Commonwealth OMBUDSMAN

Department of Immigration and Multicultural Affairs

MANAGEMENT OF A FRAIL AGED VISITOR TO AUSTRALIA

April 2006

This is an abridged version of Report No. 05/2006. The full report has not been made publicly available because of the amount of personal detail in the report.

Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. 05 | 2006

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 three other roles on the Commonwealth Ombudsman—the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); and the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force. The Commonwealth Ombudsman investigates complaints about the Australian Federal Police under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal finding or report. Both of the above Acts provide (in similar terms) that the Ombudsman can culminate an investigation by preparing a report containing 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 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.

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1. INTRODUCTION

1.1 This is an abridged report of an investigation into the handling by the Department of Immigration and Multicultural Affairs (DIMA)[1] of the case of Mrs Aziza Yaukob Agha, an elderly Syrian visitor to Australia from Lebanon. Mrs Agha died shortly after attending a medical examination requested by the Department.

1.2 Mrs Agha arrived in Australia on 15 September 2004 on a six-month visitor visa. In early March 2005 Mrs Agha's relatives approached DIMA seeking an extension of her visitor visa. DIMA refused to accept the application as Mrs Agha's visa had been issued with a 'no further stay' condition. The family subsequently sought a waiver of the condition on the grounds that Mrs Agha was not fit to travel and could not depart Australia.

1.3 The request for waiver was apparently made only two full working days prior to the expiry of the visitor visa and the family were advised by DIMA to apply for a Bridging Visa E (BVE). The Department did not make a decision on the waiver request. A number of short-term BVEs were subsequently issued to Mrs Agha on the basis of medical certificates provided by Dr Chris Towie, the Melbourne-based general practitioner who treated Mrs Agha.

1.4 On 20 July 2005, Dr Towie wrote a letter to DIMA that, among other things, suggested Mrs Agha may be permanently unable to travel. DIMA then referred Mrs Agha for a medical assessment by Health Services Australia (HSA), a government owned corporation contracted by DIMA to undertake medical examinations of visa applicants. The medical assessment was to determine whether Mrs Agha was fit to travel back to Lebanon. The appointment, initially set for 25 July 2005, had to be re-scheduled to 8 August 2005 due to Mrs Agha's ill health.

1.5 Mrs Agha died on 10 August 2005.

2. BACKGROUND

2.2 On 24 August 2005, Melbourne media reported on the recent death of Mrs Aziza Yaukob Agha. Her death was attributed by the media to the actions of the Department of Immigration and Multicultural Affairs (DIMA). The allegation was founded upon the assertions of Dr Chris Towie who reportedly had recorded upon Mrs Agha's death certificate that her death was the result of 'harassment' at the hands of DIMA officials.

2.3 During her visit to Australia, Mrs Agha stayed with her daughter and grandson. Media accounts suggested that Mrs Agha's health had deteriorated during her stay and Dr Towie had assessed Mrs Agha as unfit to travel when her visitor visa expired.

2.4 On 25 August 2005, I was approached by DIMA, at the request of the Minister responsible for Immigration, to review the administrative actions of the Department in this case. The review was to consider DIMA's interaction with the deceased, her relatives, her family doctor, and the staff of Health Services Australia (HSA), who had deemed Mrs Agha fit to travel on an international flight only days before her death.

[1] At the time of the events under investigation, the name of the Department was the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The Department is referred to as DIMA throughout the report.

2.5 I accepted DIMA's request, and commenced an investigation under section 5(1)(b) of the *Ombudsman Act 1976.* This section empowers the Ombudsman to 'of his or her own motion, investigate any action, being action that relates to a matter of administration … by a prescribed authority'.

3. CORONER'S INQUIRY

3.1 Media reports indicated that Dr Towie had referred Mrs Agha's death to the Victorian State Coroner's Court. The role of the State Coroner is to investigate all reportable deaths. A coroner investigating a death looks to find, among other things, the cause of death and the identity of anyone who contributed to the cause of death. A coroner may comment on any matter connected with a reportable death in an attempt to prevent similar deaths occurring again.

3.2 Informal inquiries made by my office confirmed that the matter had been referred to the State Coroner. It is important to note that the role of the State Coroner in such cases is quite different from the role of the Ombudsman. While, by necessity, this report makes references to medical opinions and Mrs Agha's medical history, it is not the role of my office to determine the cause of Mrs Agha's death. My investigation and the opinions I have formed as a result of the investigation, focus on the administrative framework in place, and the reasonableness of actions taken by DIMA in managing Mrs Agha's case. My investigation does not go to the cause of Mrs Agha's death.

4. THE INVESTIGATION

4.1 In the course of my investigation of DIMA's and HSA's interaction with Mrs Agha and her family, I identified a number of issues of concern relating to the processes followed by the Department in the handling of Mrs Agha's case. The evidence suggests that many of these deficiencies are not confined to Mrs Agha's case and are systemic in nature. They include:

- Repeated failure to identify or give adequate consideration to, Mrs Agha's circumstances, and particularly the urgency attaching to her situation. The result was that Mrs Agha's application for waiver of the 'no further stay' condition, and any subsequent substantive visa application she may have made, could not be considered in a timely manner. Subsequently, it resulted in a failure to identify, and act on, Dr Towie's suggestion that the HSA assessment of Mrs Agha might ideally be undertaken at home.
- Limited guidance to, and supervision of, officers in the exercise of their delegations under the *Migration Act 1958*. At several key points in the processing of Mrs Agha's case, including the decision to seek a medical assessment of Mrs Agha, the delegate was a junior APS officer with limited experience in handling such matters. This raised concerns generally about the level at which decisions are being taken in DIMA.
- Repeated failure to adhere to policy and procedural directions laid down for the handling of cases such as Mrs Agha's. These ranged from failure to provide Mrs Agha's family with appropriate advice on requesting the medical waiver of the 'no further stay' condition, to failure to provide all relevant medical information about Mrs Agha to the HSA doctor undertaking her medical assessment.
- Inadequate recording keeping, that impeded the investigation to the point where it was necessary to rely on often conflicting recollections by DIMA officers and members of

Mrs Agha's family. In several key areas it was not possible to determine what actually occurred.

4.2 In my view, none of the errors or deficiencies identified in DIMA's handling of the case was, in itself, of serious concern. However, the cumulative effect of these errors and deficiencies was an unnecessarily stressful situation for Mrs Agha and her family.

5. CONCLUSION

5.1 Mrs Agha was, by all accounts, a frail, aged woman. She had suffered from strokes in the past, had elevated blood pressure, diabetes and found it difficult to walk unaided. She died, of a suspected heart attack, 11 months after arriving in Australia. During her stay here she was treated for anaemia, high blood pressure and arthritis. In the last weeks of her life she suffered a respiratory infection.

5.2 While it may be surprising that Mrs Agha could have been found fit to travel just two days before her death, it is imprudent, in my opinion, to suggest that harassment by DIMA was a direct cause of Mrs Agha's death. Ultimately, the cause of death is a question for the Victorian State Coroner.

5.3 I have found no evidence to support a conclusion that the actions of DIMA officers in this case constituted 'harassment'. To the best of my knowledge, Mrs Agha had no direct contact with DIMA after arriving in Australia. Indeed, it seems clear that the family conducted the negotiations with DIMA about her situation. Mrs Agha's only direct interaction with Australian authorities was to attend a relatively brief medical examination by an HSA medical practitioner. Notwithstanding this, Mrs Agha may still have been stressed by the advice her family was providing her in relation to their dealings with DIMA.

5.4 Although I have found no evidence of 'harassment', I have identified a number of concerns in DIMA's dealings with Mrs Agha and her family. In my opinion:

- DIMA did not satisfy itself that Mrs Agha, an illiterate woman, or her family, understood the consequences of Condition 8503 at the time the visitor visa was granted. While this may not have been a legal requirement, good administrative practice suggests it would have been appropriate, particularly when dealing with an elderly person.
- DIMA staff did not identify, or advise Mrs Agha's family of, the urgency attaching to lodgement of the Condition 8503 waiver request. Once the request had been received, DIMA failed to identify the urgency attaching to its consideration by the delegate. As a result there was insufficient time for a further substantive visa application to be lodged.
- DIMA wrongly recorded that Mrs Agha's request for waiver had been refused.
- DIMA failed to maintain proper records relating to Mrs Agha's case, including records of advice provided to Mrs Agha's family and management of hard copy documentation relating to Mrs Agha's bridging visas.
- DIMA failed to pass on to HSA all relevant medical information on Mrs Agha's condition, as required by the medical assessment guidelines. In particular, DIMA did not respond appropriately to the advice from Dr Towie that Mrs Agha could 'ideally be seen at home'.
- On several occasions, DIMA's interactions with Mrs Agha's family were not as sensitive as they might have been, particularly the advice to Mrs Agha's family about the outcome of the medical assessment and Mrs Agha's visa status.

5.5 The investigation has also highlighted areas where DIMA's procedures may require review. These include:

- management of health assessments at overseas posts for elderly persons seeking to travel to Australia
- provision of advice to a visitors about any conditions relevant to the visa granted
- procedures for deciding on waiver of Condition 8503 on medical grounds, in particular, the need to contact the overseas post
- routine recording of time and date of receipt of documents in DIMA offices
- procedures for identifying matters that require urgent attention
- procedures for issuing of bridging visas
- greater clarity in criteria and procedures for assessing the health of elderly persons, especially the distinction between 'fit to travel' and 'fit to depart'
- the level at which delegations are exercised by DIMA staff, the degree of training, guidance and supervision of delegates, and procedures for identifying and escalating 'problem' cases
- general record keeping procedures.

5.6 I am aware that DIMA's Victorian State Director has already taken action to remedy at least some of the deficiencies identified above. However, the issues identified in the course of my investigation are likely to be equally applicable to other DIMA offices. Unless consistent action is taken on a national level, the circumstances that gave rise to this investigation could occur again.

5.7 I would emphasise in particular the need for DIMA to review its arrangements relating to delegation of decision-making and the supervision of staff. In my view, had Mrs Agha's case been drawn to the attention of a more senior officer, it seems likely that her visa status may have been resolved more quickly and with less stress. Whether or not Mrs Agha's state of health would have been less affected by such an approach is impossible for me to determine. I am, however, confident in saying that, had she died in these circumstances, her death would not have left behind the same sense of bitterness and resentment.

5.8 I am pleased that DIMA has accepted all my recommendations. It is my intention to monitor their implementation and ask DIMA for a formal progress report against each recommendation within six months.

6. OMBUDSMAN RECOMMENDATIONS AND DIMA'S RESPONSES

I make the following recommendations:

Recommendation 1—Arrangement of independent medical examinations
Where DIMA decides that an independent medical examination is necessary for a temporary visa holder who claims to be ill and/or unfit to travel, the visa holder should be informed that they are entitled to arrange for the medical examination to take place in their home. A pro-forma notification should be developed which includes advice about other information that the person should take with them.

DIMA's Response:

Agreed. It is already open to visa holders to request that a medical examination be undertaken in their home. DIMA is undertaking a review of the conduct of medical examinations and the dissemination of the capacity to make such a request will be pursued as a part of this. The Department will also consider how we can influence the clarity of advice given by General Practitioners to DIMA to encourage unambiguous medical advice where the individual is vulnerable.

Recommendation 2—Instructions given to medical examiners
DIMA and HSA should review the instructions provided to HSA medical examiners to ensure that the scope of the task is clear and that there are consistent criteria for the assessment of fitness to travel, particularly in relation to frail aged persons.

DIMA's Response:

Agreed. Implementation is underway. In recognition of the seriousness of Mrs Agha's complaint, the Department has acted immediately to enhance DIMA processes relating to 'fit to travel' cases. In particular, Health Policy section has advised that measures to ensure the Department handles such cases more sensitively are being implemented. These measures include:

- *asking State and Territory Offices (STOs) to refer aged visitors, who have claimed they are not fit to travel by the expiry date of their visa, to Health Policy section for advice prior to referring them to HSA for a medical assessment; and*
- *providing aged clients who claim they are not fit to travel to attend HSA for a medical examination with the options to attend either HSA or to be seen in their home. These cases are currently assessed on treating doctor report/s provided by the client.*

The Department is developing options for providing enhanced visa arrangements for applicants who are in Australia and have been assessed as unfit to travel.

Recommendation 3—Supervision
DIMA should review the delegations issued to Compliance staff and ensure that there are adequate supervisory and quality assurance arrangements in place, in particular, in relation to escalation of cases and oversight of correspondence.

DIMA's Response:

Agreed. In line with recommendations of the Palmer and Comrie reports, the Department is undertaking a number of initiatives to bring about a change in the compliance culture and our operational processes. This will include reviewing and re-engineering our business practices and establishing a basis for fairer and more reasonable dealings with our clients. The issue of delegations and escalation of cases will be considered in this context.

The Department is also reviewing the processes for creating and applying Migration Series Instructions (MSIs) to ensure that they are properly reflected in decision making. A key part of this review will be implementing new quality assurance processes and introducing clearer instructions and consolidated checklists. These initiatives will help compliance officers do

their job and better manage the interests of clients in a fair and reasonable manner.

The Department is currently implementing a new national case management framework. Under this framework clients at risk (based on a number of key risk indicators) are referred to case managers to provide one on one assessment of their individual circumstances and establish a case plan to achieve the appropriate migration outcome for the client in a way that is fair and reasonable. Cases such as Mrs Agha's will be managed under the new holistic case management framework that will ensure that all vulnerable clients are comprehensively assessed and a case management plan developed to address their specific individual needs.

Recommendation 4—Administrative actions
All documents lodged with, and accepted by DIMA, should be stamped with the date of receipt and entered into a records management system. The handling and storage of these documents should be reviewed to ensure that it is consistent with best practice in records management.

DIMA's Response:

Agreed. The Department is currently implementing the findings of a review of its record keeping and records management practices conducted by the National Australian Archives. As a result, records management issues will form an important part of the new compliance quality assurance processes currently being developed. A key component of these new processes will be the introduction of easy to follow instructions and consolidated check lists. In addition, records management is a key component of the Department's Systems for People programme that will provide major improvements in record keeping practices, which will be mandated within Departmental systems.

Recommendation 5—Imposition of Condition 8503
DIMA should review its processes for informing those granted a visa with Condition 8503 to examine how best to implement the intent of the Ministerial Direction no 36, in particular, for illiterate applicants.

DIMA's Response:

Agreed. The Department is reviewing the process of providing information to clients and their agents. With a view to improving the general information available, it is developing Fact Sheets on the condition 8503 imposition process and the waiver process to be published on the DIMA website. As the report recognises, Mrs Agha's application was facilitated by her family and a Migration Agent. Given that the Department is unlikely to have direct contact with most applicants (whether illiterate or not) we must ensure that representatives are aware of their obligations to clearly explain and ensure the visa conditions are understood by the applicant they represent. The Department will review its forms to ensure the clarity of visa condition 8503 and to reflect the important role representatives (whether agents, family members etc) play.

The Department is also revising the procedural guidelines contained in the Procedures Advice Manual (PAM) on condition 8503 imposition to include client service issues.

Recommendation 6—Waiver of Condition 8503
DIMA should clarify the process to be followed in considering a waiver and ensure that clear information on the waiver processes is available to those seeking advice when they visit DIMA offices and also available on DIMA's website and *LEGENDcom*. DIMA should review its guidelines on when it would be appropriate to consult with the overseas post.

DIMA's Response:

Agreed. DIMA has already moved to improve relevant information, including the development of Fact Sheets for clients, revision of client information sheets currently available to clients and revision of the PAM Guidelines to reinforce client service issues. The Fact Sheets will be made available on DIMA's website. In addition, interim guidelines on dealing with waiver requests) were sent to all State and Territory Offices in October 2005.

Recommendation 7—Bridging visas
DIMA should, as part of its current Bridging Visa review, examine the guidelines for granting a Bridging Visa and the period for which a Bridging Visa should be granted, particularly as they apply to those whose departure from Australia has been delayed for health reasons.

DIMA's Response:

Agreed. DIMA is currently undertaking an extensive Bridging Visa review, which will examine the circumstances under which Bridging Visas are granted and policy guidelines for staff.

Recommendation 8—Staff sensitivity
DIMA should pay further attention to ensuring DIMA staff demonstrate appropriate sensitivity when dealing with their clients, especially those who are frail and have medical conditions.

DIMA's Response:

Agreed. Please refer to the Department's response to Recommendation 3. In light of the findings of the Palmer and Comrie reports, DIMA compliance and detention areas have been restructured to ensure a more robust and integrated approach to managing compliance and detention cases, with a strong focus on case management. We are looking at our operational priorities, and reviewing the principles that could guide the way compliance officers do their work in the future. That is, case management will be used as a tool to inform the sensitivities of vulnerable clients including those on bridging visas in the community.

Our existing training is being comprehensively reviewed in line with DIMA's new organisational and cultural framework - 'People Our Business'- and the new business directions and priorities for Compliance. The new training content will be fully consistent with new instructions and procedures as they become available.

The new training programs will enhance the delivery of knowledge and its application by incorporating adult learning principles, for example, by increasing the workplace simulation activities in the program to reinforce knowledge acquisition and retention.

DIMA's College of Immigration, Border Security and Compliance will begin training staff in July 2006. It is planned that the college-based learning will be integrated with and supplemented by further supervised workplace learning. Provision has been made for the continued review of training content, validation of assessment processes and oversight of quality review processes through the governance structures of the college, in particular the College Curriculum Sub-committee.

A cultural awareness training course is currently being developed. Course material will cover culture, language and ethnicity as well as responsibilities of compliance officers when engaging with clients from diverse backgrounds. This training is expected to be piloted in mid 2006 and incorporated into the College curriculum.