Coalition For The Protection Of Asylum Seekers

An interfaith coalition to protect asylum seekers with a well founded fear of persecution.

The Senate
Parliament House
Canberra ACT 2600
AUSTRALIA

2 November, 2003

Alistair Sands
Secretary

Ministerial Discretion in Migration Matters - Select Committee

Attention : Peta Leeman

Dear Mr Sands

Please find enclosed additional information I have collected in response to Senator Humphries' questions during the hearing I attended on 22 October, 2003.

Although I did not relish the extra work, the experiences of former RRT members do provide further evidence of the claims of Bruce Haigh and the concerns of the Coalition for the Protection of Asylum Seekers. Some members of the Coalition's network have also offered information.

The Coalition proposes that one of the Senate Select Committee's recommendations be that the Senate establish a similar inquiry into the impact of Ministerial and Departmental influence and intervention on the decisions of the RRT. Meanwhile, the Coalition will canvass its membership whether, in the light of the information that the RRT is influenced by the Minister and Department, the power of full judicial review be restored to the Courts or, more importantly, to a specialist Refugee and Humanitarian Court. Clearly the RRT should be reformed. There should be three Tribunal Members at a hearing for instance, and the discussion and recommendations of the Senate Legal and Constitutional References Report "Sanctuary under Review"(June 2000) should be implemented as a matter of urgency.

Yours sincerely

Frances Milne

Frances Milne
Convenor of Working Group
Coalition for the Protection of Asylum Seekers

" When times are bad, good people must do more good, so justice does not die".
- Afghanistan : Where God only Comes to Weep, by Siba Shakib.

Additional Information

Relating to Lack of Independence of the Refugee Review Tribunal (RRT)

CONTENTS **PAGE**

Note : Hard copy documents will be sent to the Senate Select Committee by mail.

Bruce Haigh

On 23 October, 2003, I spoke by telephone with Bruce Haigh, who lives on a property outside Mudgee, to redress Senator Humphries' concerns that I had not met and did not know anything about Bruce Haigh's life.

Bruce Haigh talked very openly about his experience as both a full time and part-time member of the RRT, and indicated he was still a Member of the RRT in 2000. Prior to his RRT experience, he had been a Diplomat in Pakistan, Afghanistan, the Gulf states including Yemen, Iran, Saudi Arabia, Sri Lanka and South Africa.

Bruce Haigh explained that the influence of the Minister was subtle, but there was an unwritten consensus among RRT Members that only about 20 % of applicants should be found to be refugees. This unwritten rule was further validated when any member whose record of approvals for refugee visas climbed to around 35%, would be 'counselled' by the Principal Member or senior Members about the way they made their decisions.

Bruce Haigh refused to comply with this absurd 20% rule of thumb and in late 1996 or 1997 when his own approvals were much higher, the Principal Member Shun Chetty, drew him aside and went through Bruce Haigh's decisions arguing against the evidence which supported the applicant's claim to be a refugee. Bruce argued back that this was only Shun Chetty's opinion and he had no intention of changing the way he assessed applications. He also pointed out to Shun Chetty that he had far fewer appeals from those cases he did not approve to the Courts, and very few of his decisions overturned in the Courts compared with other RRT Members who kept the 20% rule.

At meetings within the RRT Chetty would indicate to members the Minister's thinking on issues, such as the set aside rate and government policy in relation to the processing of East Timorese refugees.

Dr Peter Nyghe the following Principal Member would also pass on the Minister's thoughts and perceptions as to the framework which the RRT ought to be operating.

When I asked him what was the response of the RRT Members when Courts did overturn their decisions, he said that the RRT Members took note of every court appeal, and when their cases were overturned their response was that courts were wrong.

Bruce had known Shun Chetty as Diplomat in South Africa whom he helped out of South Africa. Sadly, however, he saw him change under pressure to conform to the RRT culture of compliance to government expectations that the RRT should not be a backdoor to onshore claims for protection. Bruce Haigh noticed this same change in other independent thinkers and human rights advocates once they became RRT members. He observed the insidious way these highly paid RRT Members became trapped by their mortgages and standards of living, so that they gradually complied with the culture of rejecting most refugee claims. In 1999 RRT Members positions became more tenuous with 2 an 3 year contracts subject to review by the Minister and Cabinet. Many part-time members have now been appointed. Those who do not meet expectations do not get cases, and the expectation is that they will leave the RRT.

Bruce Haigh also mentioned that any RRT Member that did not use DFAT Country Reports to at least balance the Amnesty International or other Human Rights reports, would have that matter drawn to their attention. RRT Members read each other's reports so there was no chance of remaining unnoticed if the protocols were not observed. Bruce Haigh noted that not all RRT members have succumbed to this pressure, which means that the RRT is of variable quality in terms of decision making. He also noted that many RRT members have no direct experience of the countries which they deal with.

Eventually in 2000 Bruce Haigh's application for re-appointment to the RRT was not approved by the Minister.

Dr Lyn Fong

Dr Lyn Fong was appointed as a Member to the RRT from 1993 when it was first established, to 1997. Dr Fong had been a medical practitioner who, prior to joining the RRT, had worked in the Attorney-General's (A-G) Department on Refugee Status Review Committee (RSRC), the forerunner to the RRT and other projects including the blueprint for the establishment and operations of the RRT.

However, even prior to its establishment in 1993, how to make the RRT an independent body was always a difficult issue. Dr Fong was of the view that while the RRT was positioned in the Immigration Portfolio, she could not be confident that that the RRT could ever be entirely independent of the influence of the Minister and Immigration Department. The task of the A-G's Department was to decide how to make the RRT as independent as possible within these structural limitations. One issue was the suggestion was that Tribunal Members should only serve one term of office to prevent members seeking to ingratiate themselves to the Minister for Immigration to attain re-appointment. In hindsight Dr Fong would have more vigorously supported that proposal.

Dr Fong said that she was never aware of any direct Ministerial intervention in the way Members made their decisions especially under the first Principal RRT Member, Leroy Certoma. In fact, she said that although she and other Members felt that the first Principal Member showed a lack of leadership to the Members, that in hindsight this may have been preferable to the more directive style of a later Principal Member, Mr Shun Chetty. Mr Chetty seemed very willing to serve the Immigration Minister by interfering in the conduct of cases related to East Timorese refugee applicants. Members dealing with these cases were instructed to put decisions 'on hold' in 1997 pending a political resolution to the East Timor situation. Dr Fong observed that Mr Certoma's lack of influence on the decisions of the RRT Members was unpopular with the Minister and Mr Certoma stepped down from the position when it was made clear that he did not have the support of the Minister.

During her term of office at the RRT. Dr Fong remained concerned that the RRT was operating too closely with the Immigration Department and its Minister. She witnessed the development of a group mentality among the RRT Members who were desirous of re-appointment to the RRT. Members were very aware that the Minister had the power to hire and fire, and the reality was, Dr Fong explained, that for a lot of Members this job was their future, and they were unlikely to find another job with equivalent status and salary. She believes that the low rate of successful refugee applications coming before the RRT is in part because of the pressures upon Tribunal Members to make decisions rejecting refugee applicants that would make them popular with the Immigration Minister.

Dr Fong also commented on the acceptance of 'country' information collected by the Department of Immigration & Multicultural and Indigenous Affairs (DIMIA) and the Department of Foreign Affairs as fact based evidence. The degree to which such material reflected the Departments and Government's own prejudices was generally ignored by Members. For example, the official government line about countries like Cambodia, Afghanistan, Iraq and the former Yugoslavia is that subsequent to war, these countries became politically stable and it is safe for refugees to return when in reality these countries remain extremely unsafe, and have unstable government, judicial and security structures in operation to protect returned refugees. Unfortunately for asylum seekrs and people on Temporary Protection Visas from these countries, Australia's has a policital vested interest in portraying the regime changes it helped to negotiate to be 'successes' .The country evidence provided by the Department of Foreign Affairs and Trade portrayed these countries as 'safe' to further successful trade and diplomatic relations with these 'new' nations and does not provide a balanced view of safety issues for returning refugees.

Dr Fong was disappointed that the RRT relied so heavily on governmental sources for information and did not have the will, or the resources, to obtain current independent country information from NGO aid agencies like Community Aid Abroad, Oxfam etc who could provide valuable insights into real state of affairs in those situations. The RRT was armed with governmental sourced information and public domain information while refugee applicants, with little financial capacity, were expected to be able to refute those sources. To achieve a more balanced and fairer hearing, Dr Fong's believes that the applicants should have access to a a well-resourced 'public defender' organisation to help bring vital current country information to the Tribunal's deliberations and it is essential that the Immigration Minister be denied the position of 'Big Brother' over the Tribunal's operations.

Dr Fong concluded that the current structure and positioning of the RRT within the framework of the Immigration Portfolio will always predispose the RRT to Ministerial influence on the decision making of its Members.

Dr Ken Chan

Dr Ken Chan was a career diplomat from 1972-1993, and then was appointed a Member of the RRT between 1993 – 1997. He provided me with the information below plus the attached copy of a statement he made to the Senate Standing Committee on Foreign Affairs, Defence and Trade on 24.3.99.

Page 190 of the statement is evidence of Ministerial intervention in the processing of the East Timorese asylum seekers in 1997. Dr Chan also observed that the two structures which are responsible for the primary and review stages of the refugee determination process are both located under the Minister for Immigration's portfolio and this systemically mitigates against the RRT operating as an independent review body. The primary decision maker is a Department of Immigration Officer ultimately answerable to the Minister, and RRT members are very aware that their appointment and re-appointment are subject to the Minister's decision.

No credible claim to conduct independent reviews can be made by a Tribunal which is in the portfolio of the same Minister who is responsible for making and implementing the policies and legislation concerning the treatment and assessment of on-shore asylum seekers.

As well, the RRT relied on information and research that came from the Department of Immigration and from Foreign Affairs in regard to political and social issues on various countries. Thus, these Departments were able to feed information to RRT members making decisions. I'm not arguing that this always created a bias but it had potential to shape the assessment of members when they conducted hearings and wrote decisions.

A genuinely independent process would have seen such sources of information kept at arms length. Furthermore, in the period that I worked in the RRT there were a large number of research/support staff who were previously connected to Immigration, having worked there for some time before transferring to the RRT when it was set up. In my opinion that also detracted from independence of the RRT.

Finally, a comment on the role of Principal Member. He/she must always ensure the integrity of the RRT's independence and defend the Tribunal from pressures whether from ministerial officers or the Minister himself. The current set-up and the lines of authority make it too easy for staff in Ministerial offices to pick up the phone and speak directly with the Principal Member of the RRT claiming, when they do so, to speak for the Minister for Immigration.

Ken Chan

Inserted here : Submission to Senate Standing Committee on East Timor -hard copy in mail.

SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

REFERENCES COMMITTEE

INQUIRY INTO EAST TIMOR

SUBMISSION

Submission No:	34
Submittor:	**Dr Kenneth Chan**
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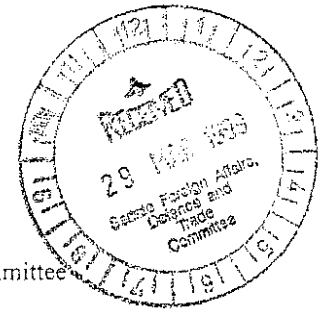
Telephone:	**62 397 573**
Fax:	
Email:	
No. of Pages:	11
Attachments:	**Nil**

28/10/03.

Hi Frances,

This is the submission I wrote to the Senate Standing C'tee on FADT in March 1999. The bits about pressure from Chetty on me in the RRT is at p 190 as marked.

Ken Chan



24 March 1999

Senator John Hogg (Chair)
Senate Foreign Affairs, Defence and Trade Reference Committee
Parliament House
Canberra

Dear Senator Hogg,

Attached is the submission I have written on the Inquiry into East Timor. I have addressed the terms of reference as released by the Committee.

I was a career diplomat with the Department of Foreign Affairs and Trade from 1972-1993. In September 1993, I took leave from the Department and began working as a full-time member of the Refugee Review Tribunal in Sydney. I finished my term with the Tribunal in June 1997. Soon after, I retired from Foreign Affairs.

During my career with Foreign Affairs I served three years (1979-82) in the Permanent Mission of Australia to the UN, New York. My work covered decolonization issues, including the question of East Timor.

As a member of the Refugee Review Tribunal I dealt with a large number of Indonesian applicants, among whom were some from East Timor.

I can be contacted on 62397573 should the Committee wish to seek any further information.

Yours sincerely,

Kenneth Chan

(Kenneth Chan)

PO Box 3909
Manuka
ACT 2603

Senate Foreign Affair

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Inquiry into East Timor

Submission of Dr Kenneth Chan

[a] Economic, social and political conditions in East Timor including respect for human rights in the territory

The recent history of East Timor and its people is a history of turbulence, denial, bloodshed and betrayal. The Indonesian invasion and occupation in 1975/76 set in place a regime that has produced 23 years of subjugation that have denied the people of East Timor a say in their own future, a voice for their own aspirations, and the opportunity to create a meaningful country for themselves free of the oppressive presence of Indonesian military forces.

The presence of the Indonesian military, its offensive against the East Timorese, and its harsh treatment of the people of the territory has created an atmosphere of fear, resentment and distrust. Yet the military has been acting on orders: it has been the government in Jakarta that has driven a process that has made a mockery of any claims that its raison d'être for initially occupying East Timor was to re-establish order and to put an end to "the fratricidal struggle among the inhabitants of Timor." (UN Department of Political Affairs, Trusteeship and Decolonization, *Issue On East Timor*, No 7, August 1976, pp 49-50). If these claims had any semblance of truth Indonesia would have withdrawn its military forces once the "chaos" had ended. Instead the heavy hand of the Suharto regime has imposed itself on East Timor for two decades with consequences that have been devastating for the people of the territory.

The many acts of atrocity committed in East Timor by the regime include arbitrary arrests, killings, torture, and rape as instruments of repression and control. These have been well-documented, not least by Indonesian men and women of courage who have dared to take a stand against the forcible occupation of East Timor and who have called for a genuine process of self-determination for the people living there. There have been outside voices which have tried to keep international attention focussed on the struggles of the East Timorese for freedom and independence and have highlighted the mounting list of brutal acts perpetrated by the Indonesian regime. Amnesty International has reported regularly on the repressive policies that have been applied in East Timor, and the Indonesian scholar, George Aditjondro has disclosed the appalling record of the Indonesian government in a number of published studies such as *Violence by the State Against Women in East Timor* (East Timor Human Rights Centre, 1997) and *In the Shadow of Mount Ramelau* (INDOC, Leiden, 1994).

The Indonesian regime has, at times, made much of its claim to have injected substantial amounts of funds into the territory but as Miranda Sissons has pointed out the levels of education in East Timor, are very low, especially among women. About two thirds of adult women and half of adult men have never attended any school. (*From One Day to*

Another: Violations of Women's Reproductive and Sexual Rights in East Timor, East Timor Human Rights Center, 1997). This, even allowing for the impact of the indifferent administrative record of Portugal in the years before the Indonesian invasion, is a damning comment on the so-called assistance that Indonesia has provided to East Timor.

Moreover, as Louise Williams stated in a recent article, the patterns of employment favour the outsiders, not the East Timorese. And this is in a territory where there is severe unemployment. A considerable part of the public service is "dominated by non-East Timorese appointed by Jakarta." This is especially the case in teaching and health. The commercial sector is largely run by outsiders. (*The Sydney Morning Herald*, January 30, 1999, p 31).

What this reflects is a record of failure in development, an unwillingness to provide opportunities for the East Timorese to be educated and to have jobs. The fact that outsiders to the territory have held down many of the public sector positions and have run commerce has fuelled resentment and created tensions.

[b] Indonesia's military presence in East Timor and reports of ongoing conflict in the territory

The record of the Indonesian military has been so horrific that only a complete withdrawal of that presence from East Timor would demonstrate that the current government, under President Habibie, was completely genuine about its intentions to quit East Timor. Reports that right-wing pro-Indonesian elements have formed a group known as Alive or Dead with Indonesia and that it has been provided with arms by the Indonesian military indicate that the armed forces will continue to try to manipulate the situation in the territory.

The fears of some observers in East Timor that the territory may be prone to violence and struggle between pro-independence groups and pro-Indonesian ones is a very real one given the machinations of the military. One journalist has referred to attempts by the military to orchestrate "a regime of brutal chaos." He quotes comments by Manuel Carascalao that the Indonesians "have always said that if they leave East Timor, there will be bloodshed. Now they want to ensure that is true" and by Florentino Sarmento that the armed forces (ABRI) "are instigating unrest, not only here but all across the archipelago." (Dennis Schulz, "Reign of Terror," *The Bulletin*, February 16, 1999).

In other words, while official pronouncements from Habibie and Foreign Minister Ali Alatas have suggested that Indonesia is willing to move to a reasonable resolution of the East Timor problem, the actions of the military on the ground have created a scenario that is quite disturbing. In the second half of 1998, the military armed hundreds of Timorese civilians into paid, pro-Jakarta militia units that now terrorise many parts of East Timor. These recruits are mostly "bored young men, disenfranchised by unemployment and poverty and empowered by guns." (Louise Williams, *op cit.*). What has been fomented is the prospect of a civil war in an independent East Timor. The Indonesian government, through its military, is trying to orchestrate the outcome on East Timor's future status in

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favour of autonomy on Jakarta's terms. It is not yet ready to let the territory go its own path, according to the wishes of the East Timorese.

[c] The prospects for a just and lasting settlement of the East Timor conflict

The United Nations, a much-maligned body, has, throughout the 23 years of Indonesian occupation, stood by the resolutions adopted by the General Assembly on 12 December 1975 (Resolution 3485 (XXX), Question of East Timor) and those adopted by the Security Council on 22 December 1975 and 22 April 1976 (Resolutions 384 and 389). What this has meant is that the international community, as reflected in the General Assembly resolution, has supported the following:

i) A strong condemnation of the military intervention of the armed forces of Indonesia in Portuguese Timor

ii) The call for the withdrawal, without delay, of Indonesia's armed forces from the territory in order to enable the people of the territory to exercise their right to self-determination and independence

iii) The appeal to all parties in Portuguese Timor to respond positively to efforts to find a peaceful solution through talks between them and the Government of Portugal in the hope that such talks with end the strife and lead to the orderly exercise of the right of self-determination by the people of Portuguese Timor

iv) Drawing the attention of the Security Council to the critical situation in the territory and recommending that it take urgent action to protect the territorial integrity of Portuguese Timor and the inalienable right of its people to self-determination.

The Security Council resolutions confirm the principles that the General Assembly adopted and propose that:

i) The Secretary-General urgently send a special representative to East Timor to make an on-the-spot assessment of the existing situation and establish contact with all the parties in the territory and all states concerned in order to ensure the implementation of resolution 384

ii) The Secretary-General, in pursuing the implementation of resolution 384, submit recommendations to the Security Council as soon as possible

iii) All states and other parties concerned co-operate fully with the UN to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the territory.

Despite the passage of two decades, these points, grounded firmly in the Charter of the UN and the principles of international law, remain relevant to the situation in East Timor.

They provide a just base from which the building blocks of a fair outcome for the East Timorese can be erected. For what the UN has stood by for two decades is the denouncement of Indonesia's forced occupation of East Timor. What it is advocating is the withdrawal of those forces and a genuine act of self-determination for the East Timorese within the framework of the UN Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples as set out in resolution 1514 (XV) of 14 December 1960.

General Assembly resolution 3485 considers Portugal to be one of the key players in the steps towards the act of self-determination. The link 3485 makes to the Security Council (and the subsequent Council resolutions that were adopted) provide the Secretary-General with the authority to assess the report of his special representative and to submit recommendations on what should be done.

Seen from this perspective, the proposals for some structure of autonomy to be put in place in East Timor can only have validity if that is the wish of the people of the Territory. It cannot be a proposal that is imposed or contains elements that have not been fairly put to and endorsed by the people of East Timor. And to have something fairly put to the people means that points are laid out fairly; that there is a genuine educational process involved so that the people have been fully informed before making their choices.

Beyond this, there has to be a time-table for a proper referendum on the status of the territory, conducted under UN supervision and observation. Having a time-table is critical because it will underline the fact that autonomy is only a half-way house to a fair and just resolution of the problem of East Timor's status. Autonomy would be seen, in this way, as a step along the path to self-determination for the people of the territory, not as a temporary measure that could become permanently entrenched.

It needs to be emphasised that there has to be a strong measure of good-will and determination on all sides if the UN is to play its part in a just outcome. The UN can only be a strong player if it is equipped, by its member states, with the means to be so. If Indonesia continues to play a spoiling game; if members of the UN speak strong words but sit on their hands when it comes to providing concrete support; if Fretilin, despairing of the international process, withdraws its voice, then a just settlement will not be possible.

It is important that Indonesia be given recognition for unblocking the process that has, until now, prevented the UN and other states, from any movement on an international resolution of the East Timor issue. The fact is that the UN resolutions lay almost dormant for two decades, occasionally being dusted off when the Secretary-General tried to kick-start the self-determination process. But without Indonesia's co-operation very little was achieved. In the current situation, Indonesia's co-operation remains important to the negotiations on a just settlement. But it has to be a co-operation that fits within the framework of the above-mentioned UN and Security Council resolutions. A co-operation that accepts and abides by the principles of international law.

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There is another dimension of a just settlement in East Timor which needs to be mentioned and that is the processes by which the people of the territory can give voice to the pain, suffering, and brutalities that were heaped on them for 23 years. The idea of a Truth Commission, of which the most notable recent example has been that of South Africa, has an Orwellian ring to it. The victims, as it were, turning on their inquisitors and exacting their pound of flesh. The point is that the history of the East Timorese has been largely silenced, the struggle they have gone through has been presented piece-meal and in distorted form, the atrocities have only been partially uncovered and, at every turn, justice for the victims has been elusive or ignored.

Yet atrocities must be exposed to hold up to the Indonesian state and to the international community the enormity of the horror. If the mistakes of past policy are to remain unvoiced then the danger will be that they will be repeated at a future date.

Whether there can be any compensation for the victims is hard to answer. Governments are notorious for disavowing past wrongs for fear that acknowledgement might create an example for the future. But a true measure of justice would include compensation for the people of East Timor, for the many families that have suffered at the hands of a repressive regime.

There has been much commentary about the fragile economic quality of the territory and this cannot be denied. It is fragile, it has a number of social and economic problems, some of which have been noted under heading (a) above. And this has been used by some commentators as an argument for East Timor to continue to remain under Indonesian control. The talk about autonomy is subsumed into this argument: let the people of East Timor have some measure of "freedom" provided the territory stays within the Indonesian fold. Such arguments are really a mask for those who remain opposed, for whatever reasons, to a genuine act of self-determination for the people of East Timor.

If economic weakness and underdevelopment were the criteria for rejecting the right to independence then a large number of small states which currently exist (many of these are in the Pacific region) should never have become independent. To use such criteria as low income levels, a small population, lack of natural resources, and a fragile economic structure as measures of a state's right to be independent is to confuse economics with politics. East Timor will be dependent on outside aid, on the support of bodies like Community Aid Abroad, on outside technical experts and teachers for many years. But none of this is an argument against its right to have a free and fair choice on its ultimate political status. If the international community, and that includes countries like Australia and the US, is prepared to assist the East Timorese then a lasting settlement can be achieved.

[d] Australia's humanitarian and development assistance in East Timor

There is a climate of international support for East Timor's transition to independence which means that Australia can expect that any development aid it provides will only be

part of a much larger package. The press has reported Mr Ramos Horta as saying that Portugal has promised up to US$ 300 million to assist the financing of a transitional authority and that this would be augmented by aid pledges from private companies and organisations. He added that other Western nations were willing to help financially. (*The Canberra Times, February 20, 1999*). No details were provided of the Portuguese offer but the implication of the report is that funds will be forthcoming, on a generous level.

Australian Foreign Minister Downer has been reported as saying that Australia was prepared to give generous assistance to East Timor but has not elaborated on this. (*The Canberra Times, February 25, 1999*). In its 1997-98 *Annual Report*, the Department of Foreign Affairs and Trade said that its country assistance programme to Indonesia was $ 80.4 million, although this included help in response to the drought and financial crisis in Indonesia. But there was no precise breakdown of what was provided to East Timor and how funds were earmarked for specific programmes. The point is that whatever the level of assistance will be in the future, the Australian government should be setting up programmes in close consultation with the leaders and the people of East Timor without having to seek the imprimatur of Jakarta for what is decided. The move toward the act of self-determination for East Timor needs to take account of the right of the East Timorese to state what their priorities in development aid and humanitarian assistance. This should underline the Australian approach.

[e] The Timor Gap (Zone of Cooperation Treaty)

Writing on Australia's negotiation of the Timor Gap Treaty, the then Foreign Minister Gareth Evans and Bruce Grant stated that it represented the most "substantial achievement" in the efforts of Australia and Indonesia to search for "practical outcomes" in their relationship. They noted the "imaginative solution" that enabled the two countries to put aside their differences and reach an agreement that they say, somewhat proudly, was signed in December 1989 "in an aircraft ceremony above the Timor Sea." (Gareth Evans and Bruce Grant, *Australia's Foreign Relations in the World of the 1990s*, (Melbourne University Press, 1993), p 188).

The practical outcome of the Treaty, however, was predicated on two acts. One was the invasion and occupation of East Timor which led, in the end, to the deaths of 200,000 people in the territory. The other was the decision of the Fraser government to accord *de jure* recognition in February 1979 to Indonesia's forced incorporation of East Timor. A decision which the successor governments, under Prime Ministers Hawke and Keating did not repudiate. In other words, the Treaty, however "imaginative" its legal and technical solutions may have been, was a further assertion to the world that East Timor belonged to Indonesia. Australia's assent to this Treaty confirmed the Labor government's view in 1991 that there was no turning back the clock on the issue of East Timor's status. The interests of the people of East Timor were not countenanced in this Treaty: the negotiations that took place were between Indonesian and Australian Ministers and officials.

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But if the fact of Indonesia's incorporation is now under more concerted scrutiny and challenge and if, in the end, the people of East Timor choose independence over autonomy, then the status of the Treaty can also be questioned. At the very least, the Treaty would need to be declared void and a new one negotiated with the representatives of East Timor. To act otherwise, even to pass the revenues from the successful exploration of oil in the Timor Sea to the people of the territory, would be to recognise any continuing Indonesian claim to a decisive say in the exploration process and in what happens to the revenues from the oil.

[f] Past and present Australian government policy toward East Timor including the issue of East Timorese self-determination

The furore in the past few months ignited by Laurie Bereton's speech on East Timor in which he challenged the orthodoxy adhered to by successive Labor and Liberal governments has only served to confirm how entrenched was the official view that the issue of self-determination for the East Timorese should be allowed to remain buried.

In attacking his own Party and its leaders for both their past sins of omission and commission the Bereton speech was merely pointing out that they, too, had chosen to put pragmatism ahead of principle. Casting our minds back to the events of 1974-75, the interesting point about the Whitlam letter to Suharto of 28 February 1975, which was published in the press in early March this year, is that it sets out, very clearly, the support for the principle of self-determination and the opposition in Australia to "any suggestion of a possible resort to unilateral action." The letter stresses this point to Suharto stating that "you will understand that no Australian Government could allow it to be thought, whether beforehand or afterwards, that it supported such action." In reaffirming that the two leaders had agreed, in September 1974, that the preferred solution was that the territory should become part of Indonesia, the letter says that "this outcome would need to result from the properly expressed wishes of its people." (*The Canberra Times*, March 6, 1999).

This championing of the principle of self-determination, however, does have a false ring to it because the main thrust of the letter accepts Indonesia's right to step in and take over the territory though not by force. There is no hint of a challenge to that right; no suggestion that some alternative arrangement for settling the problems in East Timor might be countenanced that would exclude a major role for Indonesia; no acknowledgment that the choices available to the people of East Timor were wider than incorporation into Indonesia. By early 1975, the Whitlam government had accepted, some might say embraced, a significant voice for Indonesia in determining what happened in East Timor.

As Jim Dunn makes clear in his probing and meticulous analysis, this did not have to be the case. There were other options. At the time, the Portuguese envoy, Dr Almeida Santos, proposed that a UN good offices committee be sent to the territory but this was not accepted by Australia. Yet Dunn states that a UN good offices committee "could have functioned very effectively." But such a committee would have "presented an

obstacle to Jakarta's plans to integrate the territory." (*Timor: A People Betrayed*, (Jacaranda, 1983), p 191).

When events in East Timor reached a critical phase in October 1975, the Australian government, notwithstanding its outline of the principles set out in the Whitlam letter, chose to take a muted and pliant approach to the Indonesian military activity that it knew, from intelligence sources, was taking place on the ground in East Timor. Australian was fully aware that the Indonesian military was involved in East Timor during October. (Paul Kelly, "Willesee: Whitlam reigned on East Timor," *The Australian*, March 10, 1999). A UN report on East Timor in August 1976 noted that:

> ...reports began to circulate of armed clashes on the border between Portuguese and Indonesian Timor. These clashes became increasingly serious by mid-October when full-scale fighting took place on the border town of Batugade leading to FRETILIN's withdrawal from the town. FRETILIN charged that the UDT/APODETI forces operating from Indonesian Timor were being assisted by Indonesian troops and that Indonesian air and naval craft were involved in the fighting. These claims were confirmed by the Australian observers who visited Timor during this period and appear to have been increasingly accepted as accurate by foreign news media as time wore on and armed clashes grew in intensity. (UN Department of Political Affairs, Trusteeship and Decolonization, *Issue On East Timor*, No 7, August 1976, pp 26-7).

The UN drew on publicly available material to compile its report so that the Australian government could hardly pretend that Indonesian was not intervening on the ground in East Timor. Yet the statement of the then Foreign Minister Don Willesee on 30 October 1975 was a relatively mild rebuke to the Indonesian government.

In reviewing his approach some 24 years later, Willesee said that he believed in self-determination but there was no doubt that Whitlam took a different view: "Gough felt East Timor should be incorporated within Indonesia. I just believed that we should have left the decision to the East Timorese, without any suggestions or trying to lead them to Indonesia. That was the difference between myself and Gough." Paul Kelly quotes from an article by Professor Viviani which argues that Willesee held back from making a stronger public statement on Indonesian actions because he knew that Whitlam would resist for fear of precipitating a breach in relations with Indonesia and because the Department of Foreign Affairs was advising that it was impolitic to confirm reports of Indonesian military involvement when the Indonesians were busy denying such reports. (Paul Kelly, *op cit.*).

The above is worth setting out in some detail because it demonstrates that Australia conceded the game to Indonesia at a very early stage. It also reflects the prevailing tendency in Australia's policy in the past two decades to hone its responses to Indonesian actions in East Timor in ways that would cause least offence. The comments in the Evans and Grant book encapsulate the fundamental approach of both Labor and Liberal governments since the Indonesian invasion and occupation:

There was little or nothing any Australian government could have done at the time to limit or reverse the annexation, and successive Australian governments since, conscious of international realities, have accepted its irreversibility, with *de jure* recognition being given in February 1979. They have concentrated efforts, rather, on pressuring the Indonesian government to improve the situation of the East Timorese people, pressing for economic development and proper attention to human rights. But that has not stopped the issue of East Timor – and the activities of expatriate East Timorese in Australia – being a recurring irritant. (Evans and Grant, *op cit.* p 187).

It is the last sentence of this quotation that underscores the policy of successive Australian governments: the implication that East Timor is small beer; that the rights of the East Timorese can somehow be properly protected by the occupying power; that without the stirrings of the expatriate East Timorese in this country the problem would hardly exist. There is no suggestion that there are fundamental issues that have to be confronted: the denial to the East Timorese of any political voice in their future; the demand that the Indonesian military withdraw from the territory completely; the fact that the international community, through the UN, does not consider that the issue of East Timor has been resolved.

One strand in this policy on East Timor has been the desire to cause least offence to Indonesia. I had personal awareness of this when I worked as a member of the Refugee Review Tribunal in Sydney from 1993-97. Among the cases the Tribunal had to deal with were applications from East Timorese who had escaped from Indonesia and had sought refugee status in Australia. In the process of working through a couple of these cases, two of my colleagues looked carefully at the question of nationality.

They raised the issue that the East Timorese might have both an Indonesian nationality (following the Indonesian occupation) and a Portuguese nationality (because Portugal had not ceded its claim to be the administering power – a claim supported in both UN General Assembly resolution 3485 and Security Council resolutions 384 and 389). These issues were taken up by several government departments, including the Department of Immigration and Attorney-General's and a number of academics.

The question of Portuguese nationality was a difficult and complex one and, in the search for an expert opinion, my colleagues sought advice from a Portuguese academic and lawyer who was based in Lisbon. But even before these questions were properly resolved, the Keating government made public assertions that East Timorese applicants in this country were Portuguese nationals and could go to Portugal if they did not wish to return to Indonesia. I thought that these assertions reflected disdain for the rights of the East Timorese. They were cynical in that the Australian government, in its arguments to the International Court of Justice when Portugal challenged the validity of the Timor Gap Treaty, asserted that Portugal had no claims on East Timor or its resources since it had abandoned the territory in 1975. Thus Portugal had no connection to East Timor any longer yet, for the purposes of dealing with East Timorese in Australia, Portuguese

nationality was still valid. In real political terms, dealing with the East Timorese in this way would solve a thorny issue in relations with Indonesia.

While the Howard government inherited the problem of dealing with East Timorese applicants it, too, favoured outcomes which had these applicants declared Portuguese nationals and sent to Lisbon. In June 1997, I had written a Tribunal determination on an East Timorese family in which I concluded that the option of seeking protection for them in Portugal was not available and, because I accepted that their claims were valid, the family were refugees entitled to remain in Australia.

I had completed the draft except for a final correction of spelling and grammar when the then Principal Member, Shun Chetty, called me into his office. He demanded that I not proceed with my decision because the office of the Minister for Immigration had contacted him to say that the government was preparing a pronouncement on the issue of Portuguese nationality. Until that was available my decision should be withheld from the applicant.

I asked him when the government's paper would be available. He said he did not know. I then responded that since my decision was ready to be finalised it would be unfair to the applicant to withhold it for some undefined period when the alternative was to advise him that his application and that of his family had been successful. Chetty brushed this aside. He said he would assume personal responsibility for what I had drafted and would guarantee that it would be finalised and issued just as I had written it once the government paper was available. I said I did not accept his arguments. He then threatened that he would take the case from me. I commented that this would be an extraordinary step if he went through with his threat.

I left his room, gathered up my papers and finalised the decision but not at the Tribunal. The next morning, after I had delivered a copy of my decision to the applicant's legal representative, I went to my office and discovered that Chetty had issued a direction to staff that the case be taken from me. This was illegal and a breach of the relevant section of the Migration Act covering the handling of cases by members, once those cases had been assigned.

I have concluded, from what Chetty said to me, that he felt he was under great pressure to rein in the Tribunal members and get them to hold off on completing East Timorese cases until the government made its pronouncement on Portuguese nationality. I know that I would not have had any resistance from Chetty if he had concluded that my applicant could seek protection in Portugal. In the broader context, I have read this to mean that the Australian government would have been happy to dispose of the problem of East Timorese applicants by sending them to Lisbon. If it could do this it would remove yet another "irritant" in the relationship with Indonesia.

Turning, finally to developments in the last few months, there is a disturbing note in the comments of John Howard on the status of East Timor. He has been reported in the press as saying that autonomy for East Timor is his preferred option, not independence. The

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reason he offers is that there would be an inherent instability, economically and strategically. There would, he adds, be the potential for ongoing tension between an independent East Timor and Indonesia of a type that might not exist if East Timor were an autonomous part of Indonesia. (*Canberra Times*, February 11, 1999). No support is offered for the assertion that an independent East Timor would be inherently unstable or why a small entity with a total population under one million people should be a source of potential tensions with Indonesia.

These remarks can be read as tilt in Indonesia's favour: a pronouncement on the status of East Timor that is calibrated to accord with the thinking of the Indonesian leadership. But their more worrying implication is that they deny to the East Timorese an open-ended choice about their future status. What might this say about the strength of Australia's commitment to a genuine act of self-determination? Moreover, if the East Timorese do opt for independence, what continuing support developmental assistance can they rely on from Australia if Howard's preferred position is to have East Timor remain within the Indonesia fold?

Australia's future role on East Timor must be to support fully those international processes, within the guidelines of the key UN resolution, that will ensure that the people of the territory are given the chance to determine their future, unfettered by the pressures exerted by Indonesia. Above all, this means the withdrawal of Indonesian forces and the cessation of the supply of arms to pro-Jakarta elements in the territory. If there is to be a period of autonomy, then that has to be by the consent of the East Timorese. They must be made aware that the choice of autonomy does not close off other options, including the option of independence. Australian assistance be it technical, humanitarian, or training should be guaranteed to the territory, especially if the East Timorese choose independence. Australian policy cannot right the errors of the past but the opportunity now presents itself for a commitment to the future of East Timor based on principled behaviour and not the expediency that has marred so many past acts.

Tony Gibbons

Barrister Tony Gibbons was appointed to the RRT between 1993 - 1996. He outlined two instances of pressure from the Minister on RRT Members in a phone conversation.

The first situation involved Mr Gibbons being given East Timorese asylum seekers to review.

He was allocated two of the first cases from East Timor and found that they were not Portuguese and were refugees. The Minister referred his decision to the Attorney-General's dept for evaluation and Burmester, counsel for the A-G responded to his decision by producing a written argument against the decision which was circulated in the RRT (see Peter Mares 'Borderline' pp214-215).

Members of the RRT specialised in various countries though all did some Chinese as they were numerous. Tony Gibbons specialised in cases from South America and East Timor. He knew there were more East Timorese cases in the pipeline. So, when he had a slow period he went to the Principal Member and asked to do some more East Timorese cases but was refused and given no reason. He was never given another East Timor case. A very similar case to the one mentioned above was given to another member. That member upheld the department. The applicant took the matter to the Federal Court and won. Gibbons' decision was never taken to the Federal Court by the Minister. Gibbons takes it as a reasonable inference that there was pressure exerted so that he did no more East Timorese cases.

The second situation Mr Gibbons referred to, was the regular briefing meetings for RRT Members where the Principal Member, who had just returned from Canberra, would indicate the Minister's stated concerns. Such things as the need to speed up decisions, that particular groups could have no satisfactory grounds for protection visas. While no groups were named specifically, the message was that the Minister clearly thought that certain types of cases should not be given visas.

Mr Gibbons also took up the issue of the set back rate. He checked and found the average rate of RRT decisions which overturned the primary Departmental decision to refuse a protection visa averaged approximately 15% at the time. There was a wide discrepancy between members, some setting aside 6% and others over 30%. This did not appear explicable on the basis of the types of cases they were doing.

Since that time Tony Gibbons has spent 6 years in the Federal Court, much of the time appearing against decisions of the RRT. He considers the decisions have become even more appalling, badly argued and inadequately researched. He considers that an important factor in this happening is that many of the members of the RRT have had no legal training and are dealing with a difficult and complex area of law. Certainly it was true during his time at the RRT that those members who had legal training had to spend time helping those who had not.

A further factor supporting poor decision making is that nine years ago the Federal Parliament passed s.476(2) of the Migration Act. This law rules out any appeal to the Federal Court on the following grounds:
(a) that a breach of natural justice has occurred.
(b) that a decision is so unreasonable that no reasonable person would make it.

The member is thus protected if unreasonable or failing in natural justice. The Federal Court has, on numerous occasions, had to say to asylum seekers that the decision of the RRT was so unreasonable that no reasonable person would make it but we can do nothing.

The law was also an invitation to lawyers to find ways of overcoming it, and this helped to increase the cases before the Federal Court.

Debby Nicholls

For Alastair Sands, Secretary

You may recall that when I attended Frances Milne's presentation at the Hearings on Wednesday, I asked for permission to give support to a couple of her statements. In response, you said Committee rules would make that difficult, but you would welcome an emailed submission. I therefore make the following comments:
The statement "We are therefore completely unsurprised at the allegations of Bruce Haigh etc"

Most of us who have been involved in the RRT process in the past couple of years have heard of Ministerial interference in the decision making process. I myself have been told about it by former members of the Tribunal and individuals who work there. The interference does not come directly from the Minister by way of a phone call or memo, rather it filters down through the network but in ways where there is no real doubt about the source.

Reading RRT decisions is another clue. The conclusions reached at the end are often quite surprising, given the evidence that has been presented, but in the end it is the Tribunal Member who is allowed to decide on his/her consideration of that evidence what actual fact has occurred. Once this fact is recorded in the decision, it cannot be challenged in the Federal Court unless it actually misquotes details. It is not unreasonable to conclude that the Member has taken care to cast doubt on statements wherever the opportunity has occurred.
The statement "We also believe that not all applicants for a a s417 determination have an equal chance of attracting the Minister's attention" and "it is a matter of whether an asylum seeker can obtain the support of someone with sufficient influence etc"

The initial statement is well supported by the situations reported recently in the press, which refers to s417 applications in general. As for the second portion of the statement regarding asylum seekers, I know of only a handful of asylum seekers who have been successful in obtaining Ministerial intervention, an substantially smaller percentage of the total number of applicants than in the cases recently noted in the press. As Ms Milne noted, because no reasons need to be given for rejection of requests for intervention, we can only surmise why one application is successful and a myriad fail, and tend to attribute it to the type of support which has been given.

The frustration experienced in connection with the s417 process was clearly stated by the previous speakers, Ms Lesick, Ms Newell and Mr Duffield. As someone who has been involved in a number of these requests to the Minister, I wholeheartedly support everything they said.

Thank you for including this in the Select Committee papers.

Yours sincerely,
Debby Nicholls

24.10.2003

Timorese asylum claims blocked by secret freeze
By Helen Signy and Cynthia Banham, SMH November 18 2002

The Australian Government issued a secret directive that refugee applications from the East Timorese community should be put on hold, documents obtained by the Herald claim.

About 1800 East Timorese have been waiting for up to 10 years for their applications to be processed. They face deportation to East Timor because the Federal Government says it is safe for them to return. The Immigration Minister, Philip Ruddock, has blamed the delay on litigation by the applicants and advocacy groups.

"If you have migration rules that operate on that basis, every unlawful [immigrant] that comes to Australia would simply say, 'all I've got to do is outwit you and stay in a community long enough and eventually you'll say it's all too ... hard, I'm entitled to stay'," he said.

But an internal Refugee Review Tribunal memo obtained by the Herald claims there was a secret moratorium which prevented any of the East Timorese cases from being finalised.

The memo, sent in 1995 from a former tribunal member to the acting principal member, says the moratorium was followed by similar directions given verbally and by internal mail.

"Members have been kept in total ignorance of the existence of this official moratorium even though it was a general talking point that no Indonesian/East Timorese cases appeared to be coming through the constitution system," the memo says.

"When the existence of this moratorium ... was raised with you, your reaction was to tell members we were not supposed to know about it, commence a hunt to establish how it was we came to know about it, presumably with the object of punishing someone and a crackdown on the staff of Client Services, who were probably unaware of the explosive effect knowledge of this secret instruction might have both within the RRT as well as outside it."

The moratorium, allegedly imposed by the Labor government in 1995, appears to have been kept by the present Government, which did not start processing East Timorese claims until April this year.

A spokesman for the East Timorese Government, Abel Guterres, said East Timor would respect the decision to repatriate the asylum seekers but that the country was in no position economically to take them.

Lawyers for Australia's East Timorese community say most of the applicants would have qualified as refugees if their applications had been processed promptly.

"We knew the East Timorese cases were not being processed, but here is documentation from within the RRT ... [showing] it was the government or agencies of the government that have underhandedly interfered with and undermined their due process," said Andrew McNaughtan, of the Australia East Timor Association.

A spokeswoman for Mr Ruddock said the reason claims were not processed was because the East Timorese in Australia had been entitled to apply for Portuguese citizenship, but had declined to.

However, the Federal Court found against the Immigration Department's stand on Portuguese nationality in three cases in 1997, 1998 and 2000.

Attachment 2 : Document relating to Christine Hayward, RRT Member was supplied by Dr Andrew McNaughtan, of the Australia East Timor Association.

Article supplied by Sister Susan Connolly, Mary MacKillop Institute for East Timorese Studies.

REFUGEE REVIEW TRIBUNAL MEMO

STRICTLY PRIVATE AND CONFIDENTIAL
FOR THE ACTING PRINCIPAL MEMBER ONLY

TO: Acting Principal Member Gerkins

FROM:Christine Hayward

DATE: 22 September 1995

SUBJECT:Your minute of 8 September 1995

Introduction

In addition to the above, I have also received your Minute dated 14 September 1995, addressed to all Members in Sydney. In it, you agree that in the short period you have been Acting Principal Member, you have observed significant morale problems amongst the RRT Members in Sydney. These problems are long standing. I note from the two draft responses sent to the Administrative Review Council (we have not seen the final version) which your and the Registrars name appears on, so I am assuming you take this position also, that the entire morale problem in Sydney is a result of a small number of members who will not conform to requirements as reasonably laid down by Professor Certoma. In contrast, when Professor Certoma visited Sydney member to discuss the ARC questionnaire, he said not one RRT member had anything good to say about the place. As members have been given no access to the questionnaire results or the signed version of what you send to the ARC, this is the only information we have. What Professor Certoma told members is therefore inconsistent with the six troublemakers theory put forward to the ARC in explanation. Perhaps you could start rebuilding morale by providing me with a final signed version of the ARC response. Parts of the draft I saw contains a thinly veiled, one-sided attack on me concerning some of the issues you now say you want to know about. I note that the time you signed the ARC letter you expressed no interest in checking for yourself the truth of certain allegations.

In respect of this morale problem, you say you intend to provide members with a better work environment and you want to change practices to ensure that Members "know what is happening on a tribunal wide basis." I could not agree more, but such statements are taken with a grain of salt. I want to give you an outline of why and I will use a current example.

Only in the past few weeks Members discovered that both you and the preceding Principal Member had issued instructions to the Client Services Section, which were titled a "moratorium" on constituting East Timorese/Indonesian cases. Members have been kept in total ignorance of the existence of this official moratorium even though it was a general talking point that no Indonesian/East Timorese cases appeared to be coming through the constitution system and obviously something was going on at the Principal Member level to cause this. Client Service staff were sufficiently well aware of this moratorium to include reference to it in their staff bulletin. When the existence of this moratorium, kept secret from members until recent weeks, was raised with you, your reaction was to tell members we were not supposed to know about it, commence a hunt to establish how it was we came to know about it, presumably with the object of punishing someone and a crack down on the staff on Client Services, who were probably unaware of the explosive effect knowledge of this secret instruction might have both within the RRT as well as outside it.

When you took up the Acting Principal Members position, Members anxious to try and inject some commonsense into the way the Tribunal was dealing (or more specifically not dealing) with East Timorese cases, approached you in an open manner with their concerns that the RRT must be seen to be dealing properly with these cases. At that time they had no idea of the secret moratorium and it appears its existence was never volunteered by you. Those members suggested a meeting of all members to discuss the issue, which is congruent with your stated goal of better communication. Your immediate response was to accuse them in writing of seeking to "usurp" your powers as Acting Principal Member.

This instant attack mode, though less public that your ccmail to me in June 1995 (and less direct than my experience with your predecessor, Professor Certomas serial non-response/ serial non-acknowledgment mode) is an example of what created the poor morale you have already agreed exists in Sydney. Your style of management - the instant attack mode whenever something is raised you do not want to deal with for whatever reasons - is in contradiction to your stated goals of open communication, member consultation and morale building. Whether by design or effect, members reaction to your attack mode is to retreat, watch and wait, as such issues will invariably explode at some time.

Whatever the entrenched management style of the Principal Member - passive private means or active public means - many members and staff with genuine concerns are denied a place or person to take their concerns to and have them treated "seriously." This is what you did to me in June 1995, when I raised my concerns amongst all members about Professor Certoma's highly directive language to members with carriage of East Timorese cases. It is difficult for me to set this aside now simply because you have taken us out for a coffee and made a few public statements about the need for member consultation. It is hard to accept when at the same time I still see your instant reaction is still to attack members who seek to raise sensitive matters you do not want discussed. This undermines my confidence about to how you will handle the matters I raise here. You clearly have a defined objective which you will not even discuss with me. You may use this information for good or for ill. I do not know whether you will take these matters seriously and put remedial action into place, or if it is to be used for less attractive purposes. I will explore the history of this "moratorium" a further to flesh out what I mean by this.

In the period before the existence of this secret East Timorese/Indonesian "moratorium" became known to members, I had grown increasingly alarmed at the way Principal Member Certoma was becoming involved in matters properly the province of members who which the case was constituted. This was happening across a range of matters, including a <u>number</u> of cases of mine where Mr Joel was the adviser. I see a pattern that concerns me.

to his approach and that I thought it was ultra vires, to no effect, and Legal Aid at least were already aware of his previous instructions, I went public in my reply to his June 1995 ccmail message to members. I had exhausted all private avenues.

The Principal Members June 1995 ccmail message stated Members "should not proceed to finalise" East Timorese cases. It is couched in uncompromising language. I objected to it again, this time not privately to Professor Certoma as that demonstrably had not worked, but to all Members using an attachment/reply facility to the ccmail message he sent. I note at that time you said about my public comments "I find it difficult to take the views expressed by the person who circulates this message seriously." I note from your recent communications to members you have retreated completely from the directive language of Professor Certoma's that I complained of and adopted the non-directive language formulation I suggested and about which you heaped such scorn on only recently. Your current actions indicate to me that despite your uncorrected public comments to the contrary, you are in fact taking what I said very seriously indeed. It would be a boost to my morale and in keeping with the goals you identified in your minute of 14 September 1995, if you acknowledged to all the staff who saw this (Registrar, Deputy Registrars, Office Managers, Director Research and head of Legal) and all the members it was sent to, hat you have now decided I was right about this.

At the time you publicly attacked my position, a number of Members chorused their approval of your position and concomitantly, against mine. Ideas are attacked or supported depending on the identity of the member who states them, rather than on the intrinsic worth of the argument. The culture of saying 'yes' to whomever is in charge, irrespective of your true views, is another problem. Members with views to the contrary become too intimidated to voice them. For example, members who agreed with my interpretation of Professor Certoma's words (which your actions indicate you now share) approached me privately to tell me this. Some were well aware of my past attempts to privately get Professor Certoma to approach this matter differently. They said to me they

first information I gained that I did not like was the fact that the two members who wanted further information about the nationality issue from a Portuguese lawyer Professor Ramas, Members Fergus and Fong, were being ridiculed for asking for this material. I heard a number of adverse comments about this. The person ultimately responsible for processing this request was Ms Lam, Director of Research, who was also one of the people I clearly recall making derogatory remarks to me about the two members. I advised one of the members about her remarks at the time. He told in turn me about the inordinate delay caused within this tribunal in processing what was, in his experience, a relatively simple information request. He had followed the requests for months only to find it was being bounced around inside the RRT without the required attention. It was difficult to pin down why this was so. Ms Lam had already revealed her displeasure to me about tis request. The management view at that time appeared to be that members should get on with making the East Timorese decisions on the information before them.

This view then changed. In early 1995 the Principal Member gave verbal orders for Members not finalise their East Timorese cases currently constituted to them. I orally objected to his bald instruction at the time as I considered it to be ultra vires, to no avail. I am also aware that in early 1995 at least one Member wrote to Legal Aid advising them he was not proceeding with hearing <u>because</u> of this request from Professor Certoma. Legal Aid are therefore formally aware of this instruction.

In June 1995 Principal Member Certoma sent another message, this time via ccmail (not I note a formal File Note that would as a matter of course go on the relevant files and be readily discoverable under FOI. The status of ccmail messages, while clearly caught under the FOI Act, are an area that FOI Delegates and others within the RRT appear to think is not clear cut and no systematic search is undertaken to see if such messages should be on an FOI'd file). I read Professor Certoma's message as an 'order' or 'instruction' to all Members not to proceed with any East Timorese cases constituted to them. As I had previously traversed privately with the Principal Member my disagreement

were so intimidated by your (and other Members) attack on me such that in order to avoid being targeted themselves for similar treatment, they felt unable to express their contrary views.

It amazes me that merely disagreeing with the Principal Members position is perceived by certain Members as gross disloyalty, with the sole aim of "undermining" the Principal Member or, as per your recent message, "usurping" your powers. It also amazes me that such a debate presents certain members with an opportunity to try and prove their unquestioning loyalty to the Principal Member, using the crude language of a football match "on ya" but failing to deal with the actual issue. Part of this is a spin off about numbers and productivity, which you are also weighing into. The climate is such that members who are not in the top decision making category are not permitted to have a worthwhile opinion on any topic. The most devastatingly effective way I could think of to undermine the Principal Member is not to argue - to simply agree with everything he says or does irrespective of how preposterous, and to continue to do so when your true belief is otherwise. I have excellent recall for every time members who took a public positions supporting Professor Certoma came to me to privately to complain about the very same matters they criticised me publicly for.

Suddenly, in the last week and after you asserted Members were attempting to usurp your powers by the simple act of wanting to meet and talk about East Timorese issues, and after members then found out about this secret "moratorium" on Indonesian/East Timorese cases issues by Professor Certoma and yourself and after months after your public statement that you found the points I made about using extremely careful, non-directive language to Members with carriage of East Timorese cases not to be taken seriously, the language you are using about the East Timorese cases has dramatically altered.

I could not understand why. However, I was told on 21 September 1995 that Legal Aid have lodged an FOI request relating to the processing (or more correctly non-processing) of East Timorese cases. Concurrent to this I received a

memorandum from you dated 15 September 1995 (which I did not receive until 19 September 1995) stating you have given instructions to the Registrar to "instruct" RRT staff not to seek advice from Members about FOI applications. The only contact we are permitted it appears is the courtesy of being told that an FOI application has been lodged.

When I have some free time I will write to you to set out why I believe your instruction to the Registrar and her proposed instruction to staff is ultra vires. I make the point that if there had been one of the aims stated in your memorandum of 14 September 1995 - communication and consultation - this issue could have ben thrashed out prior to you actually committing yourself to paper and in my view making an error. It is my hope though that this instruction has not yet been issued and this consultation will take place beforehand. Again employing that hackneyed expression, I believe there is a Pandora's box surrounding material clearly relevant to the non-processing of these cases, some of which is held by members and others by registry, some of which is on electronic mail and some of which is likely not to be on the official RRT applicant file. If the staff with the statutory responsibility for FOI Delegate is forbidden in writing by you or the Registrar from discussing such matters with members, the chances of all the material in the possession and control of the RRT on this subject, that clearly relates to these cases, is unlikely to be discovered or released under FOI. If it then emerges at some later date eg., in the Federal Court proceedings, then it will appear as if the RRT is deliberately subverting the FOI Act. This example encapsulates the ongoing nature of a cluster of problems I have been concerned about for a long time.

Background matters to N94/03457

Your memorandum of 14 September 1995 says that Members "need to feel" that management will treat Members fairly. I would say that Members not only need to "feel" that is so, but that it must be an objective reality as opposed to a mere subjective perception. An important aspect of fair treatment is ensuring that when Members raise issues or problems with management, instead of going

Humanitarian Intervention in the Public Interest?

A Critique of the Recent Exercise of s 417 *Migration Act* 1958 (Cth)

Johanna Stratton
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A paper submitted for the LLB Honours Programme,
Faculty of Law, The Australian National University

Tale of Contents

Appendices: ss 417 & 415; Ministerial Guidelines; Visa Types 50

Parts 2 & 3 & Conclusion

2.4 Comparison between Minister Bolkus and Minister Ruddock

There are two key differences in the way the current and preceding Ministers have exercised s417 discretion. The first disparity relates to the types of visas granted. As discussed in 2.2, Minister Bolkus granted only permanent Protection Visas while the incumbent has granted an array of temporary and permanent visa types. The other salient difference is in the respective styles of making statements to Parliament.

2.4.1 Statements to Parliament

Section 417(4) requires the Minister to provide to each House of 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.

The two Ministers have interpreted subsection 4(c) differently. The statements made by Minister Bolkus frequently provided detailed information about the nature of the case decided upon, and the impetus for exercising discretion in that particular case. For example,

While not refugee-Convention related, the applicant would suffer intense personal hardship should she return to her country of origin. I have also taken into account the interests of the applicant's Australian citizen infant child. To separate the family especially as the child is a baby, would go against the interests of the child. [7/8/95]

The applicant's circumstances are such that a return to their home country would mean that the family would be subjected to harassment and intimidation by both the authorities and the general populace. The applicant's religious beliefs are in conflict with the state religion which also dominates the laws of the country. The two children of the applicant have spent their formative years in Australia having arrived in Australia at the ages of 13 years and 3 years in 1984 and would have extreme difficulty in adjusting to strict religious codes in place in their home country. [7/8/95]

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]

Minister Bolkus often made reference to the applicant's Œcontinuing subjective fear,' or the Œexceptional personal hardship,' and Œdiscrimination and prejudice' that the applicant would face if returned. He even cited Œthat it is in the interest of the applicant and his family that he should remain as opposed to it being Œin the public interest' as the basis for making a decision.

A study of Minister Ruddock's statements in his first two years in office suggest that a similar‹though much less descriptive‹style to his predecessor was adopted. Statements tabled from November 1998 to August 2002 however, evince a standardisation of the reasons provided.

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.

As a result, the only information to glean from these pro-forma type documents is the date of decision and the type of visa class granted. Surprisingly though, DIMIA carelessly breached s417(5) on two occasions by publishing the name of the applicant in the tabled statement.

Of concern is not only the consequent dearth of information available to the public, especially applicants and advocates who wish to better understand ministerial reasoning for positive decisions, but also Minister Ruddock's patent disregard for the legislative requirement in s417(4)(c) to set out Œthe Minister's reasons for thinking that his or her actions are in

the public interest.' The nebulous phrase replicated in every statement is inadequate and meaningless. Yet, there is no parliamentary review of specific cases reported by the Minister, nor any effective regulation in place to ensure that the Minister complies with his legal duty to disclose substantive reasoning. The importance of properly complying with the statutory criteria is heightened by the fact that the Minister is not required to table reasons in Parliament for refusing or not considering cases.

Significantly, 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 of the Migration Review Tribunal. The discrepancy between s417 and s351 statements is not justified by the sensitive Œhumanitarian claims' of s417 applicants. Minister Bolkus proved that it is possible to provide detailed reasons for decisions without jeopardising the safety of the applicant or associated persons.

3 Key deficiencies in the s417 process

The current Minister cites four objectives that influence and shape Australia's refugee determination system: public accountability of government; compliance with international obligations; administrative justice for the individual; and practical, efficient and lawful administration. Presumably, these objectives also extend to s417 ministerial intervention even though applicants have not been recognised as refugees. Interestingly the Government occasionally refers to the s417 process as a discrete stage of Œreview' for failed asylum seekers.

Ironically, the key deficiencies in the s417 process correspond in many ways to the Minister's said objectives. In this section, the restricted avenues of review from s417 decisions and lack of accountability mechanisms, together with the politicisation of the s417 process are considered against the concept of the rule of law. In addition, the dearth of information on ministerial discretion, inadequacies of the Guidelines and weaknesses in the administrative procedural regime are also addressed.

3.1 Lack of Accountability

If the underlying idea of accountability can be expressed simply as Œgiving an account or explanation,' without any mention of the varied forms or processes of accountability, then minimal effort is needed to be deemed accountable' in some way. Yet, it appears that the current practices of the Minister relating to s417 ministerial discretion might arguably be falling short of meeting even basic notions of accountability.

The most alarming observation is that the current Minister may be evading his legislative duty under s417(4)(c) to provide *reasons for believing* the decision to be in the public interest. Section 417(4) is the only check on the exercise of s417 power. Thus a Minister who only partially complies with the sole mechanism of accountability to Parliament and the wider public, is acting irresponsibly and with excessive autonomy. The absence of Parliamentary review to scrutinise s417 decisions contributes to the unaccountable state of affairs regarding ministerial discretion.

Avenues for judicial review are practically non-existent. Given the Minister is not required to make public his reasons for refusing or not considering certain cases, the difficulty in accessing ministerial reasoning in rejected cases hinders the effectiveness of judicial review for the largely Œnon-reviewable' s417 discretion. Another evidential problem is that the blandness of the Minister's pro-forma statements for refusing or not considering certain cases, may not reveal any error on which to base a claim against the Minister. Given the s417 caseload of several thousand requests being lodged each year, and the enormous potential for litigation, the drive to curtail judicial review may be due to administrative ease and economic efficiency, as well as seeking to ensure the immunity of the Minister's decisions.

The inquiry by the Senate Legal and Constitutional References Committee recommended positive reforms for s417 ministerial discretion in its report, *Sanctuary Under Review.* In short, the recommendations aimed at improving transparency, accountability and compliance with international obligations. The Government dismissed as unnecessary all of the major recommendations, or otherwise insisted that certain recommendations were already current practice. None of the recommendations were actually implemented. The lack of substantive impact of the Senate's report highlights the fact that public inquiries with non-binding recommendations offer no real safeguard against a government intent on persisting with its policies. Although the Inquiry was valuable in providing a forum for scrutiny and debate, there has been virtually no counteraction to the Government's inertial response to the Report.

The Minister is not accountable to the Commonwealth Ombudsman as s5(2)(a) of the *Ombudsmans Act 1976* (Cth)

precludes the independent government agency from investigating action taken by a Minister. However, the actions of DIMIA officers are subject to investigation. The Ombudsman will act if the administrative action investigated is deemed unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise Œwrong'. For instance, if there has been unreasonable delay in processing a s417 request. The Ombudsman has recommendatory powers and political clout but cannot legally enforce its findings.

An international law remedy for failed s 417 applicants with a genuine treaty-based claim is to lodge a complaint to the United Nations. A successful outcome would result in adverse media attention and political embarrassment for the Minister and Government, and probably act as a good accountability mechanism. However, communications to the UN are rare as domestic remedies must first be exhausted, and there is considerable expense and time involved in the process. To date there have been two communications made to the Human Rights Committee and Committee Against Torture by failed s417 applicants that have resulted in favourable decisions for the complainants.

The above overview of avenues of appeal from the s417 process suggests a regime that is largely devoid of effective and reliable accountability mechanisms. It is argued that judicial review of administrative decisions is considered internationally to be a human right, and should therefore extend to every person *physically* in Australia. The right arises from Australia's international obligations that require member states to treat people equally before the law and to provide access to courts. The absence of external review is incongruous with one of the fundamental rule of law principles, that every action of government must be justified by, and testable against, pre-existing law. Moreover, the lack of accountability in the s417 process reflects negatively on Australian society, and its identity as a liberal democracy that supposedly believes in the rule of law and a fair go' for all.

3.2 Politicised nature of s417 decisions

DIMIA has stressed the centrality of the Minister in the s417 process by stating,

irrespective of the processes, the administrative chain of events, the whole raft of considerations that are taken into account, at the end of the day, the decision is the Minister's and it is the Minister's personally. And in a sense, it is possibly arguable that regardless of what underpinning processes you have, in a sense, they count for nought if the Minister decides he will not even consider considering to exercise his power.

Consequently, the underlying presumption in the s417 process is that the Minister's interpretation is always right and that he/she always acts in good faith. This is problematic. The Minister is influenced by a host of factors, other than the merits of the individual case, when exercising his/her discretion. These factors may be as diverse as: international obligations; the Guidelines; immigration policy; foreign policy; migration quotas; political expediency; economic policy; and personal bias. The High Court has noted that the Minister functions in the arena of public debate, political controversy, and democratic accountability' and pointed out that [m]inisterial 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.' As a politician, the Minister is not an independent decision-maker free from political interests and agendas. Given such a lack of impartiality, it is questionable whether the Minister alone should be entrusted with the task of acting as the safety net' against breaches of Australia's international humanitarian obligations.

Without any built-in' protection against political influence or interference, the Minister's ability to act as a safety net' is often compromised. Anecdotal evidence suggests that certain advocates are able to conveniently bypass the MIU stage and access the current Minister to discuss s417 requests, often with favourable results. This claim is also supported by the Refugee and Immigration Legal Centre:

Defects in the process are apparent given the Minister's reliance upon informal recommendations by persons known and 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.

Crock also criticises the *ad hoc* manner in which the politicised decision-making of the Minister takes place and cites changing public opinion as one of the factors that clouds the assessment of individual cases. . She rightly claims that without consistent and impartial decision-making, it is difficult to envisage a system that produces decisions that are accurate, efficient or acceptable.'

3.3 Problems stemming from the Ministerial Guidelines

The Guidelines are instrumental throughout the assessment of requests but especially when the case manager and MIU officer are determining whether or not to refer a case to the Minister. Although the Guidelines are useful and reasonably comprehensive, they are also deliberately broad and open to a multitude of interpretations. There is no examination of the quality of the decision-making by the case manager or MIU officer, and it is virtually impossible to challenge a DIMIA officer's interpretation of the Guidelines. There is also no way of ensuring consistent application of the Guidelines between the three MIU offices because of the large number of requests made to each office annually. For instance, each year the Sydney MIU handles approximately 7000 requests, the Melbourne MIU deals with approximately 1800 requests and the Perth MIU comprises just one person to handle approximately 800 requests per year, 80 per cent of which emanate from detainees. It is improbable that uniform standards of application can be achieved given the logistical and time management difficulties of comparing requests.

The lack of clear and legally binding criteria against which humanitarian claims can be assessed results in a lack of consistency in the administrative and ministerial stages of decision-making. The suggestion that a proper codification of all of Australia's obligations arising under human rights treaties be incorporated into the Guidelines, has not received due consideration by the Government.

3.4 Lack of Transparency

It is of serious concern that information about the operation of ministerial discretion is not widely available. Aside from the Senate's Report, which contains incomplete statistical data from 1993‹1999, and the occasional reference to s417 Protection Visa grants in the DIMIA Annual Report, it is necessary to personally request information about ministerial intervention. The multitude of DIMIA internet resources, including *Fact Sheets* and *Media Releases,* provides no substantive information as to how many visas are granted each year, what types of visas are issued or useful information outlining procedural issues.

Many advocates are poorly informed about the administrative procedure and potential time frame regarding a request, as well as the range of visas being granted, and the chance of a positive outcome. Some advisers rely on hearsay to gauge the likelihood of the Minister intervening in a certain type of case, and may consequently design the request based on this (mis)information. Preferably, advocates should seek the client's file from the Minister's Office under the *Freedom of Information Act* 1982 (Cth) in an effort to better understand the reasoning process behind the decision. Still, there is no guarantee that the decision-making rationale can be easily grasped.

DIMIA does not collect statistics on the number of s417 requests that have legal or other assistance for their preparation, or the percentage of requests with expressions of support from others in the Australian community. Information about the number of applicants in detention compared with those in the community is not publicly available. It is not even possible to find out how many cases requesting ministerial intervention are lodged in one year, or the corresponding country of origin information.

The reluctance to make public statistics which help demonstrate the way the minister's discretion is being exercised is symptomatic of a wider problem: a lack of transparency in the process of ministerial intervention. When asked why information regarding the reasoning process behind s417 decision-making is not accessible, DIMIA simply regurgitated a statutory description of s417 and stressed the importance of keeping personal information confidential for the security of certain people at risk. The apparent culture of secrecy and bureaucratic evasiveness lends itself to a sense of distrust and suspiciousness in the community. Is the Department afraid of its internal proceedings being made public? To adopt Lord Hewart's words, Œit is a queer sort of justice that will not bear the light of publicity.'

3.5 Other Deficiencies

It is beyond the scope of this paper to deal with all of the weaknesses in the s417 process however, it is important to briefly acknowledge some issues relating to [a lack of] procedural fairness and administrative [in]efficiency, in response to the Minister's objectives for Australia's protection regime.

A current practice in some states is for the same DIMIA official to act as both a primary decision-maker in determining refugee status and a s417 PIGA' case manager. To avoid a problem of bias and possibly also the rejection mentality' of some decision-makers, there is a sound argument that an individual officer should not be involved more than once in any case.

It is not known what qualifications DIMIA officers dealing with s417 cases have regarding Australia's humanitarian obligations under international law. There is evidence that the Attorney-General's Department provided DIMIA officers with educational training relating to *non-refoulement* obligations when the Guidelines were introduced. However, there is also evidence that some DIMIA officers do not demonstrate a comprehensive understanding of Australia's non-Convention obligations given their rejection of patently deserving cases. Clearly, such administrative decision-makers ought to be fully conversant with the range of international humanitarian obligations that Australia is required to comply with.

All s417 cases are determined by assessment of documentary evidence only. It is possible that the applicant may be contacted by DIMIA if the Minister requests additional information in order to consider the case, although this practice could be described as the exception to the rule.[1] Significantly, applicants do not have any opportunity for hearings, interviews, the right to access adverse information, or other measures of procedural fairness.

Finally, there is no right to legal assistance for applicants in preparing s417 requests. The effectiveness of the ministerial discretion appears to rely on a premise that an applicant has the knowledge and resources to make a written request. Due to factors such as cultural and language barriers, legal costs and geographical isolation for the majority of people in detention, applicants do not have equitable access to the Minister. Most advocates have advised that there is a heavy reliance amongst clients on word of mouth[1] to find out about the ministerial intervention review option and seek legal advice.

Conclusion

The empirical research undertaken from July‹November 2002 has convinced the author that there is much potential for the current system of s417 ministerial intervention to be improved.

There is a clear exigency amongst failed refugee claimants and throughout the refugee advocacy community for explanatory material on making s417 requests. DIMIA should disseminate an information sheet in various languages to explain the provisions of s417 and the Guidelines, and publish statistical information on ministerial discretion in the DIMIA Annual Report. Not only is the existing documentation on ministerial intervention cursory and vague, it is not easily accessible. An applicant should not be disadvantaged by the Government's failure to equip him/her with the necessary knowledge and resources to lodge a request.

Pivotal to the concepts of the rule of law and accountable government, is the need for the Executive to fully comply with their statutory duties. The current Minister falls short of satisfying 417(4)(c) by declining to provide case specific reasons for each instance of ministerial intervention. Such form is both indolent and remiss, and should be rectified so that the public can better identify the reasoning process behind s417 decisions.

Although it cannot be shown conclusively that the s417 discretion is being exercised to disproportionately assist applicants with claims that are *not* based on Australia's international humanitarian obligations, the statistical data in Part 2 strongly suggests that applicants with immediate family ties are the overwhelming beneficiaries of the Minister's discretion. The displacement of permanent Protection Visas with temporary Spouse Visas seems to signal that political considerations are weighing heavily on Ministerial reasoning. Most alarming of all the findings, is that the s417 humanitarian safety net[1] regime of ministerial intervention is neglecting to provide protection to deserving recipients, notably the deceased Bilal Ahad, and the authors of the two successful communications to UN Committees.

Regrettably, the parameters of this study have prevented examination of alternative mechanisms to address Australia's international humanitarian obligations, such as on-shore humanitarian visas and other forms of complementary protection. It is hoped however, that this report contributes in some way to a better understanding of Australia's protection regime. In an ideal Australian society, those individuals who face a significant threat to their personal security, human rights or human dignity if returned to another territory will receive the protection they deserve.

St Paul's
Anglican Church, Carlingford

16th June 2003

Parliament House
CANBERRA ACT 2600

Dear

RRT Decisions/
Concern regarding safety of Iranian Detainees in Iran

In response to the meeting with you, John Fry, Cliff and Stewart on the 22nd May 2003, I spoke to last Friday regarding the information we have been collecting to support our concern regarding decisions handed down by some RRT Members.

Accordingly, we are enclosing copies of some of the Court Decisions, comments made by one of the barristers concerned, a copy of an article from the Age newspaper and a Refugee Council of Australia Document dated July 2001 (which they stated was still relevant) on their position regarding the RRT. In addition there is a Federal Court decision on Mr. Rajamanikkam. (This man won his appeal in the Federal Court. The Minister appealed and lost in the Full Federal Court. The Minister appealed and won on technical grounds in the High Court. Mr. Rajamanikkam is now on a Bridging Visa with no benefits and is too sick to be able to be sent back.)

Our big concern is that Members are not appointed and re-appointed on the basis of being able to make just decisions. The enclosed evidence strongly suggests that the RRT's aim is find a way of rejecting an applicant rather than to fairly and justly consider the applicant's claims.

Yours sincerely,

Helen Binns

Helen Binns
Cross-Cultural Ministry.

Enc.

Faxed.

1. Erduran v Minister for Immigration FCA 814 (27 Jun 2002) – pages 2, 8&9.
2. NASS v Minister for Immigration FMCA 350 (9 Jan 2003) – page 2, 12-16.
3. NASS v Minister for Immigration FCAA 477 (20 May 2003) - pages 2,3,7,8,10,11&12.
4. SCAT v Minister for Immigration FCAFC 80 (30 April 2003) –pages 2ff.
5. SBAS v Minister for Immigration FCA 528 (30 May 2003) – pages 2ff.
6. Comments regarding NASN of 2002 v Minister for Immigration.
7. Refugee Council of Australia – Position Paper July 2001 – RRT – pages 5-15.
8. The Age, June 10,2003 – Asylum Seekers have a right to be heard.
9. Rajamanikkam V Minister for Immigration FCA 1411 (19 Nov 1999) – pages 3, 16 & 29.

18 December 2002

Judgment of:

Raphael FM

REPRESENTATION

Counsel for the Applicant:

Mr L Karp

Counsel for the Respondent:

Mr J Smith

Solicitors for the Respondent:

Blake Dawson Waldron

ORDERS

I declare:

(1) The decision of the Refugee Review Tribunal to be invalid and of no effect.

(2) I order that the respondent pay the applicant's costs which I assess in the sum of $4,000.00 pursuant to Part 21, Rule 21.02(2)(a) of the Federal Magistrates Court Rules.

FEDERAL MAGISTRATES

COURT OF AUSTRALIA AT

SYDNEY

SZ 938 of 2002

NASS

Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL

& INDIGENOUS AFFAIRS

Respondent

			aunty. From these it may reasonably be found that his evangelising in Australia was over the 'phone to his family.

NE1

Tribunal's Statement	Transcript
He claimed that he was a believer, but he could not go to the Church, that his aunt was a believer, and that he worked on his brother in Iran [CB 121] at 44.	Q. Did any of them convert to Christianity? A. And also my aunt, my aunty. My sister is a believer but she can't go to any churches and my aunty which I have spoken to her from the beginning on many occasions, she's also a believer and worked on my brother [T 28 Q144].

NE2

Tribunal's Statement	Transcript
He was asked "What did the bible studies entail?, and he said they studied the bible. This was not the evidence a person who had attended church regularly would give. It was apparent that the applicant did not know the detail of his claim.	There is no question "What did bible studies entail?" The nearest question is T25 Q124 "What did you do there though? Did you study the bible, did you listen to sermons, did you discuss Christianity? What did you do there?" A. They were praising for the sermons and also one section of bible was selected, one verse of it and that would be discussed and spoken about.

6. The findings I make in respect of these errors are as follows:

Error 1

I accept that this misstatement did not affect the Tribunal's understanding that the applicant's claim was that he had been accused of being in contact with people from other countries.

Error 2

Whilst there is an incorrect rendition of what occurred at the hearing

I accept that the Tribunal makes it clear in its findings that it regarded the comment made by the applicant *"that he would be killed if he was returned to Iran because he was an apostate"* was incompatible with his story that he had in fact been arrested twice as an apostate and on both occasions released on the payment of a bribe.

Error 3

I find that the response make by the applicant is wider than that credited to him by the Tribunal and that his claim to have evangelised was more extensive than that allowed by the Tribunal.

Error 4

I am satisfied that the applicant did not resile from his original claims.

Error 5

I am satisfied that the applicant did not tell the Tribunal that he was in contact with Christians internationally. His evidence was clearly that these were matters being put to him by the Iranian authorities. This is an error which may have gone to the Tribunal's consideration of the applicant's credibility.

Error 6

The comment made by the Tribunal at the end of this passage *"He was asked for specific details, but was unable or unwilling to do so"* is a comment which is critical of the applicant. It indicates that specific questions were asked but were not responded to. Instead, it is put by the respondent that the applicant was asked an open ended question to which he did not respond specifically. I do not consider that these are the same thing. I would therefore not consider that the comment made by the Tribunal is responsive to what actually occurred, as opposed to what the Tribunal would have its readers believe occurred.

Error 8

It seems to me that the real complaint here is the addition of the pejorative remark "He did not answer." I have looked at the transcript [p24] and the questions referred to by the respondent. I agree there are a series of questions but I do not agree that the applicant did not answer them. He gave answers to all questions. It is quite clear from the transcript that the applicant had difficulty in understanding some of the questions being put to him by the Tribunal. I do not have the impression from reading that transcript that the applicant was dissembling, but that is the impression one would get from reading the Reasons for Decision.

Error 9

The concern I have is that a question, which was admittedly not asked, was used by the Tribunal in coming to its findings.

Error 10

My view about this matter is the same as my view about item 7.

I repeat that the transcript indicates that the applicant answered all relevant questions. The court is unable to say what appearance the applicant gave to the Tribunal but I do have a concern that the Tribunal's findings and reasons proceed on the basis of apparent unsatisfactory responses when the transcript indicates that was not necessarily the case.

Error 11

I accept the applicant's criticism of this matter. The context would appear to indicate that the Tribunal's use of the word "regularly" as a synonym for the word "frequent", the evidence indicates otherwise.

Error 12

I accept the submissions made by the respondent in relation to this matter.

Error 13

This is a similar complaint to that made in respect of items 7 and 10 and I take the same view about it I have concerns about the Tribunal's comments in the light of the transcript evidence and the reliance upon inaccuracies to make findings about the credibility of the applicant.

Error 14

I repeat my concern that the Tribunal made reference in its Reasons for Decision to questions that were not asked. Whilst it does not appear that the response the applicant is alleged to have given to this non existent question affected the mind of the Tribunal it is possible that it did do so.

Error 15

The question asked was as follows:

"Q143 Now, you say that you confessed to evangelising Muslims when you were in Iran and that you gave them a list of those people whom you did so to. Can you explain to me just how you did that? How would you evangelise someone in Iran.

A Well, I evangelised my own brother, my sister, my parents and my close friends and when I say friends I don't mean colleagues or just people who I knew, I mean close friends which I knew and it is because I knew that evangelising is difficult and it is a dangerous thing to do in Iran.

Q144 Did any of them convert to Christianity?

A And also my aunt, my aunty. My sister is a believer but she can't go to any churches and my aunty which I have spoken to her from the beginning on many occasions, she's also a believer and at the moment I am working on my brother."

I do not believe that these responses can be characterised as confining a claim of evangelising to speaking to his brother at the telephone. It seems to me that the applicant is claiming to have evangelised his entire family and some close friends and his aunt. At [CB 18] the applicant gives details of his family members who were not in Australia at the time of his application. It would appear from this document that he has brothers by the name of Hassan, Ali, Farviz, Hamid and Manoucher. It must be possible that the brother he refers to as having evangelised is a different brother from that who he describes as telephoning from Australia.

NE1

7. In relation to the complaint "NE1" this misstatement is contained in the same paragraph of the Reasons for Decision [44] as the references to his brother and may well have added to the concerns which the Tribunal had as to the applicant's credibility.

NE2

8. These matters goes to the concern which I have already expressed about the Tribunal's comments on the applicant's non specificity of responses.

9. I have no evidence before me that the Tribunal had before it the transcript of the hearing or that

I heard the tape. I would therefore propose to proceed on the basis put forward by the respondent's counsel that the Tribunal began to deal with this matter some months after the hearing had taken place. I am guided, in my approach as to whether what occurred constitutes a failure to approach the Tribunal's task in good faith, by the views of the Full Bench of the Federal Court in *BBS v Minister for Immigration* [2002] FCAFC 361 and in particular [42 to 59].

10. The applicant has put his case on two alternative bases. The second alternative basis is that the actions of the Tribunal demonstrate a recklessness in the exercise of the power (*SCAZ v Minister for Immigration* [2002] FCA 1377). In *Minister for Immigration v SBAN* [2002] FCAFC 431 Heery and Keifel JJ at [8] said:

"As with other areas of the law where wrongful intent is in issue, reckless indifference may be the equivalent of intent. But this is not to say that the test is objective. The enquiry is directed to the actual state of mind of the decision maker. There is no such thing as deemed or constructive bad faith. It is the ultimate decision - in the case of the RRT, affirming the rejection of a protection visa application - which must be shown to have been taken in bad faith. Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith. Such defects can be equally explicable as a result of obtuseness, overwork, forgetfulness, irritability or other human failings not inconsistent with an honest attempt to discharge the decision makers duty."

11. On the other hand no Full Bench or High Court decision has yet resiled from the statement of Lord Bridge in *R v Secretary of State for the Home Department; ex parte Bugdaycay* [1987] AC 514 at 531:

"The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

12. I have found that the Tribunal made a significant number of errors. Worse, in many cases, those errors contributed to the decision which it made not to accept the applicant's story. If, as suggested by the respondent, the Tribunal waited some months before embarking upon the writing of its decision and forgot what questions it did ask or what responses the applicant gave, then it would seem to me that by not (at the very least) playing the tape which is always available, it was acting with reckless indifference to the effect of its forgetfulness upon the decision. I am not suggesting that the Tribunal knew that its decision was wrong, that is not necessary (*SCAZ* supra). I believe that a heavy burden is placed on the Tribunal because of the very width of its powers. Section 474 of the Migration Act gives the Tribunal extraordinary rights. But with extraordinary rights come extraordinary responsibilities and obligations. The obligation is not one not to make mistakes, but it is an obligation not to abuse the privilege given to it by undertaking its tasks in a reckless manner. I am satisfied that this is what occurred here. Having come to that conclusion I do not believe it necessary to deal with the alternative submission of the applicant, save to say that they are very grave charges, which I believe the applicant would have difficulty in making out on the evidence before me.

13. I am satisfied that in coming to its decision in this matter, in the manner in which it did, the Tribunal did not enter upon its task in a bona fide manner. In so failing it placed itself within the first exception to the *Hickman* dicta that:

"the decision is a bona fide attempt [by the decision maker] to exercise its power ..." R v Hickman ex parte Fox and Clinton (1945) 70 CLR 498 at 615 per Dixon J.

14. I declare the decision of the Tribunal in this matter to be invalid and of no effect. I order that

The respondent pay the applicant's costs which I assess in accordance with Part 21, Rule 21.02(2)(a) of the Federal Magistrates Court Rules in the sum of $4,000.00.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date:

JUDGE: WILCOX J

DATE OF ORDER: 20 MAY 2003

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant, Minister for Immigration and Multicultural and Indigenous Affairs, pay the costs of the respondent.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N63 of 2003

ON APPEAL FROM A FEDERAL MAGISTRATE

BETWEEN: MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

APPELLANT

AND: NASS

RESPONDENT

JUDGE: WILCOX J

DATE: 20 MAY 2003

PLACE: SYDNEY

REASONS FOR JUDGMENT

WILCOX J:

1 This is an appeal by the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") against a decision of a federal magistrate (Raphael FM) allowing an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed a decision of a delegate of the Minister to refuse to grant the respondent a protection visa. The respondent filed a notice of contention by which he sought to sustain the magistrate's decision upon an alternative ground that was not accepted by the magistrate.

2 Pursuant to s 25(1A) of the *Federal Court of Australia Act 1976*, the Chief Justice directed the appeal be heard by a single judge of the Court.

Background

3 The respondent, an Iranian citizen, arrived in Australia on 21 March 2000. He sought a protection visa, claiming to be a refugee, within the meaning of the 1951 *Convention relating to*

the Status of Refugees (as amended by the 1967 *Protocol relating to the Status of Refugees*), by reason of the fact that he had a well-founded fear of persecution on the ground of his religion. Although he is the respondent to this appeal, it is convenient to refer to this person as "the applicant", as did the Tribunal and Raphael FM.

4 The applicant claimed he became a Christian, while still in Iran, and this led to his arrest on two occasions. On those occasions, he said, he was interrogated and tortured; he regained his freedom only upon his family paying large bribes.

5 The Tribunal accepted that, since his arrival in Australia, the applicant had involved himself in Christian activities. However, the Tribunal said this was done only "to provide for himself the profile of, and the enhance his claims to be, a refugee". Accordingly, the Tribunal held s 91R(3) of the *Migration Act 1958* applied to the applicant "and his conduct in Australia must be disregarded in determining whether he has a well founded fear of being persecuted for Convention reasons".

6 The Tribunal did not accept that the applicant had become a Christian while still in Iran. The member disbelieved the incidents of persecution claimed by the applicant, finding that "overall [his] evidence was not reliable". The member expressed the view "that he fabricated most aspects of his claims in an attempt to create for himself the profile of a refugee".

7 The Tribunal did not suggest the incidents claimed by the applicant, if true, would not have amounted to persecution for a Convention reason; the applicant's claim for a protection visa failed because he was disbelieved.

The magistrate's decision

8 The hearing before the magistrate took place on 18 December 2002, before the decision of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 195 ALR 24. Consequently, counsel argued the application for judicial review by reference to the so-called "*Hickman* exceptions". Counsel for the applicant (Mr L Karp) relied on the first exception in contending to the magistrate that the Tribunal failed to make a bona fide attempt to exercise its power. Mr Karp put this submission on alternative bases. First, he argued, the actions of the Tribunal, in its review of the evidence and its findings and conclusions, amounted to "a concerted, blatant and dishonest attempt to find against the applicant on the basis of lack of credit". Alternatively, Mr Karp said: "the Tribunal has been so recklessly indifferent to the accuracy or otherwise of its statements that it cannot be said to have made a bona fide attempt to exercise its power".

9 Raphael FM did not accept the first submission, of deliberate dishonesty; but he upheld the alternative submission, recklessness. In doing so, he referred to a table provided to him by Mr Karp detailing fifteen alleged misstatements, by the Tribunal in its reasons, of the evidence. Counsel for the Minister (Mr J Smith) had responded to that table, conceding many of the misstatements claimed by Mr Karp. The magistrate set out the table in his reasons for judgment and added references to two additional statements of the evidence by the Tribunal that he had found for himself and thought to be dubious.

10 The magistrate had a transcript of the evidence given by the applicant to the Tribunal. So he was able to determine whether the errors claimed by Mr Karp had occurred and their significance.

11 The magistrate accepted the accuracy of Mr Karp's table in relation to each of the errors claimed by him, although he thought three of them were insignificant, in the sense that they would not have affected the Tribunal member's understanding of the case put to him by the applicant. However, the magistrate expressed concern that other errors might have affected the Tribunal's

very least, recklessness in the exercise of power.

28 Pursuant to the notice of contention filed by his client, Mr Karp repeated the first argument he had put to Raphael FM. He submitted that, having regard to the nature of the Tribunal's errors, and that they were all adverse to the applicant, "the Tribunal's conduct, seen cumulatively, amounts to a concerted and dishonest attempt to impugn the respondent's credit".

Conclusions

29 The scheme of the *Migration Act* is to leave to the Tribunal the task of determining the facts of the case. It is important that members of the Federal Magistrates Court of Australia and members of this Court, who are called upon to undertake judicial review of a case, avoid substituting their own view of the facts of the case for those found by the Tribunal. It is not to the point that a magistrate or judge might think that a particular factual finding of the Tribunal, or even a number of its findings, are of dubious merit or illogical.

30 Nonetheless, there are occasions when it will be necessary for a court to look at the evidence adduced to the Tribunal and the Tribunal's factual findings, in order to assess the availability, in the particular case, of a ground of review that is open to a party. I accept Mr Karp's submission that a decision-maker who fails to act in good faith commits jurisdictional error. That was made clear by Gibbs J in *Buck v Bavone*. Whether the proposition be put in that form or in terms of the *Hickman* exception, it is clearly open to an aggrieved party to obtain judicial review, and have the Tribunal's decision set aside, if he or she can demonstrate lack of good faith.

31 In *SBBS* the Full Court (Tamberlin, Mansfield and Jacobson JJ) summarised the principles that apply to an allegation of bad faith. Omitting citations of authority, their Honours said:

> *"First, an allegation of bad faith is a serious matter involving personal fault on the part of the decision maker. Second, the allegation is not to be lightly made and must be clearly alleged and proved. Third, there are many ways in which bad faith can occur and it is not possible to give a comprehensive definition. Fourth, the presence or absence of honesty will often be crucial; ...*
>
> *The fifth proposition is that the circumstances in which the Court will find an administrative decision maker had not acted in good faith are rare and extreme. This is especially so where all that the applicant relies upon is the written reasons for the decision under review; ...*
>
> *Sixth, mere error or irrationality does not of itself demonstrate lack of good faith; ... Bad faith is not to be found simply because of poor decision making. It is a large step to jump from a decision involving errors of fact and law to a finding that the decision maker did not undertake its task in a way which involves personal criticism; ...*
>
> *Seventh, errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness; ...*
>
> *Eighth, the Court must make a decision as to whether or not bad faith is shown by inference from what the Tribunal has done or failed to do and from the extent to which the reasons disclose how the Tribunal approached its task; ....*
>
> *Ninth, it is not necessary to demonstrate that the decision maker knew the decision was wrong. It is sufficient to demonstrate recklessness in the exercise of the power; ..."*

32 I accept this summary of principles. It is appropriate for me to apply it to the resolution of this case. In doing so, it is important to make a distinction that may have been overlooked in the submissions made to me by Mr Smith.

33 If the position in the present case was that the Tribunal member had merely made findings of fact that Raphael FM thought to be incorrect or illogical, that would not have justified his order setting aside the Tribunal's decision. If the magistrate had taken that course, he would have usurped the Tribunal's role as final determiner of the facts. However, the magistrate did not set aside the Tribunal's decision because he disagreed with its factual conclusions, or any of them, but because of the manner in which the Tribunal undertook its fact finding function. His decision was based, not upon a disagreement about the facts of the case, but upon his categorisation of the Tribunal's conduct. That is consistent with the generally accepted notion of good faith, which is concerned with process rather than outcome.

34 As it seems to me, the critical question in this case is whether the magistrate was justified in holding that the Tribunal acted recklessly in the exercise of its power. Were the Tribunal's erroneous statements about the applicant's evidence of such significance as to support an inference of recklessness, and therefore bad faith? Not every misstatement of evidence will support such an inference. Even a careful decision-maker may err in his or her account of the evidence. Bad faith is not to be readily inferred. But if a material misstatement of evidence is sufficiently egregious, or the number of significant errors is sufficiently great, a reviewing court may be compelled to infer that the decision-maker has set out deliberately to distort the evidence or (more likely) has carried out his or her duties in a reckless manner.

35 Raphael FM appreciated the issue before him was one of degree. That is why he analysed each of the claimed errors and evaluated their significance. I have considered his analysis and evaluation and have read the relevant portions of the transcript of evidence given to the Tribunal. I agree with the magistrate's conclusion. I see no reason to attribute deliberate dishonesty to the Tribunal member. Like Raphael FM, I think the likely explanation of the misstatements is that, by the time the Tribunal member set about writing his reasons, many months had elapsed. He relied on his memory of the applicant's evidence. That it proved faulty is not surprising. What is surprising is that the Tribunal member apparently failed to check his recollection of the applicant's evidence against either the tape or a transcript of the hearing. This might not have mattered if the member had decided to accept the applicant as a witness of truth and to accept the thrust of the claims he made. But it did matter if the Tribunal member was minded to disbelieve him, and reject his claims, because of the detail of his evidence. If the Tribunal member was so minded, it was reckless of him to omit to confirm the accuracy of his recollection of the evidence.

36 I need not deal with all the misstatements. It is sufficient to note some of them. In so doing, I am not making any findings of fact, or disagreeing with any factual finding made by the Tribunal. I am concerned only with the question whether it can properly be said that the Tribunal failed to apply itself in a bona fide manner to its obligation to make findings about the facts of the case; including, as a necessary incident, findings as to the applicant's credibility.

37 Central elements of the applicant's claim to the Tribunal were:

(i) he became a Christian while still in Iran;

(ii) he practised his Christian religion in Iran, although in a low-key way; and

(iii) he was arrested, detained and tortured because of his Christian belief and practice.

conspiracy to overthrow the government, he had previously stated (in answer to question 96) that he was forced to sign this statement during a period of detention and interrogation. After he came to Australia, the applicant never made a claim that he was engaged in an international conspiracy to overthrow the Iranian regime.

43 The importance of this misstatement of the applicant's evidence is indicated by the fact that it is the first example cited by the Tribunal member in support of his conclusion that the evidence of the applicant was "inconsistent, contradictory and implausible".

44 In para 38 of his reasons, the Tribunal member said:

> *"He was asked if it was his evidence that confessing to the Komiteh that he was a mortad and had evangelised Muslims meant that he would not go to court and be killed as a mortad and proselytiser. He had nothing to say."*

45 The second of these two sentences suggests acknowledgement of error. However, as Mr Smith concedes, the stated question was never put. Mr Smith offered the following comment:

> *"There is, and can be, no direct evidence as to why the Tribunal set out a question that was not asked, however, there is available an innocent explanation just as readily as a sinister one. That is, that the Tribunal had intended to ask such a question and perhaps had notes of that question without anything in reply (which would explain why it thought that the applicant had nothing to say to it) but that with the passage of time, it failed to realise that there was nothing written because there in fact had been no question."*

46 The explanation may be innocent, in the sense that it gives no support to a suggestion of deliberate distortion of the evidence by the Tribunal member. But it tends to support the suggestion of recklessness.

47 Similarly, in para 39, the Tribunal member said:

> *"The applicant was asked about his claim of becoming like a son to a Christian family. He was asked how that came about. He claimed that he went to Teheran and met his neighbours. He was asked for specific details, but he was unable or unwilling to do so."*

48 In fact, as Mr Smith again concedes, the applicant was never asked for specific details as to how he met his neighbours. The exchange on the subject between the Tribunal member and the applicant (questions 108 and 109) was as follows:

> *"Q. You say that you became friends with a Christian family and you became like a son to them?*
>
> A. Yes
>
> Q. How did that come about?
>
> A. When I moved to Youssefaba then I met my neighbours, Mr Sepi, Mohammed Sepi, and Mrs Shahabi and their daughters."

49 The member then moved to a different topic, the applicant's church attendances.

50 In the same para 39, the Tribunal member said: "He was asked if it was his evidence that he had gone to the church for one year and he said yes. It was put to him that he had attended the church only about 6 times. He had nothing to say."

51 The applicant did say that he went to church for about a year. As is conceded by Mr Smith, it was never put to him that he had attended church only about 6 times.

52 There are a number of other occasions, detailed by Raphael FM, in which the Tribunal said a matter was put to the applicant when it was not.

53 In para 40 of his reasons, the Tribunal member said:

> *"The applicant was asked what he did at the church. He claimed that he attended the sermon session with Ms Shahabi. He was asked what he did there, and he said bible studies. He was unable or unwilling to give details, and appeared reluctant to be more than general. He was asked what did bible studies entail. He claimed they studied the bible. He was unable or unwilling to give any details."*

54 In fact the member asked two questions about this topic. By question 123, he asked "what did you do when you went to church?" The applicant replied:

> *"Services, sermons, the sermons sessions, don't know what that, and that's - they're the sessions that Mrs Shahabi introduced to me and they were very interesting and Mr Edward was conducting them."*

55 The following question and answer were as follows:

> *"Q. What did you do there though? Did you study the Bible, did you listen to sermons, did you discuss Christianity? What did you do there?*
>
> A. They were praising for the sermons and also one section of Bible was selected, one verse of it, and that would be discussed and be spoken about."

The member then passed to another topic.

56 An important error of the Tribunal relates to the time when the applicant claimed to have been evangelising. The relevant evidence is at question 143 to 145:

> *"Q. Now, you say that you confessed to evangelising Moslems when you were in Iran and that you gave them a list of those people whom you did so to. Can you explain to me just how you did that? How would you evangelise someone in Iran?*
>
> A. Well, I evangelised my own brother, my sister, my parents and my close friends and when I say friends I don't mean colleagues or just people who I knew, I mean close friends which I knew and it's because I knew that evangelising is difficult and it's a dangerous thing to do in Iran.
>
> Q. Did any of them convert to Christianity?
>
> A. And also my aunt, my auntie. My sister is a believer but she can't go to any churches and my auntie which I've spoken to her from the beginning on many occasions, she's also a believer and at the moment I'm working on my brother.

Q. How are you doing that since your brother is in Iran?

A. Every time that I have a phone contact with him even if it's two words that I can say, that I have to say, I still do that because I, I believe now, I'm a believer now and I believe that even if it's two words I still have to say those words and to convey them, and every time that I talk with him, every time I talk with him he points out, he says to be careful, he says that there are sort of - it's an expression - that there are people who are better than us, meaning that there could be people listening to us, you know, the government listening to us and it might not be interesting for you but it's just interesting to say that on Sundays every time I speak - I have telephone conversation like with my auntie she says that Did you go to the suit today, meaning Were you wearing the suit to go to, you know, to church she means but she can't say or she says that Pray for us as well when you go there and things like that, she says them because she can't say it clearly."

57 Mystifyingly, the member ignored the fact that the applicant's first answer responded to a question that includes the limitation "when you were in Iran". In para 44 of his reasons he said:

"The applicant was asked how he went about evangelising some one in Iran. He claimed that it was his brothers, parents and close friends because it was dangerous in Iran. He was asked if any one converted. He claimed that he was a believer, but he could not go to the church, that his aunt was a believer, and that he worked on his brother in Iran. It became apparent that his claim of evangelising was speaking to his family on the phone from Australia. He claimed that every times he contacts his brother by phone he tells him to believe, but that the phones are listened to. He was asked if he had been baptised in Iran, and he said no."

58 I need not go on. It is apparent the Tribunal member made no real attempt to establish and analyse the evidence given to him by the applicant. Even on critical issues, he did not check the accuracy of his recollection. In the result, he impugned the applicant's credibility by reference to his own faulty recollection of his evidence.

59 Before parting with the matter I should say something about that part of Mr Smith's submission in which he asserted a contradiction in the applicant's claim (see para 22 above); the contradiction being that the applicant said "he would be killed in Iran without doubt if he were to return but also claimed that he had been twice arrested, tortured and detained by reason of having been converted to Christianity and then released". There may indeed be some inconsistency between these claims, although it would be necessary to consider all the circumstances before coming to a definite conclusion about that. However, the Tribunal was not sitting as an examiner in logic. The fact that the applicant may have exaggerated his likely punishment, if returned to Iran, did not absolve the Tribunal from making its own assessment about the likelihood of persecution. The applicant claimed to have twice been detained and tortured in Iran, by reason of his Christian faith. If the Tribunal accepted the truth of those statements, it needed then to consider whether this would be likely to happen again, if the applicant were returned to Iran; and, if so, whether this amounted to persecution for a Convention reason.

Disposition

60 The appeal should be dismissed with costs. The order of the magistrate will stand. The matter will need to be reconsidered by the Tribunal. Having regard to the history of the matter, I presume the President of the Tribunal will direct that the reconsideration be undertaken by a different member of the Tribunal.

2nd June 2003.

INFORMATION FROM LEONARD KARP

Leonard Karp was representing an Bangladeshi man – **NASN of 2002** v The Minister for Immigration.

The case was due to go the the Federal Court the week beginning 27th May 2003.

The alleged errors of the Tribunal were the same as for NASS except there were more of them.

The Minister agreed to settle NASN 2 days before the case was due to be heard on the basis that the matter return to the Tribunal.

Re **NASS** The Tribunal Member took about six and a half months to make a Decision. He obviously didn't go back to the tape while making his decision. He referred to questions he said he asked and didn't and to answers he said NASS had made which he hadn't. He misinterpreted NASS's comments and make False statements like "The applicant refused to answer".

Our concern here is that a Member who acts in such a manner is allowed to continue making decisions that could affect whether a person lives or dies.
(The Member concerned in both the NASN and NASS cases was Roger Gibson. We wonder how many other applicants have had similar decisions but have not had the benefit of a barrister or someone to check the tape of their RRT hearing against the Member's decision.)

LIST OF TRIBUNAL MEMBERS

All Member appointments are in effect until 30 June 2004. This list includes a number of Members whose appointments take effect after 30 June 2002.

Principal Member

Steve Karas, OAM	01/07/2001

Deputy Principal Member

Kerry Boland, A/g	01/07/2001

Senior Members

NSW		Victoria	
Paula Cristoffanini	01/07/2001	Adolfo Gentile, A/g	01/07/2001
Susan McIlhatton	01/07/2001		

Full-time Members

New South Wales

	Appointed		Appointed
Wendy Berkley	01/07/2001	Kim Rosser	01/07/2001
John Blount	01/07/2001	Shahyar Roushan	01/10/2001
Ruth Cheetham	01/07/2001	Giles Short	01/07/2001
Roger Fordham	01/07/2001	Peter Thomson	01/07/2001
Peter Gacs	01/07/2001	Jill Toohey	01/07/2002
Roger Gibson	01/07/2001	Paul White	01/07/2001
Pamela Gutman	01/07/2001	Stephen Whitlam	01/10/2001
Luke Hardy	01/07/2001	Robert Wilson	01/07/2002
Jack Hoysted	01/07/2001	Sue Zelinka	01/07/2001
Rodney Inder	01/10/2001		
Chris Keher	01/07/2001	Victoria	
Dinoo Kelleghan	01/07/2001		Appointed
Ruth Layton	01/07/2001	Kim Boyd	01/07/2001
Ian Lincoln	01/07/2002	Graeme Brewer	01/07/2001
John Lynch	01/07/2001	Julie Gould	01/07/2001
Philippa McIntosh	01/07/2001	Margret Holmes	01/07/2001
Juliet Morris	01/07/2001	Brendan Kissane	01/07/2001
Louise Nicholls	01/10/2001	Elizabeth Lee	01/10/2001
Kenneth Northwood	01/07/2001	Alan Moller	01/07/2002
Margaret O'Brien	01/07/2001	Stefan Romaniw	01/10/2001
Irene O'Connell	01/07/2001	John Vrachnas	01/07/2001

June 29, 2003 THE SUN-HERALD

Visa staff pressured in appeals decisions

By KERRY-ANNE WALSH
POLITICAL CORRESPONDENT

A FORMER member of the body responsible for reassessing rejected refugee applications has claimed he and colleagues were politically pressured over their decisions.

Bruce Haigh, a Refugee Review Tribunal member for five years from 1995 and a former diplomat, said there was no directive issued to members of the statutorily independent board, but members would be told if "the [Immigration] minister [Philip Ruddock] wasn't happy" about certain decisions.

Pressure was exerted through informal "chats" and meetings with the tribunal's senior member after meetings with Mr Ruddock, he said

"It is supposed to be an independent tribunal, but it is not," Mr Haigh said.

"People are appointed to the tribunal on $90,000 plus cars and other perks, and if they want to have their term renewed, they end up agreeing with certain directions and influences."

He said that although he had no evidence of "palm-greasing" in return for visas, refugee places had become so tight that the system was open to corruption.

Mr Ruddock's use of his ministerial discretion to intervene in cases had become more powerful over the years, Mr Haigh said.

"What we saw was real from the department and the minister, for instance, when we were looking at East Timorese refugees.

"There has been corruption in the department forever."

Both the Government and Opposition have been muddied in the past two weeks with claims and counterclaims about cash payments from international businessmen for visas and political purposes.

The Australian Federal Police is investigating an alleged $220,000 payment by fugitive Filipino businessman Dante Tan to Karim Kisrwani, a prominent Sydney businessman and close friend of Mr Ruddock.

Opposition immigration spokeswoman Julia Gillard claimed the large payment was made to Mr Kisrwani to lobby Mr Ruddock to look favourably on Tan's immigration application.

Tan, wanted in the Philippines for corporate fraud, was granted Australian citizenship last year by Mr Ruddock within weeks of making a $10,000 personal donation to the minister's election campaign fund.

Mr Kisrwani has vehemently denied receiving money from Tan.

Figures show Mr Ruddock has used his powers of intervention 1751 times since becoming Immigration Minister in 1996 – an average of 250 times a year, as much as three to one times more than his three predecessors.

Mr Ruddock could not be contacted for

THE AGE
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Asylum seekers have a right to be heard

June 10 2003

Due process demands judicial review of far-reaching administrative decisions.

How Australia deals with those who seek asylum here has become a difficult and divisive issue. The process of deciding whether a person should be permitted to remain in Australia, even though this may involve issues of human rights, is largely an administrative one. Fortunately, such decisions remain subject to judicial review. In a stinging rebuke to the Refugee Review Tribunal, Justice Richard Cooper of the Federal Court has condemned its failure to adequately investigate claims of persecution by an Iranian family applicant before it. He has ordered the tribunal to review afresh the family's case, saying the tribunal failed to fully canvas claims made by the applicants. His decision calls into question 60 other similar tribunal decisions. The family are members of the Sabian Mandaean faith, which regards John the Baptist as their prophet. There are only about 20,000 Sabian Mandaeans worldwide. Most live along the border between Iraq and Iran. The family in question fled Iran, where they claim to have been subject to significant persecution at the hands of the Shiite Muslim majority. Many Sabian Mandaeans have been detained in Australia as illegal immigrants. The Federal Government has refused to accept that they are treated as "infidels" or persecuted. It has acknowledged that Mandaeans are subject to discrimination.

This is not the first time a judge of the Federal Court has lambasted the Refugee Review Tribunal. The tribunal was established in 1993 to

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provide an independent review of decisions made by immigration officers. Where refugee status is refused, a case may be brought before the tribunal to assess whether an applicant meets refugee criteria laid down by United Nations convention. Tribunal members include lawyers, public servants and refugee advocates. They normally sit alone. Of 6640 applications completed by the tribunal last year, it affirmed the department's decision in 5091 cases. What Justice Cooper's comments appear to highlight is a failing on the part of the tribunal to adequately investigate at least some of the claims of applicants before it. This is a charge that has been levelled at the tribunal before by the court. In turn, the Federal Court - to which some cases may be taken on appeal - has been criticised for trying to subvert government policy, overstepping its mandate to review cases on the basis of law and a general hostility to tribunal decisions. Decisions of the court itself are subject to review by the High Court, which confirms the process of judicial review. Where abuses of human and legal rights are at stake, the danger of extinguishing rights by fiat raises issues beyond normal administrative purview. It is proper for a judicial review to probe deeply into such matters. Forcing the return of asylum seekers, perhaps to face persecution, without a full review of their cases is unconscionable.

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From Weekend Australian June 28/29, 2003

Lebanese 'bread' recipe

From Page 1

been using it — increasing the number of visas issued under his discretion.

"He (Ruddock) can play the role of the godfather," says Bruce Haigh, a former member of the Refugee Review Tribunal and diplomat.

Under Section 417 of the Migration Act, the minister has the power to intervene to grant visas to asylum-seekers rejected by the tribunal.

"The tribunal operated on the basis that only 20 per cent of people who came before it should be given refugee status," says Haigh, a tribunal member from 1995 to 2000.

"If you went over the 20 per cent you'd be counselled by the senior member and told your decision-making was a bit sloppy."

An unpublished manuscript by Australian National University law graduate Johanna Stratton shows that the number of Lebanese granted visas by Ruddock outstrips visas to all other countries.

Indeed, Afghanistan and Iraq do not make the top 18 countries favoured by the minister, although most asylum-seekers come from those two countries.

"Over the years, the migration legislation has become more and more rule-oriented, and the powers of ordinary departmental officers have diminished," says Mary Crock, a senior lecturer in law at Sydney University and the author of several books on refugee law.

"The end result has been to funnel the ultimate power over visas to the minister. The focus of so much power in one person inevitably creates problems of perception and leaves the system vulnerable to manipulation."

Now Ruddock's longstanding connections with Kisrwani are under close scrutiny from a Labor Party determined to prove foul play. They are not there yet but, with dogged front-bencher Julia Gillard leading the charge, the Opposition is hoping for a prized scalp before too long.

INSIDE STORY

The ALP believes Kisrwani is the key to what it is calling the cash-for-visas scandal. The saga has played out in parliament for the past four weeks, with Labor targeting Kisrwani and Ruddock, whose ministerial stewardship of the sensitive Immigration portfolio has won him some plaudits.

'The end result has been to funnel the ultimate power over visas to the minister'

Mary Crock
Law lecturer

Labor claims Kisrwani has exploited his influence with Ruddock, obtaining favourable treatment on immigration visas for those prepared to pay.

And now, just a month after these allegations first surfaced, the Australian Federal Police has been asked to investigate claims that Tan, charged with the biggest stock market swindle in Filipino history, paid Kisrwani $220,000 to lobby the minister for favourable treatment over Tan's immigration status.

Kisrwani "absolutely" denies it. "I have never accepted $220,000 or any other money, from Dante Tan to secure him a visa or for any other reason."

Labor's immigration spokeswoman fired off a letter yesterday to AFP Commissioner Mick Keelty. Gillard says several sources have told her about the alleged $220,000 payment from Tan — who fled Australia just over three weeks ago and is now understood to be in hiding in Europe.

Gillard told the AFP an informant had stepped forward and was prepared to be interviewed. But the anonymous "deep-throat" wanted guarantees of protection because, Gillard explained, they were "concerned about their personal security and the security of their family members and friends".

Gillard, who has been one of Simon Crean's best performers, is staking her reputation on this political witchhunt against Ruddock, a close ally of John Howard.

As she sees it, the facts are straightforward: "Mr Karim Kisrwani has been involved in a series of matters where Minister Ruddock has changed his mind or acted in a way to advance people that Karim Kisrwani has made representations about."

Born in the southern Lebanese city of Jezzine in 1930, Kisrwani emigrated to Australia in 1957. Twelve years later, he established the Jet Set Travel Company in Harris Park. It was here that his brother, Tony, was shot dead in 1992, for reasons that have never been properly explained.

Kisrwani has built a network of influence over the years, befriending — and falling out with — politicians from both sides.

Eddie Obeid, the controversial NSW minister in the Carr Government, is a former business mate. But the two had a falling-out, apparently over a $100,000 loan that Kisrwani claimed had not been repaid.

Despite Kisrwani breaking his silence last night to challenge Labor's claim he had pocketed $220,000 from Dante Tan, it will not be his final remarks in this "cash-for-visas" saga if Labor has its way.

Philip Ruddock MP

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AF

MEDIA CENTRE

Changes To Protection Visa System

MPS 56/2003

The Minister for Immigration and Multicultural and Indigenous Affairs, Philip Ruddock, today announced a package of regulation changes to enhance consistency and integrity in the protection visa system for asylum seekers in Australia.

The existing Temporary Protection Visa (TPV) arrangements applying to unauthorised arrivals have been broadened so that they will now also apply to people who make a protection visa application after arriving in Australia lawfully.

This change will not affect existing protection visa applicants. Nor will it affect people who are resettled in Australia under the Offshore Humanitarian Program. Unlawful arrivals will continue to be covered by the TPV arrangements.

'The change will align Australia's protection arrangements with international protection objectives which emphasise that for most refugees the appropriate response is to provide interim protection until they can return home in safety, ' Mr Ruddock said.

It also reflects the situation between 1989 and 1994 when people requiring protection were only granted temporary visas.

All people owed refugee protection by Australia will continue to receive protection.

The regulations will also enable around 2,400 TPV holders to become eligible for permanent protection if they are found to have an ongoing need for protection. These TPV holders did not lodge an application for a further protection visa before legislative changes in 2001 prevented them from accessing a permanent protection visa in future.

'These balanced changes will ensure Australia's onshore protection arrangements are consistent and fair, and will assist in upholding the integrity of our humanitarian resettlement program,' Mr Ruddock said.

'Where TPV holders are no longer in need of Australia's protection, their places are reassigned to the Humanitarian Program to resettle refugees and others of concern who are in the greatest need.

'Recent experience with changing country situations and new security concerns clearly show the value of being able to reassess whether a person has a continuing need for protection before conferring permanent protection and stay.

'The changes will also reduce incentives for the misuse of our onshore protection

provisions by people who have abandoned protection elsewhere because they would prefer to live in Australia,' Mr Ruddock said.

The introduction of the TPV in October 1999 had proved to be a successful tool in protecting Australia's capacity to contribute to international efforts to help refugees.

'The new regulations also include a power for me to allow people who arrived lawfully, and who are in need of protection, to have immediate access to a Permanent Protection Visa, where this is in the public interest,' Mr Ruddock said.

A third change would provide the ability for the grant of TPVs and Temporary Humanitarian Visas for shorter periods than those currently stated in the regulations.

This removes the problem of visas expiring at different times for family members who had arrived separately, and will help them to be considered for further protection as a group.

28 August 2003

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Last update: 28 August 2003 at 14:41 AEST