



CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

A SPECIAL REPORT

Concerns About Ministerial Discretion in Migration Matters

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Introduction

The Catholic Commission for Justice Development and Peace Melbourne (CCJDP) has prepared this special report which focuses on the powers inherent in Section 417 of the Migration Act. This section of the Act provides the Minister of Immigration with discretionary powers in considering humanitarian claims for protection. The powers are subject to a current parliamentary Senate inquiry.

The Commission has drawn on the work of Johanna Stratton whose recent study of S417 illuminates its current use and problems arising with the power.¹ We have also consulted with legal academics and refugee lawyers in preparing this report.

This report is broken into three sections dealing with:

- 1. Catholic Social Teaching**
- 2. Current Use:** Discussion about how S417 differs from a humanitarian system; how it is applied to asylum claims; how the Minister has chosen to exercise his discretion; patterns contained in recent decisions; and problems that arise.
- 3. Suggested Improvements**

Section 1. Catholic Social Teaching

The CCJDP aims to help educate and give leadership to the Catholic and wider community in the gospel message of justice and in the social teachings of the Church. The Commission's Charter requires it to work for justice in public, local and national structures. It seeks to achieve these ends through research, analysis, working with parish networks, public forums, in schools and in the media. It actively seeks to explore ways that social justice can be improved in society and in the performance of mechanisms that have a role in public life. The CCJDP has raised the issue of violations of human rights of asylum seekers in a variety of fora including the media, the lobbying of parliamentarians and producing documents. The CCJDP monitors developments regarding the human rights of asylum seekers via the Australian Human Rights Register. The Register records entries from non-governmental organisations and the media about development on human rights. The CCJDP published a special Refugee Edition of the Register in December 2001.

¹ Johanna Stratton. 'Humanitarian Intervention in the Public Interest? A Critique of the Recent Exercise of s 417 Migration Act 1958 (Cth), LLB Honours Program, faculty of Law, ANU. 4 November 2002.

As well as the internationally accepted human rights conventions and standards that will be referred to throughout this submission, the CCJDP uses the principles of Catholic social teaching to test the justness of public policy.² Pope John Paul II has voiced his concern about States having “contempt for the fundamental human rights of so many people, especially children...”³

Additionally, the Church has clear positions on the rights of asylum seekers. Pope John Paul II points out that refugees, however they might arrive in a country – illegally or not - still have their human rights:

*His irregular legal status cannot allow the migrant to lose his dignity, since he is endowed with inalienable rights, which cannot be violated nor ignored.*⁴

Moreover, the Catholic Church does not endorse sweeping State powers to detain all asylum seekers. The ‘Pontifical Council for Pastoral Care of Migrants and Itinerant People’ warned that:

*A person applying for asylum should not be interned unless it can be demonstrated that he or she represents a real danger, or there are compelling reasons to think that he or she will not report to the competent authorities for due examination of his or her case. Moreover such people should be helped with access to work and to a just and rapid legal procedure.*⁵

² For example Catholic social teaching is concerned that public policy does not undermine the primacy of the family: “[T]he individual, the family and society are prior to the State, and...the State exists in order to protect their rights and not stifle them.” Catholic Social Welfare, Australian Catholic Social Welfare Commission, Vol.1, No.1, July 1992.

³ John Paul II Novo Millennio Ineunte: At the Beginning of the New Millennium, Strathfield, 2001, p.68.

⁴ John Paul II, Message for World Migration Day 1995-6, Undocumented Migrants, 25 July 1995 p.2.

⁵ ‘Cor Unum’: Refugees: A Challenge to Solidarity, 1992, 11.

Section 2. Current Use

2.1 What is S417 and is it a 'system' for dealing with humanitarian claims?

Every year many thousands of people apply to the Minister for Immigration for special consideration of their circumstances and to be allowed to remain in Australia.⁶ Under Section 417 (hereon S417) of the Migration Act 1958 (Cth) people seeking asylum have an opportunity to have their claim for asylum considered by the Minister for Immigration. This section states, in part:

If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the (Refugee Review) Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.

The procedures for processing applications under S417 and a description of the power of the Minister are set out in Migration Series Instructions of 31 March 1999. Grounds for consideration include human rights conventions such as the Convention Against Torture (CAT), the Convention on the Rights of the Child (CROC) and the International Convention on Civil and Political Rights (ICCPR). All consideration under these human rights treaties goes beyond the specific criteria outlined in the Refugee Convention, as do other S417 criteria which include "exceptional economic, scientific, cultural or other benefits to Australia." [These criteria are discussed further in section 3.]

Such S417 claims for asylum seekers are invariably a last resort, as claimants must have had a negative decision under the assessment process for protection under Refugee Convention criteria which are considered under s36 of the Migration Act. This means that people making a claim to the Minister under S417 will have already been through a primary decision process with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and then the Refugee Review Tribunal (RRT) and failed at both levels.

The presence of the S417 on-shore, appeal mechanism acknowledges that people do have legitimate reasons for not returning to their country which may fall outside the Refugee Convention's specific criteria. The global proliferation of wars and a wide

variety of discrimination outside the scope of the Refugee Conventions have meant that individuals often have compelling cases on humanitarian grounds for being allowed to stay. The S417 appeal is the only mechanism for dealing with Australia's obligations under human rights conventions it has signed, and it is quite limited and arbitrary as a means of protection. Nevertheless, human beings often find themselves in situations of fear and persecution beyond the strict definitions of the Convention and S417 allows consideration of those circumstances. It is a case of the broad reality of persecution being larger than the narrow focus of the Convention.

It is unfortunate that many people, who are potentially eligible for consideration of their cases on humanitarian grounds under S417, cannot have their particular circumstances considered earlier. They must wait until after their claim has failed under the Refugee Convention based criteria used by the Department of Immigration and the RRT. Such delay is unnecessary, causes additional suffering for the person making the claim, clogs up the bureaucracy and wastes taxpayer dollars by putting him or her through processes that are not suitable to their circumstances.

Many countries have systems that take into account humanitarian claims alongside the Refugee Convention claims. These countries include Canada, the Netherlands and Sweden, the UK (exceptional leave to remain) and the US. Australia's S417 Ministerial Discretion is not the same as these countries' 'complementary' protection systems as it is more limited and unique in that it concentrates decision making authority in the hands of one person with unfettered discretion – the Minister. This is not a system as such; nor does it provide a humanitarian visa class, or a complementary protection option.

Australia's focus on a single minister making decisions about humanitarian claims stands in contrast to systems in other countries. The Refugee Council of Australia described that during 1997-8 period, Australia granted 64 S417 approvals, while Denmark granted 3570 comparable approvals (in that there were circumstances outside the Refugee Convention criteria which meant the person was allowed to remain); Sweden 7110 comparable approvals and 4740 in the UK.⁷ The Refugee Council for Australia further observes that in 2001, Australia received 12,366 new asylum applications and Denmark received 12,512. Australia granted Convention refugee status to 30.4% of cases. Denmark to 21.2%. It is when one looks at the

⁶ For instance the Sydney Ministerial Intervention Unit handles around 7000 requests, Melbourne 1800, and Perth 800.

⁷ Refugee Council of Australia, 'Position Paper on Complementary Protection', May 2002.

overall protection rates (which combine refugee status and complementary protection) that the real divergence occurs. In Australia the figure remains at 30.4%, however, in Denmark, 52.6% of applicants were granted permission to remain.⁸

Australia once had a complementary protection system. However, when Section 417 commenced in July 1993, Australia abolished its humanitarian visa class (the former 6A-(1) (e)) which provided an onshore humanitarian visa class if there were 'strong compassionate or humanitarian grounds'. In doing so, the scope for judicial intervention in review of decisions made at ministerial level was stopped.⁹

The S417 power is non-delegable, non-reviewable and non-compellable and therein lies the problem. While such powers are present in the Migration Act they are unusual in the wider legislative context. As mentioned above it is assumed that a reason for having Ministerial discretion is to remove the processes of considering humanitarian and other exceptional cases from the purview of the courts. There is no obligation for the Minister to consider whether to exercise the power under S417. The Full Federal Court has affirmed this.¹⁰ Moreover the Full Federal Court has held that the Federal Court has no jurisdiction to review conduct of DIMIA officers working on S417 matters before the Minister has made a decision. Moreover, as described below, the Minister is able to evade detailed reporting to Parliament. There is a lack of transparency and accountability in how the Minister makes his decisions. Parliament ought to use its power to regularly scrutinise S417 decisions to ensure public accountability without having to resort to the means of a Select Inquiry.

⁸ Refugee Council of Australia, Australia's Refugee and Special Humanitarian Program: Current Issues and Future Directions views from the community sector (February 2003) p46:

⁹ Johanna Stratton, op cit, P.7.

2.2 How has the Minister used the S417 powers?

Hansard shows that the number of requests to the Minister for intervention have remained high.

Section 417 (Ministerial intervention power to substitute a more favourable decision for an RRT decision)

Financial Year	96/97 ^	97/98 ^	98/99 ^	99/00 ^	00/01 ^	01/02 ^
(a) Total number of requests for intervention	*	*	*	2100	2890	3681
(b) Successful interventions**	79	55	154	179	260	199
(c) Requests where power not exercised**	947	3122	3838	4100	2306	3309

^ The statistics under each year represent annual activity figures only.

* Information not available.

** Note: decisions taken in relation to the exercise of the power are not necessarily taken in the same financial year as the requests are received.

An authoritative study, conducted in 2002 by Johanna Stratton, examines a collation of statements to parliament about use of S417 between 1994-2002. She found that the current Minister's use has been "erratic", his rate of intervention ranging from 7% to 20% of total number of applications per year. The number of visas granted by the current Minister has fluctuated from 55 in 1997-98 to 374 in 2000-01. She concluded that it was difficult to deduce the percentile chance of obtaining a positive decision. She observed, "Generally speaking, legal advisers should perhaps warn clients that the 'success rate' is low. It is noteworthy that in the years 1997-99 when requests were most numerous, the Minister was least charitable in granting visas."

¹⁰ Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs (1996) 137 ALR 103. Cited in Stratton, op cit. p. 7.

Table 1 Statistics relating to number of positive decisions¹¹

1	2	3	4	5	6	7	8	9
Year	Total number of considerations	Total number of requests from the public	Number of requests referred to the Minister	Number of requests not referred to the Minister	Number of times discretion exercised	Number of visas granted	Rate of intervention ¹²	S417 requests as a % of all failed RRT applications
1993/94	-	n/a	-	-	-	42	-	-
1994/95	-	n/a	-	-	51	63	-	-
1995/96	-	n/a	-	-	69	68	-	-
1996/97	-	n/a	-	-	76	67	-	-
1997/98	-	4 072	-	-	35	55	-	64.3%
1998/99	-	4 236	-	-	154	202	-	62.0%
1999/00	12, 400	2100	1280	246	187	232	14.6%	36.3%
2000/01	9,224	2890	1718	862	302	374	21.8%	51.9%
2001/02	9,422	3681	2870	932	199	306	7.0%	72.3%

- ‘ - ’ Denotes the information is not available from DIMIA.
- Column 2 comprises cases identified by the RRT as within the Minister’s Guidelines; departmentally initiated assessments; requests by the Minister for further information; requests for the exercise of the Minister’s S417 power.
- Columns 2 and 3 include multiple requests about the same case (repeat requests by the applicant or letters of concern from third parties).
- Column 9 1997-99 includes a small number of withdrawn applications and some RRT applications determined to be invalid.
- The above statistics must be qualified before any meaningful commentary can be made. First, the S417 applicants for each year are not necessarily the same persons who had their refugee claims refused by the RRT in that year. These statistics are ‘annual activity’ rather than cohort figures. Second, the author collated and calculated the statistics in italics by hand-counting the Statements to Parliament over the period 1994-2002. Therefore these figures have not been officially verified.

2.4 Use of Visa Subclasses

Another feature noted by Stratton is the types of visas issued after a S417 decision was made. Minister Ruddock typically has issued up to 30 different subclasses of visas. From October 1996 to November 1998, Minister Ruddock tended to grant a combination of permanent Protection (866) and temporary Spouse (820) visas. From February 1999 to August 2002, the subclasses of visas diversified. The temporary Spouse visa increased to become the main one issued while the permanent protection Visa dropped from being granted in nine out of ten cases, to one in twenty five cases. The number of temporary visa grants increased and these include the temporary safe haven (449), temporary humanitarian concern (786) and global special humanitarian (202) subclasses.

¹¹ Stratton, op cit. p.20. compiled from various parliamentary sources.

Table 2 Distribution of the Six Most Prevalent Visas Granted 1998-2002¹³

Tabling date	Nov 1998	Feb 1999	Aug 1999	Feb 2000	Aug 2000	Feb 2001	Aug 2001	Feb 2002	Aug 2002
Visa Type as Percentage of Overall Visa Types Issued When Discretion Exercised									
Temporary Spouse 820	9%	57%	31%	28%	43%	48%	42%	52%	57%
Permanent Close ties 832	0%	0%	0%	0%	0%	6.6%	16%	18.5%	13.7%
Permanent Remaining Relative 835	0%	0%	0%	0%	0.8%	8.7%	8%	7.4%	4.3%
Temporary Protection 785	-	-	-	0%	1.6%	1.6%	3%	1%	0.85%
Permanent Protection 866	91%	30%	50%	30%	36%	24%	12.7%	6%	4%
Permanent Spouse 801	0%	1%	0%	0%	3%	3.3%	2.5%	0%	5%

' - ' Temporary Protection Visas were not introduced until October 1999.

Table 3. Number of Protection Visas Granted under S417 1993-2002¹⁴

1	2	3	4	5
Year	Overall Number of visas granted	Number of Protection Visas granted	Protection Visas granted as a % of Overall visas	Number of Protection Visa decisions
1993/94	42	42	100%	-
1994/95	63	63	100%	-
1995/96	68	68	100%	-
1996/97	67	107	*	63
1997/98	55	64	*	42
1998/99	202	108	54.5%	67
1999/00	232	-	≥ 33.6%	78
2000/01	374	77	20.6%	67
2001/02	306	-	≥ 4.0%	12

' - ' Denotes that DIMIA were unable to provide statistics.

* Denotes that the statistics provided in the given year does not correspond so a percentage calculation was not possible.

It is unclear why the Minister has moved from granting two types of visa subclass to around thirty. From the predominance of the Spouse visa, it is apparent the Minister

¹² Calculated by dividing the number of times discretion was exercised by the total number of requests referred to the Minister for the same period.

¹³ Stratton, op cit. p.22

¹⁴ Cited in Stratton, op cit, p.24.

is finding compelling grounds if a person is married to an Australian citizen or has other family here. Other possibilities for the decline in the use of the protection visa may be a political aim of the Minister to signal that such protection will not be provided as a last avenue of appeal. This would be in keeping with the Government's strategy with signalling to the electorate that Australia is not a 'soft touch' for victims of persecution from other countries. Refugee lawyers believe that it is rare for the Minister to exercise discretion under the humanitarian guidelines such as the CAT, ICCPR and CROC, and more common where there are compelling links to Australia.

This trend is not without risk. Stratton cites media reports which describe how in August 2002, Bilal Ahad, an 18 year old failed asylum seeker from Pakistan, was shot dead twenty days after being deported to Pakistan after his S417 application was rejected by an officer of the Ministerial Intervention Unit as falling outside the guidelines.¹⁵

Countries of Origin in S417 Decisions

The top eighteen countries for favourable S417 decision also span an eclectic range. Despite Afghanistan and Iraq collectively producing over 4 million refugees in the last decade, and being first and second in receiving protection visas in Australia; nationals from these countries do not feature in the top 18 countries under S417 decisions. By contrast, Lebanon, a non-refugee producing country is first in S417 decisions.

¹⁵ Cynthia Banham, 'This Man asked for our help – now he's dead, *The Sydney Morning Herald*, 9 October 2002.

Table 4. Number of Visas Granted under S417 by Nationality 1993-2002¹⁶

Nationality	Total 1993-99	Total 00-01	Total 01-02	Total 1993-2002
1. Lebanon	38	33	28	99
2. PRC	56	25	10	91
3. Fiji	36	13	23	72
4. Sri Lanka	26	26	18	70
5. Indonesia	17	23	20	60
6. India	22	10	8	40
7. Russian Federation	6	19	6	31
8. Cambodia	10	6	14	30
9. Iran	14	9	7	30
10. Philippines	8	15	6	29
11. East Timor	n.a.	6	19	25
12. Turkey	10	6	9	25
13. Tonga	2	8	13	23
14. Colombia	4	5	11	20
15. Somalia	5	4	11	20
16. Yugoslavia	n.a.	11	7	18
17. Ethiopia	3	3	8	14
18. Palestine	0	0	9	9

Stratton's study observes that despite the role of the DIMIA officer in recommending a number of visa subclass options which most closely align with a person's circumstances, the Minister, at times, grants visas unrelated to DIMIA case officer's options. The Study quotes an anonymous officer from DIMIA's Ministerial Intervention Unit:

unless you are able to be there at the time [the Minister] makes the decision, to be in his mind, its impossible for us to even give you the slightest hint as to why the Minister may decide that a particular type of visa should be granted.

A doubt remains as to whether S417 can ever be said to serve procedural fairness for the people who are seeking protection.

Tracking the extent of this problem is difficult at present however, as the quality of information provided to the Parliament about the reasons for S417 decisions has deteriorated.

¹⁶ Cited in Stratton, op cit. pp.25-6. Drawn from *Submission No. 69E*, DIMIA 1678-9 to Senate Legal and Constitutional References Committee, *Senate Inquiry into Australia's Refugee and Humanitarian Program*, (1999).

Decline in quality of S417 reports to Parliament

Under S417 the Minister is required to provide to parliament a statement containing:

- a) the RRT's decision
- b) the decision substituted by the Minister
- c) the reasons for the Minister's decision, and the Minister's reasons for believing the decision to be in the public interest.

Under Minister Ruddock there has been a decline in the amount of information provided to Parliament describing reasons. Since November 1998 to the present, there seems to be a 'standardisation' of the reason's applied to:

Having regard to the applicant's particular circumstances and personal characteristics, I think it would be in the public interest to allow him to remain in Australia.

This contrasts with reasons provided by previous Ministers, for example Minister Bolkus:

The applicant was subjected to the trauma of a horrific and racially motivated sexual attack as a consequence of which she continues to suffer mental and physical health problems, and would be likely to suffer further trauma if returned to her country. [16/10/95].

The result of the current practice of only referring to the public interest reason, without specifically stating what it is, means there is a lack of clarity about the reasons behind the Minister's exercise of S417 and makes it an opaque and unaccountable process. Curiously, by contrast, Minister Ruddock's s351 statements to parliament set out case specific reasons for why it is in the public interest for the Minister to substitute a decision for the Migration Review Tribunal.

The conclusion is that the S417 has become a tool lacking transparency and this is due to the Minister's absolute and arbitrary use of power in these matters. It reflects a lack of accountability inherent in the S417 mechanism and a possible departure from the rule of law. The High Court has observed that the Minister "functions in the area of public debate, political controversy, and democratic accountability" and that "ministerial decisions are not the subject of the same requirements of actual and manifest independence and impartiality as are required by law of the decisions of

courts and tribunals."¹⁷ Stratton concluded that the Minister could be said to be "acting irresponsibly and with excessive autonomy".¹⁸

The lack of accountability is taken further if anecdotal evidence is correct which suggests that certain people are able to possibly bypass the MIU review stage and discuss S417 requests with the Minister. The Refugee Immigration Legal Centre stated in a 1999 submission:

*Defects in the process are apparent given the Minister's reliance upon informal recommendations by persons known or respected by the Minister outside the Department, who contact or are contacted by the Minister on an informal basis to discuss individual cases. The 'politicisation' of these decisions is a serious problem and undermines the credibility of the process.*¹⁹

Mary Crock argues that "without consistent and impartial decision making, it is difficult to envisage a system that produces decisions that are accurate, efficient or acceptable."²⁰

The lack of adequate reporting aside, a more charitable view is that the sheer volume of applications and cases going before the Minister is beyond the physical and mental capacity of any one person to deal with on a consistent and impartial basis. The recent decision to process some 1700 East Timorese cases by means of S417 is a case in point. Given that a speedy processing of these East Timorese cases is vital if people are not to be made homeless and destitute as a result of being cut off various income entitlements when they fail at the RRT, then the Minister needs to consider S417 claims almost immediately. Again, how can he make informed decisions given his workload and dual portfolio? As Mr Ruddock has stated:

Some people have suggested that I should see every file and review them. One of my staff members said to me today, 'You are looking at, say, 25,000 cases over the last seven years'-as I have. 'You would essentially be looking at hundreds of cases a week-with the full file that you were going to try to read.' There are procedures which have been put in place to ensure that I am

¹⁷ MIMA v Jia Le Geng (2001) 65 ALD 1 at 15 per Gleeson CJ and Gummow J.

¹⁸ Stratton, op cit, p.30.

¹⁹ Submission No. 38, Refugee Immigration and Legal Centre to Senate Legal and Constitutional Affairs References Committee, *Senate Inquiry into Australia Refugee and Humanitarian Program* (1999)

²⁰ Mary Crock, 'A Sanctuary Under Review' (2000) 23(3) *UNSW Law Journal* p.265.

*briefed. I have a range of issues to consider. I have given guidelines as to the sorts of factors that I will consider in dealing with these matters. I think that is a proper basis upon which the consideration as to whether or not I will intervene can be entertained. That is the background to it."*²¹

Similarly, a comment from the Minister indicates that he is frustrated with the volume of information he has to deal with and the problems of making informed decisions based on summaries of the cases, as he told the House of Representatives *"The advice that I received from the department in the first instance-which was an abstract of the facts and quite possibly deficient in the examination of the full range of issues-was the basis upon which I made my decision"*.²²

²¹ Hansard, Wednesday, 18 June 2003 HOUSE OF REPRESENTATIVES 16007

²² Hansard, Wednesday, 18 June 2003 HOUSE OF REPRESENTATIVES 16005

Section 3.

S417 decision processes

There are three categories of decision under s 417:

- a) decisions to exercise ; and
- b) decisions not to exercise; and
- c) decisions not to consider whether to exercise the power.

This decision making power can only be exercise by the Minister. However the Ministerial Decision to decide *not* to consider whether to consider exercising discretion can be delegated to DIMIA Staff under the Minister's powers under s496 to delegate his power to refuse or grant a visa.

There are three ways which a case may receive consideration by the Minister and this involves at various levels DIMIA case officers.

1. Cases referred by Case managers in DIMIA's Onshore Protection Unit

These case managers, who may have also been the primary decision makers in the particular case, assess the failed asylum seeker's case and recommend for or against ministerial intervention. They make these assessments under Ministerial Guidelines. This process is known as 'Primary Intervention Guidelines Assessment' (PIGA). They then forward the case to the Ministerial Intervention Unit (MIU) located in Sydney, Melbourne and Perth for further assessment and either recommend the case in the form of a Ministerial Submission, or place it in a schedule which consists of short summaries of cases against consideration because they do not fall within the ambit of the guidelines. Minister Ruddock reportedly seeks full submissions in 'scheduled cases' on some occasions. As the case of Bilal Ahad shows, serious consequences can arise for some asylum seekers if the case officer refuse to send their claim to the Minister for consideration; the asylum seeker may be subjected to persecution after being returned to their country of origin. As with the Minister's decision, the processing of the claims by the case officers is not subject to review. The Migration Series Instructions on S417 set out particular circumstances that case officers assessing applications for consideration could take into account. They include human rights grounds, which as described above, have been less used in recent years. The human rights criteria include:

- i. Person with Convention based claims in the past and continuing subjective fear.²³
"...persons who may have been refugees at time of departure of their country of origin, but due to changes in their country, are now not refugees; and it would be inhumane to return them to their country of origin because of subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country.
- ii. Persons facing serious mistreatment which while not Convention related constitutes persecution.
Persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for convention reasons
- iii. Substantial grounds for believing a person may be in danger of being subject to torture under section 3.1 of the International Convention Against Torture.
- iv. Circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child into consideration.
- v. Circumstances that may bring Australia's obligations as a signatory to the International Convention on Civil and Political Rights into consideration. This includes:
 - the person would, as a necessary and foreseeable consequence of their removal or deportation of Australia, face a real risk of violation of his or her human rights, such as being subject to torture or the death penalty (no matter whether lawfully imposed);
 - issues relating to Article 23.1, which provide "the family is natural and fundamental group unit of society, and is entitled to protection by society and the State".

2. **Cases referred by the Refugee Review Tribunal**

The Guidelines state that the RRT member may refer a case which falls out of Refugee Convention grounds, but has humanitarian elements, to DIMIA for 'PIGA' assessment, although there is no guarantee that the Minister will view a full submission. Stratton identifies a problem with this method. There is no clear authority

²³ MSI at 4.2.1

on how the recommendations should be made. The Minister has advised the tribunal members against recording the humanitarian referral in the written decision as "it is thought to be inappropriate".²⁴ However, procedural instructions given to the RRT on how to make a 'humanitarian referral' state that humanitarian consideration may be referred to in their decision. This conflict means that RRT members are left in an uncertain state as to whether to highlight humanitarian concerns. Moreover there are no guidelines on how a member should precisely raise humanitarian considerations in written decisions. Given this uncertainty, not unsurprisingly, unreserved S417 recommendations are reportedly lacking in recent decisions. Instead, members articulate their inability to address humanitarian claims:²⁵

*The Tribunal notes that the applicant is in a de facto relationship and that the couple is expecting their first child. Although any humanitarian consideration is beyond the scope of the Tribunal, the Tribunal has noted that the applicant is likely to suffer serious harm if he returns to Nigeria, albeit not for Convention reasons.*²⁶

3. Individual representations

Individuals and their representatives can make requests provided that the applicant has failed at the level of the Tribunal and are not involved in migration related judicial proceedings. As with claims referred by RRT, a refusal letter from the MIU on the Minister's behalf will not state the reason for a refusal to consider a request.

Problems to be solved

The problems to be tackled are:

- To improve accountability
- To improve consistency in decision making
- To reduce the volume of requests going directly to the Minister
- To ensure that people deserving of a hearing on humanitarian grounds are considered as early in the processing as possible.

An additional issue may be to quarantine decisions on humanitarian grounds from judicial appeal, something that the Commission believes to be inherently unjust.

²⁴ Minister for Immigration and Multicultural Affairs, The Hon Phillip Ruddock. Speech to open the Migration review Tribunal, 4 June 1999, cited in Stratton, op cit. ft.61.

²⁵ Stratton op cit. p.12

²⁶ RRT Reference: N00032235 (6 September 2000) JC Blount. Cited in Stratton, op cit.p.12.

However, we will take this factor into consideration in proposing some solutions.

Option 1

Reinstitute a humanitarian visa class. Such a visa class would remove the administrative burden and degree of inconsistency and arbitrary decision making inherent in the S417 by allowing people to make applications for a new visa class. The visa would allow case officers and the RRT to consider grounds under the CAT, the non-derogable articles of the ICCPR, and the best interests of the child principle of the CROC. It would not preclude the continuation and use of S417 in certain circumstances, but would increase the discretion available to case managers and the RRT to deal with a proportion of humanitarian claims that currently comprise S417 applications, at a much earlier stage. Such a visa class would be open to judicial review. Senator Cooney recommended such a visa class in his additional comments to the Senate Legal and Constitutional Reference's Committee's report, "A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Process"²⁷

Option 2

Include Human Rights Conventions in the Primary Determination Stage

A sensible change would be to allow DIMIA case managers and the RRT to automatically consider the human rights conventions such as the CAT, ICCPR and CROS, along with the Refugee Convention. DIMIA case managers are already exercising this discretion when deciding whether to recommend the case to the Minister under S417, and it would be simply allowing them to do this simultaneously with the initial processing, thus improving the criteria for their discretion, save time, and reduce the number of cases currently made under S417 on these grounds. Dr Savitri Taylor has observed,

...if Australia was serious about fulfilling its non-refoulement obligations under the CAT and the ICCPR, the basic criterion for the grant of a protection visa would be stated to be that the applicant is 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol or under the CAT or under the ICCPR'. Rather than the decision being left to the uncertain discretion of the Minister for Immigration, protection visa decision-makers at both primary and merits review stages would then have jurisdiction to grant

²⁷ June 2000, pp.347-8.

*protection visas to persons owed protection obligations under the CAT and/or the ICCPR, though not the Refugees Convention.*²⁸

If the Migration Act s36 is amended as proposed above, definitions of 'CAT' and 'ICCPR' will of course have to be included in s5 or elsewhere. As long as meeting public interest criterion 4001 and 4002 remain additional requirements for a grant of a protection visa in Australia, there is a means of exercising strong Ministerial control which may make the proposed amendment more palatable [These extra criteria may prevent in some instances Australia from fulfilling its protection obligations properly.²⁹] Such decisions would be open to judicial review.

In the light of this option, it is interesting to note that DIMIA officers already have such powers to consider human rights conventions in 'Pacific solution' cases at the point of review after a negative decision. The review is done by a more senior officer and includes human rights conventions in addition to the Refugee Convention. The second option then, involves extending the decision making process that was available to case managers over asylum seekers on Nauru to the mainland. DIMIA officers were able to apply criteria under the CAT, ICCPR (it is unclear whether the CROC is applicable and this needs to be ascertained) to their assessments as DIMIA's Bob Illingworth has explained to the Senate:

*While we mirror our processing very closely on the UNHCR convention, this is an additional element in our consideration. In our review processes, if a person is not meeting the test for refugee protection we also formally consider whether they meet the test for protection under other conventions such as CAT. That is documented.*³⁰

²⁸ Savitri Taylor, 'Guarding the Enemy from Oppression: Asylum Seeker Rights Post-September 11', (2002) 26(2) Melbourne University Law Review (Symposium: Contemporary Human Rights in Australia) 396-421:

²⁹ Public interest criterion 4002, requires that the applicant 'is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security.'

Public Interest criterion 4001 requires that:

Either:

(a) the applicant satisfies the Minister that the applicant passes the character test; or
(b) the Minister is satisfied, after appropriate inquiries, that there is nothing to indicate that the applicant would fail to satisfy the Minister that the person passes the character test; or
(c) the Minister has decided not to refuse to grant a visa to the applicant despite reasonably suspecting that the applicant does not pass the character test; or
(d) the Minister has decided not to refuse to grant a visa to the applicant despite not being satisfied that the applicant passes the character test.

Senator BARTLETT—What happens if they meet that test?

Mr Illingworth—Those issues are then referred to the minister for consideration....

.....Senator BARTLETT—Does a different range of prospects apply to somebody who meets the protection criteria under the CAT as opposed to the refugee convention? In effect, would both go to the minister and be in the same pool for potential resettlement wherever we can find a spot?

Mr Illingworth—Essentially the same issues and considerations apply. Having identified an individual in need of protection, the same avenues are open to government: either to pursue resettlement in some other country or to bring them to Australia to protect them.

On another occasion, Mr Illingworth has told the Senate:

We incorporate consideration of other convention issues like the CAT, the convention against torture, and the ICCPR. We also, in our process, identify information on family links with Australia and other countries and look for broader humanitarian issues which might militate in favour of one particular resettlement protection outcome as opposed to another.³¹

Conclusion

³⁰ Hansard Tuesday, 6 August 2002 SENATE—References L&C 11

³¹ COMMONWEALTH OF AUSTRALIA Proof Committee Hansard SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE Reference: Migration Legislation Amendment (Further Border Protection Measures) Bill 2002, L&C 248 SENATE—References Tuesday, 17 September 2002

The S417 is a mechanism that is unaccountable, vague in application, unwieldy and overwhelming because it falls on upon one individual, opaque in operation, and potentially dangerous in that it could inadvertently omit deserving cases. 'Power corrupts and absolute power corrupts absolutely' Lord Acton famously said, and the S417 has all the elements of unfettered power inherent in its operation, which could undermine the integrity and probity of the most scrupulous of Immigration Ministers.

A potential solution lies in two options, which would allow DIMIA officers to consider at an earlier stage, humanitarian cases falling outside the Refugee Convention under other human rights treaties signed by Australia. This could be done either by introducing a new humanitarian visa class and/or by amending the Migration Act to add the ICCPR, CAT and CROC would allow DIMIA officers to consider asylum claims early on rather than burdening the Minister at the final stages. This would relieve the Minister of the burden of considering many humanitarian situations, and free up the S417 for exceptional cases only. It would mean humanitarian cases could be considered early and relieve those deserving cases of experiencing a prolonged process of claim, appeal and claim, while quickly resolving undeserving cases in the early stages of the claim process. These changes do not mean that S417 should be removed as it still serves a useful function but humanitarian cases can and must be considered earlier in the claim process.

Finally two recommendations for the S417 as it stands are:

1. The Parliament must insist on full and accurate reporting of S417 decisions.
2. The Refugee Review Tribunal should be encouraged by the Minister to make explicit recommendations on whether cases should be considered under S417 and provide the reasons for this.