INCONSISTENCIES IN USE OF THE SUBSTITUTION POWERS UNDER S.351 AND 417.

Migration Series Instruction, Guidelines on Ministerial Powers under sections 345, 351, 391, 417, 454 and 501J, state that a unique or exceptional circumstances includes a situation where there would arise "irreparable harm and continuing hardship to an Australian citizen or an Australian family unit". Yet it is the Legal Aid Commission's experience that here is no certainty in the required proximity of the relationship or the level of hardship. The folllowing examples indicate the varying responses from the Minister:

1. A Burmese husband and wife appealed to the Minister after rejection by the RRT. Both had been traumatised prior to arrival in Australia, but the key issue raised in their favour was the Australian citizenship of their two adult daughters. The daughters had become Australian permanent residents through spouse and skilled visa categories.

   The parents' request was accepted by the Minister.

2. A rejected Fijian refugee applicant had sole care for the children of his former de facto partner, who had apparently abandoned them. The NSW Department of Family and Community Services (DOCS) supported his custody of the children. His request to the Minster was refused, notwithstanding the closeness of his relationship with the children and their dependence on him.

   With the support of DOCS, he lodged a second request to the Minister, which was successful.

3. An unsuccessful protection visa applicant from the Czech Republic made a 417 submission to the Minister. The RRT had found a complete lack of credibility and there were no compassionate or humanitarian concerns. The man remained in Australia (unlawfully). Several months after receiving the Minister's letter he was told by a friend that a Liberal politician, whose name he did not note and still does not know, was visiting the country town where he was living. He approached him in the street, gave him his name and address, and said that he wanted to remain in Australia because of the harsh conditions in his country. Several weeks later he received a letter from the Minister stating that he had reconsidered the case and was exercising his discretion to grant him a visa. There was no apparent reason for this as the man's circumstances had not changed in any way, nor had the situation in the Czech Republic.

4. A Fijian man overstayed his visitor visa and worked in Australia, sending money to his 4 children who were in the custody of his ex-wife. He commenced a relationship with an Aboriginal woman – a single mother with 4 children. They lived together for 4.5 years during which time all 4 children came to regard him as their father. He left Australia and applied to migrate. He was refused on character grounds – mainly for having overstayed and worked illegally but he had otherwise broken no laws.

His partner successfully appealed to the AAT which found that the couple were "deeply devoted" and that the 4 children would suffer significant psychological distress if permanently separated from their stepfather. The AAT found that he was of good character having never breached any laws other than overstaying and working. It found that it was impossible for his Australian partner and her 4 children to migrate to Fiji. Much evidence as to the man's good character was provided to the AAT.

The Minister overturned the AAT decision, the main reason being that the man had put the interests of his partner's children before those of his own children – despite the facts that he had divorced the mother of his own 4 children 10 years earlier and that she had sole custody of the children.

This decision is inconsistent with many others where

(a) there were no "character" issues other than breaching immigration laws and

b) there is an Australian partner with children. The close family unit has been permanently destroyed by the decision with great suffering for all involved.

AN EXAMPLE OF A FEDERAL COURT CONCESSION IN A MIGRATION MATTER

Background Facts

The Legal Aid Commission of New South Wales provided assistance to an Indian woman, who was appealing to the Federal Court from the decision of the Refugee Review Tribunal (RRT).

The applicant and her son lodged an application for a Protection Visa in January 2000, based on the applicant's experience of domestic violence. She claimed that if she was forced to return to India she would be persecuted by her husband and his family, and would be unable to obtain protection from the Indian police.

The Department of Immigration and Multicultural Affairs refused to grant the application in March 2000 and this decision was upheld by the RRT in August 2000

The RRT found that the applicant had a real chance of experiencing serious harm amounting to persecution, if forced to return to India. However, the RRT found that the applicant was not a refugee within the terms of the Refugee Convention, as it was not satisfied that the persecution was "for a Convention reason". The RRT in its decision stated that the applicant's situation gave rise to "humanitarian considerations". This terminology is commonly used by the RRT to flag cases in which it may be appropriate for the Minister to exercise his discretion under section 417 of the *Migration Act*.

The Federal Court matter

1. In September 2000 a Legal Aid Commission solicitor assisted the applicant to lodge an application for an order for review at the Federal Court. The hearing was set down November 2000. The Minster was represented in the proceedings by Clayton Utz.

2. In late November 2000 the Minister's solicitor indicated that there was a possibility of the Minister "conceding the case"; raising possibility that the Minister would either agree to remit the matter to the RRT for reconsideration or intervene in some other way. The Minister's solicitor sought consent from the applicant for an adjournment of the proceedings, which she refused.

3. The matter was first heard in November 2000 before Matthews J. The Minister's counsel advised that the Minister was proposing to look at the matter under his section 417 power. Justice Matthews agreed to adjourn the matter to allow the Minister's representative to get instructions on this point. A further direction hearing for the Federal Court matter was set for February 2001.

4. In January 2001, the applicant provided information to the Protection Policy Unit of the Department of Immigration, highlighting her compelling and compassionate circumstances.

5. In February 2001, the Legal Aid Commission received a letter from the Minister stating that the applicant's matter had been referred to him and he was considering exercising his discretion under section 417 of the *Migration Act*. He advised that he would not make a decision in the matter until the relevant health and character checks had been completed by the applicant and her son. The parties agree to have the Federal Court matter stood over in the list, and a directions hearing was scheduled for March 2001.

6. The applicant started the process of obtaining the necessary health and character checks.

7. At the directions hearing held on March 2001, the matter was set down for hearing in June 2001.

8. The applicant provided all the necessary health and character documentation to the Ministerial Interventions Unit.

9. In May 2001, the Minister advised the applicant that he had decided to exercise his power under section 417 and grant the applicant and her son subclass 202 Global Special Humanitarian Visas, a visa class generally given to off-shore refugee applicants.

10. In June 2001, a notice of discontinuance was filed at the Federal Court with the consent of both parties.

Comments

The above case study is an example of how the Ministerial powers under sections 417 and 351, can play a part in Federal Court appeals. It is our submission that such a use of the Minister's powers is appropriate in certain circumstances, including the case outlined above.

One of the purposes of the Ministerial discretion in migration matters is to provide a flexible tool to deal with situations which fall outside the scope of the subclass of visa that the applicant has applied for. In our opinion, if the Minster is of the view that an applicant's case is sufficiently compelling or compassionate to warrant the exercise of the discretion under section 417 or section 351, it is appropriate for the Minister to "concede" such a case by issuing a visa.

Use of the ministerial discretion is such matters can have several advantages. It can save the applicant the anxiety that accompanies long drawn out legal matters. If the applicant had been successful at the Federal Court and the matter had been remitted to the RRT, she may well have had to wait over a year for her matter to be heard. If she was unsuccessful at the RRT on

remittal she could have again appealed to the Federal Court or asked the Minister to exercise his power under s417. The process could have taken several years. The timely resolution of the matter in the applicant's favour would assist her recovery after a significant history of abuse. In addition to the benefit to the applicant, the early resolution of the matter prevented public monies being spent on a matter, which the Minister felt was an appropriate for the exercise of his section 417 discretion.

However, there is downside to the use of the Ministerial discretion during Federal Court appeals. In cases where important questions of law are raised, settlement of the Federal Court proceedings through the Minister exercising his discretion under the Act, limits the development of case law. The use of the Minister's power will only benefit the applicant, whereas a favourable Federal Court decision has the capacity to benefit a wider range of applicants.

Overall the Legal Aid Commission is of the opinion that there are situations whereby the Ministerial discretion can be used appropriately during Federal Court appeals.