



Department of Immigration and Citizenship

*PROPER PROCESS FOR CHALLENGING
A TRIBUNAL DECISION*

February 2011

***This is an abridged version of report 03|2011.
The full report has not been made publicly available to
preserve the privacy of the complainant.***

Report by the Commonwealth and Immigration Ombudsman,
Allan Asher, under the *Ombudsman Act 1976*

REPORT NO. **03|2011**

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory. A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version.

Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

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BACKGROUND

Mr A complained to the Commonwealth Ombudsman about his partner, Ms B, being refused a partner visa in May 2010, despite a direction by the Migration Review Tribunal in October 2008 that she met the relevant relationship requirements.

The Tribunal had directed that Ms B satisfied the relationship requirements for a temporary partner visa. Unless a court overturns this kind of decision, it would usually mean that the temporary visa would be granted and the visa holder could travel to and enter Australia on it. Two years after that a permanent partner visa could be granted if the conditions were met.

When we investigated Mr A's complaint, DIAC indicated that it had concerns about the integrity of Ms B's visa application. Due to those concerns DIAC disagreed with the Tribunal finding that the relationship requirements were met. It did not, however, apply to the court for review of the Tribunal's decision. As Ms B also met the other visa conditions DIAC then had to grant her a temporary partner visa, but this did not occur until 3 May 2010. Two days later DIAC made another decision and refused Ms B a permanent partner visa based on the view that the same relationship did not meet the same requirements.

FLAWS IN ADMINISTRATION

We formed the view that while DIAC's concerns were not unreasonable, they were not dealt with in a proper manner that was fair to Ms B. In combination with other procedural deficiencies, this led to a flawed decision, on 5 May 2010, to refuse Ms B a permanent partner visa.

This abridged report focuses on the flaws in the process, highlighting the lessons that can be learned from our investigation of Mr A's complaint.

Inconsistency and denial of natural justice

Although the Tribunal decision related to the temporary not the permanent visa, the same definition of 'spouse' applied to both visas and the Tribunal had directed that this definition was met. DIAC did not seek judicial review and no new information about the relationship had come to light since the Tribunal decision.

DIAC implemented the Tribunal direction on the temporary visa, but two days later made a contradictory decision in connection with the permanent visa. The delegate was not legally prevented from doing this, but likewise was not required by law to make this decision. It is concerning that this action may have been an attempt to avoid a Tribunal decision that DIAC disagreed with but had not challenged appropriately.

The visa applicant was not informed that the delegate might make a decision on the permanent visa two days after implementing the Tribunal decision, or given an opportunity to comment on DIAC's concerns. Review of the permanent visa decision was not available to Ms B, compounding the decision's impact on her.

By applying the Tribunal decision correctly but in a narrow, legalistic sense, DIAC failed to act consistently and to accord natural justice in its decision making. These

are fundamental principles of good administration and may, in a case like this, be equally important as whether a decision is legally valid.

Failure to follow the appeal process

Agencies are bound by the decisions of courts and tribunals in cases like this, and must follow an established process to challenge them through the courts if they think they are wrong. This allows for independent review of decisions in a forum that allows each party to know the case they must make and to argue in support of the decision they are seeking.

This did not occur in Ms B's case, because DIAC did not analyse and seek advice on the decision within the court's timeframe for seeking review. As a result, the opportunity to challenge the finding on the relevant visa criteria was lost. Despite this, DIAC took the unusual step of writing to the Tribunal and asking it to reconsider its decision. The Tribunal refused to do so.

DIAC's request to the Tribunal that it reconsider its own decision was contrary to the established system of review decision and was inappropriate in the circumstances.

Delay

It took DIAC 18 months to implement the Tribunal's decision. There were a number of factors that contributed to this delay, including the complex history of the case, staffing, workload and communication issues.

The delay meant that the timeframe for a court appeal expired before DIAC could read the Tribunal decision. DIAC then sought advice internally and wrote to the Tribunal, as discussed, which lengthened the time taken to implement the decision. Visa processing (including medical and security checks) did not commence in earnest until approximately eight months after the Tribunal determined that Ms B met the relationship requirements for the visa.

It is important for court and tribunal decisions to be read and analysed by both parties as soon as possible after the decision has been made. In doing so they can endeavour to meet relevant limits wherever possible and, whether the decision is ultimately upheld or set aside, seek to ensure that the correct decision is made. They can also try to minimise periods of uncertainty for the person affected by the decision - Ms B in this case.

This office has previously commented on the problems that arise when administrative drift is not controlled by agencies.¹ We recognise the complexities involved in assessing visa applications and the genuine concerns of DIAC staff about maintaining the integrity of the visa program. However, this matter suggests that further action may be needed to ensure that difficult cases like this one are actively managed.

¹ *Lessons for public administration*, report by the Commonwealth Ombudsman, published August 2007, see Lesson 3 and Lesson 6.

RECOMMENDATIONS

The Ombudsman made three recommendations to DIAC aimed at ensuring that:

- any challenge to tribunal or court decisions occurs through the proper processes and in a timely fashion
- difficult cases are actively managed
- the flawed decision on Ms B's visa application is remedied.

The recommendations focussed on DIAC fixing the problem for Ms B, reviewing its policy guidance for staff to identify systemic issues and taking steps to reduce the likelihood of similar problems occurring in relation to other visa applicants.

DIAC accepted all three recommendations. It acted quickly and has granted Ms B a permanent partner visas in response to our investigation. It has also conducted an internal enquiry, which identified a further two areas for improvement, that:

- consideration be given to the development of a monitoring mechanism which actively oversees progress with the implementation of MRT and other Tribunal decisions, to ensure they are not lost in administrative drift
- further policy guidance be developed and promulgated which indicates that when deciding a permanent partner visa, decision makers should proceed consistent with the MRT's directions for the provisional partner visa, unless substantial new information has come to light, in which circumstances, the client has been provided with natural justice in relation to the new information.