Chapter 5

Operation of the powers – problems encountered by applicants

5.1 In this chapter the Committee discusses the operation of ministerial discretion from the perspective of those who request that the minister exercise the discretionary power in their favour. The chapter thus addresses in part the third of the inquiry's terms of reference, on the operation of the discretionary powers.

5.2 As discussed elsewhere in this report, it is widely recognised that ministerial discretion can provide a safety net for those non-citizens who cannot meet the strict requirements of the migration laws for permission to remain in Australia. DIMIA gave evidence that the ministerial discretion process allows cases that do not fit neatly within the framework to 'be resolved at minimum cost and inconvenience for the applicant'.[1]

5.3 Nevertheless, the migration system in general and ministerial discretion in particular is administered in ways that may result in applicants being exploited and suffering hardship. Many of these difficulties stem from a lack of readily available information about ministerial discretion and its processes.

Availability of information

5.4 As discussed in Chapter 2, information relating to ministerial discretion is publicly available, but it is not widely disseminated. The lack of readily-available information and many applicants' poor English language skills can lead to their exploitation by unscrupulous operators. Exploitation of non-citizens is discussed later in this chapter.

5.5 The Legal and Constitutional Affairs References Committee in its 2000 report identified a lack of readily available information as an issue in the operation of ministerial discretion. In its report that Committee recommended that an information sheet should be produced to explain the provisions of section 417 and the accompanying Ministerial Guidelines.[2] The Government's response to the recommendation was that:

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1 DIMIA Submission no. 24, p.8

2 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.257

> Ministerial Guidelines on s417 … are publicly available. DIMIA Fact Sheet 41 explains the Minister's discretionary powers and further publication of such information is not considered necessary. The powers are non-compellable and, in any event, every case where the RRT finds that a person does not require refugee protection is considered by DIMIA against the intervention guidelines as a matter of course. Cases meeting the guidelines are referred to the Minister without any action being required by the applicant.[3]

5.6 As noted in Chapter 2, the DIMIA fact sheet that contains information about ministerial discretion (now Fact Sheet 61) includes only two sentences on the subject and gives no advice on how to make a request or on how requests are processed.[4] DIMIA clearly sees no need to make information more widely available. DIMIA submitted that:

> 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.[5]

5.7 Some witnesses have a different view from the government about whether information should be more widely disseminated. A migration agency, George Lombard Consultancy, for instance, submitted that:

> … it is extraordinary that there is no widely disseminated source of information about access to the Minister's discretionary powers and how the Minister might be assisted to consider a matter. In that a large number of Ministerial intervention requests are made each year, it would seem that a failure to advise of the existence of the discretion does not inhibit the use made of it, and instead makes potential applicants reliant on agents. It would clearly be better to formalise both the information available about the discretion and the public aspects of the processing. There is probably the need for an information form and an application form.[6]

5.8 As noted in the quote above, applicants will tend to rely on agents or others because they do not have sufficient information to make a request themselves. People in the community who wish to make or support a request should have reasonable access to the ministerial guidelines. DIMIA and the minister would also benefit if all

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3 Government Response to the Senate Legal and Constitutional References Committee Report, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p.13

4 DIMIA, *Fact Sheet 61. Seeking Asylum within Australia*, p.4

5 DIMIA Submission no. 24D, Answer to question on notice N1

6 George Lombard Consultancy Pty Ltd, Submission no. 16, p.3

requests were to address the guidelines. The Committee considers that in the interests of equity and efficiency information should be more easily accessible than at present.

Recommendation 6

5.9 The Committee recommends that DIMIA create an information sheet in appropriate languages that clearly explains the ministerial guidelines and the application process for ministerial intervention. The Committee recommends that the new information sheet be accompanied by an application form, also to be created by the department. Both the information sheet and application form are to be readily and publicly accessible on the department's website and in hard copy.

Legal aid

5.10 As stated by George Lombard Consultancy, applicants are encouraged to rely on agents because information is not widely disseminated. Applicants are also disadvantaged by the unavailability of legal aid. Ms Balgi informed the Committee that Legal Aid Commission of NSW (LAC) was unable to take on many immigration cases either under the Immigration Application Advice and Assistance (IAAAS) contract or otherwise and were generally not able to help people with requests for ministerial intervention. She stated that:

> This lack of legal aid availability for these kinds of applications can create problems, especially for people who are financially disadvantaged. They may try to put their case themselves, and they may not have the knowledge of the Australian migration system or the personal language skills to really put their case properly to the minister. As a result, they may have a very significant outcome such as the cancellation of a visa; they may fall through the safety net of the minister's substitution powers under the act. Given the importance of these outcomes, we are of the opinion that legal aid should be more generally available for people who are seeking to have the minister exercise his discretion in their favour.[7]

5.11 Applicants' dependence on others may, as mentioned earlier, lead to exploitation. The LAC commented that the unavailability of legal aid may exacerbate this possibility. The LAC stated that:

> It must also be remembered that there is no assistance for ministerial requests provided through the IAAAS Scheme or through community workers at migrant resource centres. As no general advice is available from credible legal information services, vulnerable applicants are often driven to approach migration agents who give them unrealistic expectations as well as charging large fees for applications to the Minister.[8]

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7 Ms Balgi, *Committee Hansard*, 22 September 2003, p.24

8 Legal Aid Commission of NSW, Submission no. 17, p.22

Recommendation 7

5.12 The Committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for ministerial intervention to obtain an appropriate level of professional legal assistance. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents.

Reasons not given to unsuccessful applicants

5.13 Many witnesses were concerned that the minister does not give reasons for a refusal to exercise the discretionary powers.[9] Summaries of cases prepared by the MIUs in which the minister chose not to intervene may be accessed by applicants under the Freedom of Information laws, but, as was noted by the Immigration Advice and Rights Centre (IARC), most applicants are not able to do this because they have been required to leave Australia. The IARC submitted that this information should be provided to applicants at the time when the minister does not exercise the public interest power in their favour.[10] Uniting Justice Australia submitted that the section 417 power should:

> Require that the applicant be informed, in writing, of the decision made and the reason for intervening, or not intervening, with reference to the relevant sections of the guidelines.[11]

5.14 The LAC also suggested that in some cases it may be appropriate for the minister to provide someone for whom the minister has refused to exercise the discretionary powers with a copy of the statement of the reasons as to why that is the case.[12]

5.15 Migration agents and solicitors naturally want to know the reasons why cases they have prepared have not attracted the minister's discretionary powers so that in the future they may advise their clients appropriately and prepare cases that are more likely to succeed. Some witnesses stated that they were concerned that unsuccessful applicants may be distressed because they are not given reasons why they have failed, or may feel that they have not had a fair hearing. Because they do not know the reasons why the minister has not intervened on their behalf, some applicants are

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9 See, for example, Mr Prince, *Committee Hansard*, 22 September 2003, pp.69-70, Dr Thom, Amnesty International Australia, and Ms Burn, *Committee Hansard*, 23 September 2003, pp.15, 24

10 Immigration Advice and Rights Centre, Submission no. 22, pp.4, 5

11 Uniting Justice Australia, Submission no. 19, p.10

12 Legal Aid Commission of NSW, *Committee Hansard*, 22 September 2003, p.24

prepared to risk staying in Australia illegally in order to appeal again to the minister.[13] A corollary to this argument was stated as follows:

> It is important that asylum seekers have all the information as to why they have been refused. Allowing asylum seekers to feel that their entire case has been heard and that a definitive decision looking at all our [Australia's] obligations has been made will assist and facilitate a more humane process of return.[14]

5.16 The Commonwealth Ombudsman suggested a procedure that would provide applicants with a much better indication of why their cases may have been unsuccessful and would make the entire process much more transparent. He submitted that:

> As a matter of principle it would be desirable that each applicant be shown a draft of any submission to be placed before the Minister, to enable the applicant to comment on the comprehensiveness of the submission and to obviate later disputation. There is admittedly a risk that this could prolong the process of consideration in some cases unless a tight time frame was established, but equally there is a greater risk of delay arising subsequent to an ill-prepared submission.[15]

5.17 The Committee considers that the minister should give applicants the reasons for not exercising the discretionary power at the time they are informed that the minister will not intervene on their first request. This would be fair to the applicants and may satisfy them that their cases have been properly considered. If any significant claim had been overlooked, the giving of reasons would allow the applicant to draw attention to that in any subsequent request. Giving reasons for not intervening would also enable the parliament and the community to ascertain how the powers were being used.

Recommendation 8

5.18 The Committee recommends:

- **That DIMIA inform persons when a representation for the exercise of ministerial discretion is made on their behalf by a third party;**
- **That each applicant for ministerial intervention be shown a draft of any submission to be placed before the minister to enable the applicant to comment on the information contained in the submission. This**

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13 Uniting Justice Australia, Submission no. 19, p.6 and Legal Aid Commission of NSW, Submission no. 17, p.22

14 Uniting Justice Australia, Submission no. 19, p.6

15 Commonwealth Ombudsman, Submission no. 28, p.11

consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay; and

- **That each applicant be given a copy of reasons for an unfavourable decision on a first request for ministerial intervention.**

Exploitation of applicants

5.19 As mentioned earlier in this Chapter the secretiveness surrounding the exercise of ministerial discretion may result in the exploitation of applicants. Asylum seekers are particularly vulnerable to the predations of unscrupulous operators. Mr Mitchell of the Hotham Mission, a church agency that provides services to asylum seekers, said their research revealed that:

> Asylum seekers who approach the minister or indeed the RRT are in a very vulnerable situation. They are very vulnerable to unscrupulous migration agents who promise all kinds of things, including having connections with the minister, give the impression that they can get them work rights or a visa, charge them a lot and are of course unable to wield any influence. It is a common scenario. [16]

5.20 Ms Biok, a legal officer with the Legal Aid Commission of NSW, informed the Committee that some non-citizens in Australia have paid exorbitant amounts of money to agents for visa applications such as the 'woman at risk' visa that cannot succeed because they are offshore applications.[17] Ms Biok stated that she had heard of an agent asking for $45,000 in cash, and that asking $5,000 to $10,000 is not unheard of.[18] Another migration lawyer, Mr Prince, said that 'figures of $20,000 are regularly bandied around by my clients'.[19] Although some of these amounts represent the total bill for work spanning initial visa applications through review appeals and requests for intervention, all witnesses agreed that fees of this magnitude appear excessive and unreasonable. It is, however, likely that the danger of exploitation is greater at the earlier stages of the migration process than at the level of ministerial discretion. Mr Bitel, a migration lawyer, stated that:

> I think that probably the level of abuse at the ministerial discretion stage is a lot lower than in the other stages because, of course, no work permits are given. Frequently amongst applicants whose sole aim is to extend their stay

16 Mr Mitchell, *Committee Hansard*, 21 October 2003, p.15 See also Ms Burgess, Immigration and Rights Advice Centre, *Committee Hansard* 22 September 2003, p.44

17 Ms Biok, *Committee Hansard* , 22 September 2003, p.32

18 Ms Biok, *Committee Hansard*, 22 September 2003, p.35

19 Mr Prince, Ms Biok, *Committee Hansard*, 22 September 2003, p.75

> and obtain permission to work and obtain some money, the ministerial discretion stage is not that significant. [20]

5.21 According to Mr Bitel most of these operators are not registered migration agents. They are people who operate outside the system and prey on the vulnerability, ignorance and desperation of non-citizens.[21]

5.22 Applicants with limited English skills and little knowledge of their rights are generally disadvantaged in the complex field of migration and vulnerable to exploitation. However, people from communities or countries where dealing with bureaucracies and politicians involves middlemen and money changing hands are particularly susceptible to operators boasting of close ties to, or influence with, departmental officials or the minister. Ms Balgi of the Legal Aid Commission of NSW observed that

> …some people, because they come from cultures where personal links speak for all, are particularly vulnerable to advocates who put out that they have personal links to the minister.[22]

5.23 The risk of exploitation that non-citizens face is not only symptomatic of their general vulnerability but also reveals some of the problems peculiar to the area of ministerial discretion. The opaque nature of the ministerial discretionary system itself compounds this disadvantage and leaves people open to operators peddling misleading information, whether this is about the chances of success or their supposed personal connections with the minister. Mr Lombard stated that it is 'largely the absence of any explanatory material and any openness in the system that means that clients are very much prey to people who are not honest agents'.[23]

5.24 The Committee returns to this problem in the next chapter which discusses the role of advocates and in particular the behaviour of non-registered agents towards groups that are vulnerable.

Visas and work rights

5.25 Persons who have had their application for a visa refused by DIMIA cannot legitimately request that the minister exercise the discretionary powers unless the DIMIA decision has been upheld by an appeals tribunal. On making a first request of the Minister the applicant becomes eligible for a bridging visa while the request is being considered. Persons making second or third requests (there is no limit to the

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20 Mr Bitel, *Committee Hansard*, 21 October 2003, p.59

21 Mr Bitel, *Committee Hansard*, 21 October 2003, p.61

22 Ms Balgi, *Committee Hansard* 22 September 2003, p.29 See also Mr Prince, *Committee Hansard* 22 September 2003, p.75

23 Mr Lombard, *Committee Hansard*, 22 September 2003, p.58

number of requests a person may make) are only eligible for a bridging visa where the request is referred by DIMIA to the minister. [24]

5.26 Witnesses informed the Committee that on occasion persons lose their eligibility for a bridging visa because a letter is written to the minister, sometimes without their knowledge, which is treated as a request, or because an inadequate case is presented by an advocate. Christopher Levingston and Associates (CLA) submitted that:

> In our experience it is often the case that well-intentioned members of the public often write to the minister seeking assistance in relation to a non-citizen. It is our experience that these 'requests' commonly consist of a short letter containing only general information about the applicant and rarely represent a fulsome [sic] presentation of the compassionate features of the non-citizen's case.[25]

5.27 According to CLA, the result for the applicants is that they become eligible for a bridging visa when the 'request' is received, but these at best sketchy requests are almost bound to fail to attract the minister's intervention. If an unsolicited letter is written or an inadequate case is made, when a more thorough case is later presented to the minister by a competent advocate, it is treated as a second request. The applicant is therefore not eligible for a visa during the time that this request is being processed, unless and until it is considered by the minister personally. During the processing period the applicant will be illegally at large in the community or will be detained.

5.28 CLA submitted that this undesirable situation could be addressed as follows:

> Non-citizens should not be considered to have made a request to the Minister until the Minister has received a signed conformation from the non-citizen indicating that:
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> They wish to make the appeal to the Minister;
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> They understand that subsequent appeals to the Minister will not necessarily result in the grant of bridging visas; and
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> Only registered migration agents are permitted by law to receive any money or benefit from them for the preparation or assistance of appeals to the Minister.[26]

5.29 The Committee considers that the above suggestions have merit. If implemented, they would not only address an unfortunate and no doubt unintended consequence of

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24 DIMIA, Submission no. 24, p.41

25 Christopher Levingston and Associates, Submission no. 6, p.7

26 Christopher Levingston and Associates, Submission no. 6, pp.7-8.

the current regulations, but would also assist in ensuring that people are not exploited for financial gain.

Delays in obtaining bridging visas

5.30 Another associated issue was raised by CLA to the effect that a bridging visa may only be granted once a request is forwarded to a Ministerial Intervention Unit (MIU) and is being assessed by one of its officers against the guidelines. CLA informed the Committee that:

> There are two significant problems with this process. First, it is our experience that this process can take several weeks, during which time the non-citizen remains in a form of unlawful limbo and is unable to legalise their status in Australia, even though they have an appeal with the Minister. Second, the non-citizen has no way of knowing when their case is actually being considered by the MIU and consequentially does not know exactly when they should apply for a bridging visa.
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> This situation is especially difficult for non-citizens in detention where any application for a bridging visa must be refused unless at the time their application is lodged the MIU is assessing the request against the Minister's Guidelines. Consequently, the non-citizen potentially has to remain in detention for a further 30 days before being able to make a fresh application for a bridging visa and release from detention. [27]

5.31 Although the Committee received information from DIMIA about the time taken to process requests, that information did not specifically cover the time taken from receipt of a request by the Minister's office till initial assessment by a MIU. In view of the list of priorities set down in DIMIA's departmental administrative guidelines (MSI 387), it seems likely that in many cases a period of weeks may indeed elapse. The Guidelines assign a high priority to the processing of certain categories of requests, by minors and people in detention, for example, but the 'remainder of cases' are dealt with 'in order of receipt'.[28] DIMIA informed the Committee that cases with lower priority have longer processing times.[29] It is reasonable to conclude that non-citizens in the community may have to wait for some time for their request to receive attention in a MIU.

5.32 CLA suggested that the problem could be overcome if a bridging visa were granted automatically upon the minister receiving written confirmation from the non-

27 Christopher Levingston and Associates, Submission no. 6, p.9

28 DIMIA, Submission no. 24, Attachment no. 2, p.22

29 DIMIA, Submission no. 24, p.49

citizen that he or she wished to seek the minister's personal intervention, as discussed in the preceding section.[30]

5.33 The Committee has reservations about this suggestion. First, a 'request' may be made where the minister cannot exercise the discretionary power, for example, where a visa application is being assessed by DIMIA or is before a tribunal. Second, a request may be received that the minister may consider is 'inappropriate to consider', because, for example, migration-related litigation has not been finalised. Requests need to be first assessed to determine that they are both within the legislative power and that they are appropriate before being further assessed against the Guidelines. There would therefore be potential for abuse of the system if the making of a 'request' brought with it automatic eligibility for a bridging visa.

5.34 The Committee notes, however, that the instructions to departmental staff for applying the guidelines accords a high level of priority to requests where the minister has no power to exercise discretion and to requests which are 'inappropriate to consider'.[31] The Committee considers therefore that there would be limited potential for abuse of a system of automatically granting a bridging visa.

Recommendation 9

5.35 The Committee recommends that DIMIA take steps to formalise the application process for ministerial intervention to overcome problems surrounding the current process for granting bridging visas, namely:

- **processing times that can take up to several weeks;**
- **applicants not knowing when they should apply for a bridging visa; and**
- **applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the minister, often without the applicant's knowledge.**

Financial hardship

5.36 There may be work rights attached to the Bridging E Visas where there is financial hardship, but only where the case has been referred to the minister for consideration.[32] In effect, however, persons on bridging visas usually do not have work rights, or any income at all. A study of 111 cases involving 203 asylum seekers that was undertaken by the Asylum Seekers Project (ASP) of the Hotham Mission from February 2001 to February 2003 found that:

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30 Christopher Levingston and Associates, Submission no. 6, p.9

31 DIMIA, Submission no. 24, Attachment 2, p.21

32 DIMIA, Submission no. 24, p.42

> Almost 95% of all interviewed asylum seekers currently have no right to work. This includes all asylum seekers who failed to lodge their Protection Visa (PV) Application within 45 days (60% of all plane arrivals) and those who have appealed after receiving a negative decision from the RRT or Courts. No asylum seeker interviewed has access to ASAS benefits.[33]

5.37 Without work rights and concomitant tax file numbers, asylum seekers do not have access to Medicare.

5.38 The ASP study found that ineligible asylum seekers live in abject poverty, with virtually no mainstream supports available to them, and concluded that:

> The impact of these issues, coupled with the long waiting period and the prolonged passivity of this group, included high levels of homelessness, anxiety, depression, mental health issues and a general reduction in overall health and nutrition. High levels of family breakdown, including separation and divorce, were also noted. The impact of the Bridging Visa category was felt particularly by single mothers and young asylum seekers.[34]

5.39 Of the 111 cases studied, 37 had had a final outcome. Of the remainder still in the determination stage, 14 had made a request for ministerial intervention and an additional 4 had not been successful in attracting the discretionary power. Other cases were before the RRT or the courts.

5.40 Australia's charitable institutions are apparently having difficulty meeting the needs of these ineligible asylum seekers. The ASP alone was spending $30,000 a month on emergency relief and housing in early 2003. One witness stated that the 'welfare sector' would be hit by large numbers of people who were on temporary protection visas, who had been refused permanent visas, and who were appealing to the minister.[35]

5.41 That bridging visas do not come with work rights is not an oversight or an unintended consequence of the Migration Regulations. When explaining why changes had been made to the Regulations, DIMIA stated that the government had been concerned about the 'attractiveness of using repeat requests to obtain, for example,

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33 *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, April 2003*, Asylum Seekers Project – Hotham Mission, Uniting Justice Australia, Submission no. 19A, p.17

34 *Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E, April 2003*, Asylum Seekers Project – Hotham Mission, Uniting Justice Australia, Submission no. 19A, p.30

35 Mr Glenn, A Just Australia, *Committee Hansard*, 21 October 2003, p.25

work rights and prolonged stay … There are very narrow provisions of work rights and extension of lawful stay'.[36]

5.42 The Committee is concerned about the plight of people, particularly families and minors, who are suffering because of the lack of any income. It notes the recommendations made by the ASP that:

- Asylum seeker children should have access to the Asylum Seeker Assistance Scheme (ASAS) throughout the Protection Visa and 417 stages; from lodging to final outcome and including asylum seekers released from detention on bridging visas.

- Asylum seekers should have Medicare coverage throughout Protection Visa and 417 stages; from lodging to final outcome and including asylum seekers released from detention on bridging visas.

- At least one family member should have access to work rights and including asylum seekers released from detention on bridging visas, with the 45 day rule being abandoned.[37]

5.43 The Committee sees merit in these suggestions. It considers that visas with work rights should be available for applicants during the appeal periods, up to the time of an outcome of a first request for ministerial intervention. Applicants making subsequent requests should not be eligible for the grant of a bridging visa that attracts work rights. Children who are seeking asylum should have access to ASAS or some other social security support throughout the period of any requests for ministerial intervention, and all asylum seekers should have access to health care up to the time of an outcome of a first request.

Recommendation 10

5.44 The Committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion.

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36 Mr Illingworth, DIMIA, *Committee Hansard*, 5 September 2003, p.85

37 Asylum Seeker Project – Hotham Mission, Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E: Research and Evaluation, April 2003, Submission no. 19A, p.30

Tribunal determination as prerequisite for intervention

5.45 As described earlier, the minister may exercise the discretionary powers only after a review tribunal has affirmed the department's decision to refuse a visa. Some witnesses commented on problems that relate to the need to appeal to a tribunal, particularly in cases where there is no chance of success before the tribunal, but where there is a reasonable chance that the minister might intervene.

5.46 These cases usually involve persons who narrowly fail to be recognised as refugees, those who can invoke discrimination under the CAT or ICCPR, or those with close family ties. Mr Fergus, a solicitor and migration agent, provided information about two cases in which the Minister had intervened which suggest that the ministerial discretions are too rigidly tied to the pre-condition of a review decision by the relevant tribunal.[38] In both cases, the MRT and the RRT had no choice other than to uphold DIMIA's decision to refuse visas, although such was the nature of the cases that there was a strong likelihood that the Minister would intervene. Mr Fergus concluded that the Minister should have been able to act at an earlier stage of the process and suggested that:

> 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.[39]

5.47 Another migration lawyer submitted that the requirement for a prior ruling by a review authority could lead to otherwise deserving cases being denied the opportunity to request ministerial intervention. He described the case of a visa applicant who had not received the letter of refusal of his application for a visa from DIMIA and was therefore not able to lodge an appeal with the RRT within the statutory time. Not being able to appeal to the RRT, the non-citizen could not request the Minister to exercise the discretionary power.[40] The Legal Aid Commission of NSW described the case of a Korean woman who was forced to leave Australia with her Australian citizen child because of the inflexible time limits for appeals and the requirement that the Minister can only grant a visa where a case has been decided by a tribunal.[41]

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38 Mr Fergus, Submission no. 4, p.2

39 Mr Fergus, Submission no. 4, p.2

40 Mr Bitel, *Committee Hansard*, 21 October, 2003, p.61 and Parish Patience Immigration Lawyers, Submission no. 26, p.3

41 Legal Aid Commission of New South Wales, Submission no. 17, p.10

5.48 The Commonwealth Ombudsman informed the Committee that from the perspective of his office the main difficulty with sections 351 and 417 lies in the fact that the power cannot be exercised unless there was an earlier and less-favourable decision of a tribunal. According to the Ombudsman's office the main problem arising from this provision is that a person who through mistake, mishap, experience or impecuniosity has not lodged an effective appeal to a tribunal within the appeal period also loses the opportunity to benefit from ministerial intervention. Another problem that arises from the government's interpretation of sections 351 and 417 is that persons who have successfully appealed to the courts must pursue proceedings to finality in a tribunal before they can make a request of the minister.[42]

5.49 The Ombudsman stated that consideration should be given to defining some additional or alternative mechanism for activating the minister's powers. He suggested that:

> An alternative mechanism, which would preserve the intent of ss 351 and 417, would be to confer a discretion upon the Department to refer a case to the Minister if, notwithstanding that the person did not lodge an appeal with a tribunal, there were "exceptional circumstances" that warranted the referral. Another alternative would be to provide that a matter could be referred to the Minister upon the recommendation of the Ombudsman.[43]

5.50 The Ombudsman noted that the suggestion that he could recommend matters to the minister would have significant resource implications for his office.[44]

5.51 DIMIA considers that there could be undesirable consequences if the discretionary power could be exercised in the absence of a review tribunal decision. The department submitted that:

> 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.[45]

5.52 The Committee considers that non-citizens should be given every chance to make their case at the primary decision-maker and review stages. It appreciates that the system is designed to ensure that only the most difficult cases should be available for the exercise of ministerial discretion. The cases described in the evidence show, however, that the system can fail to deliver a reasonable outcome in every case. The Committee will recommend therefore that the exercise of ministerial discretion be

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42 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

43 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

44 Office of the Commonwealth Ombudsman, Submission no. 28, p.8

45 DIMIA, Answer to question on notice G2, Submission no. 24D, p.1

extended to cover those cases in which applicants through no fault of their own are not able to appeal to a tribunal

Recommendation 11

5.53 The Committee recommends that DIMIA consider legislative changes that would enable ministerial intervention to be available in certain circumstances where there is a compelling reason why a merits review tribunal decision was not obtained.

Conclusion

5.54 The Committee is concerned that the current processes involved in the exercise of the ministerial intervention powers may result in hardship for the very people they are supposed to assist. The lack of readily available information about the intervention powers and opaque process allow unscrupulous people to exploit applicants who desperately desire to stay in Australia. While appreciating that the system needs to have safeguards to prevent abuse of process to prolong unlawful stay in Australia, the Committee notes the hardship caused by lack of work rights for people with strong humanitarian or compassionate claims that could not be considered in the primary visa application or review processes.