit the additional documents and submission, Sergey approached Sydney Registry of the Tribunal, explained this situation. The Registry officer provided him with the special form and advised to lodge the second application to the Tribunal. On 8 September 1999 the application was lodged, the new file number was allocated, and we have been asked to provide the Tribunal with additional documents in support of our application for review.

9. After 5 months of our correspondence with the Tribunal, on 21 January 1999 the Tribunal notified us that the Tribunal had no jurisdiction for review of our second application. We were advised urgently attend the DIMA office.

10. On very next day we approached the DIMIA office and were shocked by overwhelming news that all these 5 months we were unlawful, and we should be sent to the prison by expression DIMA officer Glen Andersson *'to enjoy to play ping-pong with prisoners because in Brisbane there is no detention centre'*, if we do not sign the request for Ministerial intervention under s 417 and s 48B of the Migration Act.

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[6] Transcript of the RRT hearing of 7 August 1998.

11. The said request was signed, then the DIMA officer imposed to us a Bridging Visa E without permission to work. At this day Sergey enforced left his job as a taxi driver. Our family with small daughter was thrown to a appalling destitution. We were enforced to beg shelter and food because we had no any other source of income.

12. During this period of time, our family suffered a lot. In June 1999 Olga was admitted to Mater Hospital by ambulance service in life-threatening condition because of tremendous stress. All our attempts and pleads to the Minister Ruddock to make an intervention in our matter, were left without any attention. A number of documents were sent to the Ministerial office in accordance with *the 1999 Ministerial Guidelines for Identification of Unique and Exceptional Cases Where it May be In the Public Interest to Substitute a More Favourable Decision*, including letters from Queensland Program of Assistance for Survivors Torture and Trauma, medical reports, petitions from Australians, letters in support from the Australian Parties, non-governmental and international organisations, evidence of our education, etc.

13. Our numerous appointments with the DIMA State Director Ms Sykes had no any effect on her. Our pleas to permit us to work even 20 hours in a week were ignored. Our daughter wrote the letter to Ms Sykes describing her experience in Russia and asking to help us. However, we were told in presence of our Australian friends that she *'has no sympathy toward us'*.

14. We had two personal meetings with Ruddock appealing to him to intervene in our matter because of these particular circumstances and incorrect actions of his officers. His promised to look into our matter but his promises were only promises.

15. We had no choice like to commence the Court proceedings in the Federal Court of Australia seeking the grant of an extension of time for consideration of our application for review of the DIMA and RRT decisions. As far as our separate applications for legal aid were declined, we represented our matters by ourselves.

16. On 7 February 2000 the Federal Court delivered its judgment[7] dismissing our main application but stating that we were illegally deprived of a BVA with permission to work. On 24 February 2000, the DIMA admitted their error and reinstated our Bridging Visa A.

17. On 10 February 2000 we again sought Ministerial discretion for intervention in our matter. On 14 February 2000 we undertook a trip to Canberra with help of our friends who collected money, to see Mr Ruddock personally and ask his mercy for intervention.

18. As far as we are aware, that Ministerial discretion is non-compellable and non-reviewable, we had no choice as to seek challenge of the DIMA and RRT decisions in the Courts.

19. Notably, we kept sending our requests for Ministerial intervention during all these time-consuming and costly proceedings in the Courts. Many times we asked the Minister to settle the matter permitting to us to lodge the second application or substitute the RRT decision - in order that the money of Australian taxpayers will be saved.

20. However, the correspondence sent on 26 November 2001 by the Minister's Secretary Kay Patterson states that *'it would be inappropriate for him to do so at this time because **you are currently engaged in litigation process'**.* [Emphasis added]

21. After the judgment delivered in favour of the applicant in *Dranichnikov v Minister for Immigration and Multicultural Affairs*[8] concerning s 48 A bar to family members of the applicants for a PV to lodge the application in their own right, Olga asked the Minister to exercise his power in Sergey's request for Ministerial discretion lodged in 1999, instead of going through stressful and time-consuming process of assessment of her own application for a PV. Olga enclosed the documents proving the deterioration of health due to prolonged period of her suffering.

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[7] Dranichnikov v Minister for Immigration and Multicultural Affairs [2000] 60 ALD 482

[8] Dranichnikov v Minister for Immigration and Multicultural Affairs 769 FCA 22 June 2001

22. In her letter of 3 July 2001 Olga stated that this would **in public interest** to save time of Minister's officers and money of Australian taxpayers. Olga referred to the speech at the meeting in the Australian Institute of Administrative Law delivered by Ruddock on 12 November 1997, when he said: *"To give you an idea of the cost involved, over this four year period litigation would have costs my Department approximately $20 million. That does not include the cost of running the courts or legal aid. This means that each successful application costs around $1-million each.* ***Suffice to say my non-compellable ministerial discretion costs far less than 1 million a case!".***[9] *[Emphasis added]* In the light of recent allegations brought by the Labor Party about abuse of Ruddock's discretion in immigration matters, the said Ruddock's statement sounds very suspicious. Living in Sydney Olga was approached by one of the member of Jewish community with offer to pay $50,000.00 in order to quickly resolve our immigration matter.

23. On 8 May 2003 after detailed consideration of the application for review the Full Bench of the High Court of Australia in the matter *Re: Minister for Immigration and Multicultural and Others Ex parte Sergey Dranichnikov*[10] issued the orders absolute stating that the RRT misstated Sergey's claim for protection and ordered to quash the DIMA and RRT decisions made in 1997 and 1998 respectively.

24. On 30 May 2003 Sergey sent the request to the Minister hoping that the rule of natural justice will compel him to intervene to exercise his public interest power.

25. On 26 June 2003 Mr Ruddock notified that no further action will be taken because it would be inappropriate for him to do so at this time because the case is currently being considered by the High Court.

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[8] [2002] FCA 769 [Lee, Finn and Merkel JJ]

[9] Transcript of Speech of Philip Ruddock "Proposed Changes to the Administrative Review Scheme", Melbourne, 12 November 1997.

[10] HCA [2003]HCA 26 [8 May 2003)

26. In period from 6 June to 8 August 2993 we sent the High Court judgment along with additional submission and documents in support of our application for a PV, which by the Court order the Tribunal had to reconsider. However, only 8 August 2003 the Tribunal sent the letter notifying about new file number of our case.

27. On 25 June 2003 the High Court of Australia heard Olga's application concerning her status and her right to be assessed under *the Refugees Convention,* which was abolished by new amendments into s 36 and 48A of the Migration Act 1958 after the Full Federal Court decision of 2001. In their presumed judgment Justices Kirby and Gummow stated: *"Counsel for the Minister made it clear that if , following the decision of the Full Court of this Court, Mr Dranichnikov succeeds before the Refugee Review Tribunal, Mrs Drancihnikov, the present applicant, will be entitled to the benefit of that decision"*[11].

28. In case, if the Minister *or* the Tribunal would resolve our status prior to the hearing on 25 June 2003, there will be no any wastage of time and money on legal costs by both parties. Justice Kirby sated that there were so many other cases to be heard by this Court, and as far as we had 'a big win' in the Full High Court, this matter would never be arisen. However, the Minister does not care about these issues, as far as money goes not from his personal pocket.

29. From 26 May 2003 we have made a number of requests to the Minister asking to provide us with information how much money of Australian taxpayers was spent by the Minister in pursuing our numerous court matters. [Please see an **Annexure "1"**] However, there is no any response from the Minister.

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[11] Transcript of the proceedings dated 25 June 2003 in the matters *Minister for Immigration and Multicultural Affairs; Ex parte Olga Dranichnikov, B56/2002; Olga Dranichnikov v Minister for Immigration and Multicultural Affairs, B105/2002*

TERMS OF REFERENCE

(A) THE USE MADE BY THE MINISTER FOR IMMIGRATION OF THE DISCRETIONARY POWERS AVAILABLE UNDER SECTIONS 351 AND 417 OF *THE MIGRATION ACT 1958* SINCE THE PROVISIONS WERE INSERTED IN THE LEGISLATION

1. The Ministerial discretion power was implemented by Parliament in 1989 in order to give to the Minister for Immigration a special power to overrule the Regulations which could produce many absurd unforeseen outcomes. A former immigration minister, Senator Robert Ray, said he did not believe in using the ministerial discretion powers, and kept them only as a "reserve power"[12].

2. Indeed, as shows the DIMIA statistic figures, prior to 1996 the Ministerial discretion power was used not in many instances. Although there is no information available about actual number of requests made to the Minister until 1996, we could assume that there was only a small number of such requests. Intention of Parliament of that time was clear that the Minister's power for discretion should be thoroughly scrutinized by Parliament by obliging the Minister to specify his reasons and particular circumstances of the matter attracting public interest for intervention.

3. The fact that in 1994 Labor government issued 42,700 humanitarian visas for asylum seekers from China, Yugoslavia, Shi Lanka and other refugee country shows that there was no need to seek special discretion of the Ministerial power.

4. However, since 1996 the Minister for Immigration Ruddock presented a lot of amendments to *the Migration Act 1958* and *the Regulations 1994*, which made the procedures for determination for a refugee status more complicated. As a result, many of genuine refugees were deprived of fair hearing of the refugee claims under *the 1951 Refugees Convention*. Further restriction to strip away the right of asylum seekers aggrieved with the DIMIA and RRT decisions to appeal to the courts also well contributed to flaws in immigration system.

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[12] *"Merciful Ruddock Gives More Rejected Migrants a Lifeline"*, Sydney Morning Herald, 31 January 2001

5. As far as the immigration legislation does not stipulate a grant of visa under humanitarian criteria, many unsuccessful asylum seekers with valid humanitarian claims are enforced to seek the Ministerial intervention as the last remedy.

6. The vast resources used by the Minister for consideration of many thousand of the requests for his discretion could be more effectively used in improving of the determination process under *the Refugees Convention*. The lack of transparency about why decisions have been made by the Minister can lead to the doubts about the integrity of the Ministerial intervention process.

(B) THE APPROPRIATENESS OF THESE DISCRETIONARY MINISTERIAL POWERS WITHIN THE BROADER MIGRATION APPLICATION, DECISION-MAKING, AND REVIEW AND APPEAL PROCESSES

Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision dated 31 March 1999

7. We respectfully submit to the Committee that as far as the said Guidelines of 1999 does not contain any clauses which state that the Court proceedings may affect use of the Minister public interest powers, we allege that the Minister abuses his public office power. Thus, the Minister's letters to us states that until our matters are considered by the Court, he cannot use his **public interest power**. We suppose that there is more appropriate for the Minister to waste a lot of money of Australian taxpayers and allow to genuine refugees suffer, than to intervene in the matter when public interests (including reputation and economical interests) of the Australian community at stake. As states many allegations the Minister acts when the matter really concerns his personal *or* "ministerial interest".[13]

[13] *Please see: "Ruddock Defends His Role"*, The Age, 30 October 2001; Meaning of 'Public interest' - Welfare for general public and the Commonwealth". The Cambridge Dictionary; Criteria 4004 "Public Interest Criteria", the Migration Regulations 1994, Sh 4; Tuuhoko v MIMA [2002] FCAFC 4103

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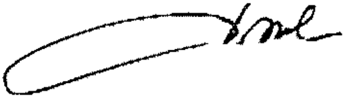
8. A solicitor P. Fisher in his paper *'Requests for Humanitarian Intervention under s417 of the Migration Act 1958'* of 11 August 2002 refers to the fact, that the current Minister has occasionally acceded to a request to intervene of his own accord. Thus, Mr Ruddock stated that instead of spending many thousand of dollars in the Courts to get different result, it would be more appropriate to ask his discretion. However, as shows the details of our particular matter, there is not the case.

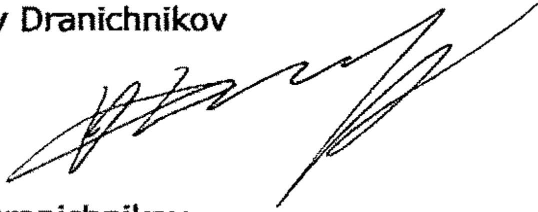
CONCLUSION

On the basis of the foregoing, we would like to ask the Committee to investigate an appropriateness of use of the Ministerial discretion in immigration matters.

Yours sincerely



Sergey Dranichnikov



Olga Dranichnikov

ANNEXURE

Sergey & Olga Dranichnikov
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26 May 2003

PHILIP RUDDOCK MP
THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

Suite MF 40
Parliament House
Canberra ACT 2600

BY FACSIMILE: (02) 6273 4144 (four pages)
& BY MAIL

Dear Sir

We refer to the following matters:

1) Dranichnikov and Department of Immigration and Multicultural Affairs [2002] AATA 830 (20 September 2002); the Administrative Appeal Tribunal;

2) Dranichnikov v Minister for Immigration and Multicultural Affairs [2000] FCA 63 (7 February 2000); the Federal Court of Australia

3) Dranichnikov v Minister for Immigration and Multicultural Affairs [2000] FCA 1801 (14 December 2000); the Full Federal Court of Australia;

4) Dranichnikov v Minister for Immigration and Multicultural Affairs; Q89/2000 (29 January 2001); the Federal Court of Australia;

5) Dranichnikov v Minister for Immigration and Multicultural Affairs [2001] FCA 199 (2 March 2001); the Federal Court of Australia;

6) Dranichnikov v Minister for Immigration and Multicultural Affairs & Others; [2001] FCA 769; (22 June 2001); the Full Federal Court;

7) Minister for Immigration and Multicultural Affairs v Dranichnikov; B61/2001; the High Court of Australia;

8) Dranichnikov v Minister for Immigration and Multicultural Affairs; B 96/2000; [2003] HCA 26 8 May 2003; the High Court of Australia;

9) Minister for Immigration and Multicultural Affairs; Ex parte: Sergey Dranichnikov B44/2001 [2003] HCA 26 (8 May 2003); the High Court of Australia;

10) The Applicant B7 (Sergey Dranichnikov)/ 2003 v MIMA (No B7 of 2003);

11) The Applicant (B8Sergey Dranichnikov)/ 2003 v MIMA (No B8 of 2003).

As you are well aware, the above tribunal and court matters with yours direct involvement, have been unsuccessful for you.

1. In this regard, we ask you to settle the matters with Sergey and Olga Dranichnikov at yours earliest convenience for our mutual full and final satisfaction.

2. We make also the following requests as the Australian taxpayers (in the full meaning of this word):

a) How much money of the ordinary Australian taxpayers have been spent by you in your capacity as the Minister for Immigration and Multicultural and Indigenous Affairs to pursue a number of the legal proceedings with self-represented onshore asylum-seekers, despite a number of attempts made to you to settle the matter at its earlier stage;

b) How much money of the Australian taxpayers you are going to spend in pursuing the further legal proceedings:

1) Dranichnikov v Minister for Immigration and Multicultural Affairs; No B105/2002; the Sex Discrimination Act 1984; the High Court of Australia;
2) Re: Federal Magistrate Baumann; the Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte: Olga Dranichnikov No B56/2002; the High Court of Australia.

It should be noted that you have no chance for success, especially in the light of the recent High Court matters* concerning the new controversial amendments to s 48A of *the Migration Act 1958* initiated by your in 2001 with purpose to overcome decision in *Dranichnikov v Minister fro Immigration and Multicultural Affairs [2001] FCA 769; 22 June 2001 (Lee, Finn and Merkel JJ)* and to continue discriminate the members of the family units of the applicants for a protection visa by using *the Migration Regulations 1994* which clearly overriding the provisions of the *the Migration Act 1958.*

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* *Please see Re: Minister for Immigration and Multicultural and Indigenous Affairs and Another; Ex parte: Applicants S 134/2002 195 ALR at [50]-[102] by Gaudron and Kirby JJ;*
Applicant S 191 /2002; Ex parte - Re MIMIA (21 November 2002); transcript of proceedings in the High Court of Australia

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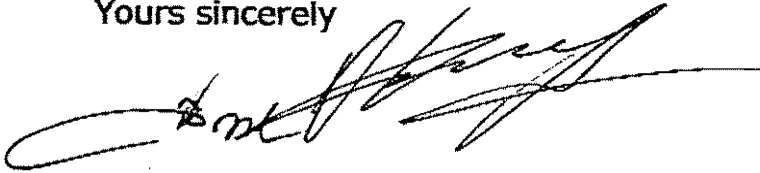
3. If you are in position to make any arrangements in settling the matter, we expect that you will do it at yours earliest convenience but no later than by 16 June 2003.

If not, we have no choice but to make an appeal to the Australian public with raising an allegation concerning your abuse of public office and direct persecution of our family for disposing your unlawful administrative policy against the onshore asylum-seekers in Australia.

Thank you for your attention to this matter.

Yours sincerely



Sergey and Olga Dranichnikov