

**REVOCATION OF VISAS
ON ENTRY TO AUSTRALIA**

SECTION 35A REPORT

September 1997

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1. OVERVIEW

For a non citizen to lawfully enter Australia it is necessary to hold a visa. Apart from the 90,000 people migrating to Australia each year on permanent visas, approximately 2.6 million enter on temporary visas for a wide variety of purposes including business, holiday and family visits.

In almost all cases the visa is obtained overseas and the person commences their journey in the full expectation of being permitted to enter on arrival. The airline (or other carrier) involved is required to ensure that passengers hold a valid visa for entry before departure on the trip to Australia. Failure to do so can result in the carrier being served with an infringement notice and/or being made to bear the costs of removal.

In the case of some visa categories and visits by people in particular circumstances a sponsor may vouch for them, provide a guarantee of support and provide a commitment that the sponsored visitor will leave before their visa expires.

Under the *Migration Act 1958* a number of grounds exist for the cancellation of visas by Immigration officers at border entry points acting under delegation from the Minister. These grounds are generally expressed, covering such matters as protecting the health, safety and good order of the Australian community and enabling action where a person has not met a condition of the visa.

Once a visa has been cancelled the person will be refused entry to Australia and held in an immigration detention centre until they can be put on a departing flight.

The Ombudsman's office has received a number of complaints about the circumstances under which visas have been cancelled by border Immigration inspectors. Although these are few in number when compared with the annual volume of visitors to Australia, (2.6 million in 1994/95), a decision to cancel a visa at the border can cause significant disadvantage and great distress to those individuals involved.

The issues raised by complainants include:

- whether the officers have exceeded their powers;
- whether the law has been correctly applied, particularly in cases where there has been no change of circumstance since the original grant of the visa;
- whether adequate contact has been made with a sponsor prior to cancelling a visa; and
- the conditions experienced by people during their detention and the feeling that they have been "treated like criminals" without having committed any obvious offence.

This report is the outcome of an investigation by the Commonwealth Ombudsman's office into one such event in March 1995. During the course of this investigation a number of important administrative changes have been introduced by the Department and further changes have been agreed to as a result of the Ombudsman's recommendations.

In addition the Department agreed to my recommendation that, in this case, compensation should be paid to the complainant (the Australian sponsor) equal to the cost of the air fare. This recommendation was made in the context of the particular facts in this case and does not mean all people who are refused entry have a case for compensation.

There is an important principle at stake in this matter. Where a person has honestly and validly applied for a visa and where it has been granted by an Australian overseas post, then that person should have a reasonable expectation that the visa will be honoured, unless there is a serious, clearly articulated and lawful reason for not doing so and the correct processes are followed.

Where the ground of "change of circumstance" is relied on, the onus is on the Department to demonstrate that the changes in the period since the grant of visa have been real and so substantial that the person would no longer be eligible for a visa.

2. THE COMPLAINT

On 5 June 1995 my Melbourne office received a letter from Ms A who complained about what had happened to her pen-pal, Mr B, a citizen of Zimbabwe. Mr B arrived at Perth airport on 3 March 1995 travelling on a valid visitor visa issued two days earlier in Harare. After a short interview with an Immigration Officer of the (then) Department of Immigration and Ethnic Affairs¹ this visa was cancelled and Mr B was refused immigration clearance, detained for 36 hours and then returned to Zimbabwe pursuant to section 217 of the *Migration Act*.

Ms A raised this matter with her local Member of Parliament, who early in April had written on her behalf to the then Minister for Immigration and Ethnic Affairs. The Minister replied by outlining events surrounding Mr B's arrival and departure from Australia and providing some clarification of the reasons why Mr B's visa was cancelled under Section 116(1)(a) of the *Migration Act*. Ms A was not satisfied with the Minister's reply and approached my office.

Included in Ms A's correspondence to the Ombudsman was a 12 page hand written account of events at Perth airport by Mr B. The text is reproduced as Attachment 1 along with extracts from Ms A's letter to the Ombudsman at Attachment 2. Copies of these documents were given to the Department when my office first wrote about Ms A's complaint.

Ms A wrote that she had raised money over a 3 year period to buy an air ticket for Mr B, her pen-pal since 1989, so that he could come to Australia to holiday with her and her family. Ms A's complaint was that the cancellation of Mr B's visa was unfair for a number of reasons.

The purpose of the visit had been outlined on the application form and was further explained by Mr B when interviewed by the Immigration Inspector at Perth airport on 3 March.

Ms A had also explained in her letter of invitation to Mr B and to a DIMA officer at Geelong in a conversation prior to the approval of Mr B's visa, that she would:

¹ The department changed its name in March 1996 to the Department of Immigration & Multicultural Affairs (DIMA). In this report it is referred to for consistency as "the Department" or DIMA.

"provide food and accommodation for him in return for help around the house and help running my music school".

Her intention was to show her students some different aspects of life and music (Mr B is an African musician). Ms A had also arranged for Mr B to attend a special occasion, a debutante ball, as the partner of her daughter.

At the suggestion of the Geelong DIMA officer, she had provided DIMA with a statutory declaration to the effect that she guaranteed to support Mr B while he was in Australia and that she understood her responsibility to ensure that he returned to Zimbabwe when his visa expired. She argued that Mr B was a genuine visitor who had strong feelings about his own country and no intentions to stay in Australia.

Ms A argued that she was fully aware that as a visitor Mr B could not seek employment whilst in Australia. She argued there had been full disclosure about the nature of the arrangement in that she had advised DIMA that Mr B was to *work* for her around the house to help **"earn his keep"** and was **"to come to my place of employment as an added interest to him"**.

Ms A also expressed her concern that:

- insufficient time was given by the Department to respond to the notification to cancel;
- insufficient effort had been made to contact her as the sponsor; and
- she had been greatly inconvenienced by waiting at the Melbourne Airport for many hours after Mr B had been detained in Perth (and hence missed his connecting flight) - without being aware of what had happened.

In addition, the direct account written by Mr B raised a number of other concerns about his treatment at Perth airport.

Ms A believed the visa had been cancelled because of a prejudice against her because of her low income, Mr B's lack of funds and an incorrect assumption that he was likely to work contrary to the conditions of his visa.

A range of other matters were also raised which related to Mr B's detention and his treatment during that period.

3. THE INVESTIGATION

This complaint was received on the 5th June 1995. After a preliminary investigation a letter was sent to the Secretary of the Department on the 17 July asking a number of questions in relation to the 7 main issues which the case seemed to raise. These were:

- the grounds for cancellation of a valid visa;
- the apparent failure to notify the sponsor of the delay;
- the apparent failure to make contact with the sponsor before cancelling the visa;
- the apprehended bias by the complainant in relation to the alleged comments of the Immigration and Customs officers;
- the lack of cultural sensitivity in the alleged offer of a hair cut;
- whether Mr B's privacy had been infringed by the opening of mail and the suggestions made about the complainant's relationship to Ms A and her daughter;
- the basis for the strip search; and
- comments on the remedies sought by the complainant.

Despite a number of follow ups with the Department, a reply to this letter was only received in February 1996, seven months after our letter to the Department. The reply dealt with a number of issues but left other questions to be resolved. The Ombudsman then obtained the Departmental files on the case and sought further advice on the legal and policy issues.

A draft report on the case was prepared and forwarded to the Department for comment on 14 August 1996 with a request for a reply within 28 days. However, no reply was received until 29 November after the Ombudsman had set a deadline for completion of the report.

The Department's replies have been incorporated in this revised report along with the details of other policy changes developed by the Department concurrently with the investigation.

4. THE ISSUES

Four key issues, set out below, emerged in the course of our discussions with the Department over this case.

4.1. THE REASON FOR ORIGINAL REFERRAL

The version of events provided to this office by Mr B and Ms A raised the concern that ethnicity, manner, dress or hairstyle may have played an unreasonable role in the cancellation of Mr B's visa.

In DIMA's first response of 26 February 1996 the former Secretary stated

"I am informed that Mr B's appearance and ethnicity were irrelevant in the consideration of the visa cancellation.

This would seem to overstate the situation and offers no alternative explanation for how Mr B came to the attention of Immigration Officers and why he, in particular, was selected for questioning. In practice it seems inevitable that appearance plays a role in border screening - the issue is whether it is used in a discriminatory or unreasonable way.

A function of Australian Customs Service (ACS) officers at airports is to refer incoming visa holders to immigration inspectors if the ACS officer identifies a visa irregularity or forms a view that there may be an irregularity. Migration Series Instruction (MSI) 51: **Immigration clearance at airports and seaports**, which applied at the time Mr B's visa was cancelled, contemplated an "intuitive referral" by an ACS officer "prompted by irregularities in the person's claims, documentation or baggage".

The Departmental file indicates that appearance may have been a key factor in initially causing the Australian Customs Service (ACS) primary officer to become interested in Mr B. The Immigration Inspector's Report at folio 46 of the Departmental file 95/005209, makes reference to:

"Pax taken offline for bonafide assessment Pax poorly dressed. At i/v he advised he had no funds at all."

Furthermore, the first 2 pages of Mr B's own account of events indicate that while he was standing in line waiting to go through customs clearance, he had already attracted the attention of an officer whom he refers to as a senior Immigration officer who approached the Customs clearance desk and according to Mr B gave them instructions. Apparently by staring back at the officer Mr B had caused some annoyance.

It appears that following questioning by the Customs officer, it became evident that Mr B had no money and was then, not unreasonably, referred to the duty Immigration Inspector for a further interview. This was in accordance with MSI 51 which provides for referrals to Immigration officers where doubts about bona fides are raised.

It is not unreasonable, that Mr B's arrival in Australia without any money attracted the attention of officers at the border. The issue, discussed below, is whether the action they took was appropriate in the absence of further contact with the sponsor or the officers who issued the visa.

I accept that Mr B was referred to the Immigration Inspector by the ACS officer in accordance with the instructions contained in MSI 51, in operation at that time, and that the Immigration Inspector was entitled to interview Mr B to determine whether or not he met the criteria prescribed by the Regulations for the grant of a visitor visa.

However, I am also pleased that the policy in question has since been reviewed. During the course of this investigation the Department held a conference of managers of Border functions in October 1995. This has resulted in a new Policy Statement on the role of Airport Inspectors which was promulgated on 7 February 1996 (see Attachment 3). This includes a number of significant changes to the arrangements in place at the time of Mr B's arrival, such as a reduced emphasis on visa verification on the basis that passenger bona fides are subject to verification at a number of points prior to passengers presenting for immigration clearance.

Importantly the new policy directed an immediate end to "intuitive" referrals of incoming passengers for further questioning. Specifically it states:

" The use of subjective indicators (such as tattoos, attire or presentation) to identify possible non bonafide travellers is not appropriate".

4.2 ALLEGATIONS OF BIAS

There are a number of anecdotal claims made in Mr B's account of events which allege various things were said in relation to his appearance and his Rastafarian beliefs. The Department has not directly commented on these allegations apart from the statement quoted in 4.1 that appearance and ethnicity were irrelevant to the decision to cancel the visa.

Because of the lack of records and the time that has elapsed since these events occurred, I have been unable to form a conclusion about these statements or whether "appearance and ethnicity" influenced the decision to cancel Mr B's visa in an unreasonable or discriminatory way.

In her letter of 29 November 1996 the current Secretary of DIMA acknowledged that it is difficult to establish the circumstances surrounding Mr B's interview at Perth Airport. She commented:

" I accept that the Departmental record of proceedings after Mr B's referral from the primary line is less than satisfactory. I will ensure that Department's interview procedures are amended so that an accurate record is kept of proceedings after a passenger is referred from the primary line. This will include mandatory completion of a record of interview which must be signed by the interviewing officer... This procedure will be introduced Australia-wide. "

4.3. CONFIDENTIALITY AND STRIP SEARCH

DIMA's February 1996 letter stated that DIMA officers did not strip search Mr B at the airport but that Mr B was subject to a normal search by Australian Protective Service (APS) officers prior to admission to the Immigration Detention Centre as part of the admissions process.

Customs officers are permitted to undertake strip searches in the exercise of their Customs function. However, I understand that they are required to record such action in a "Register of Persons Searched" and that Mr B's name does not appear in that register.

Mr B's account of events alleges that he was strip searched at the airport at the same time as he was asked immigration related questions. Mr B refers to a second search at the IDC but describes this in detail and apart from a search of his hair, it did not involve his body. The officers concerned apparently thanked Mr B for being co-operative and the induction procedures were completed quickly.

DIMA do acknowledge a search at the airport of Mr B's luggage and inspection of his mail. Section 252 of the *Migration Act* provides the legal basis for search of a person, clothing and property if:

“ a person is a non citizen who has not been immigration cleared, and an authorised officer has reasonable “grounds for suspecting there are reasonable grounds for cancelling the person's visa”.

The purposes for which such a person may be searched are to detect weapons or any "document or thing" that may be evidence for cancellation of the visa. In my view this would include the reading of the letter and the questions about Mr B's relationship with Ms A and her daughter. However, the facts in support of the suggestion that there was a relationship were very tenuous and this issue was not relied on in the cancellation of the visa.

Australia's immigration laws provide for a risk assessment to be made whilst processing a visitor application by a person from a developing country, who may have little reason to return.

DIMA officers are not authorised by the Migration Act to undertake strip searches and the former Secretary stated that DIMA officers did not strip search Mr B. Nevertheless, the Secretary has acknowledged that it is difficult to establish the circumstances surrounding Mr B's interview at Perth Airport and the search which he claims took place there. She makes the commitment to ensure the improvement of the recording of such interviews and inclusion of details such as any search carried out on a person, his or her clothing and/or property.

A visitor visa may be refused if there are grounds to believe that the applicant has a relationship with an Australian citizen and intends to circumvent Australian immigration laws by marrying on arrival and hence gaining an Australian spouse visa.

DIMA indicate that it is rare for the *bona fides* of travellers to be challenged at the border. However, this case and others suggest that travellers can be questioned quite closely on entry about their motives despite holding a valid entry visa. Particularly in the sensitive area of potential relationships with Australian citizens, it would seem that the environment of the airport is not the right place to investigate relationships involving a person who probably has just come from a long flight.

In my opinion, if an Immigration Inspector feels there is an inconsistency between an answer given on entry or in an immigration clearance form and the requirements of the visa held, then it may be more appropriate to require the person to attend a formal interview at DIMA to further explore the facts. If a revocation decision is thought justified after this interview the individual should be provided with an opportunity to respond to the allegations that they have failed to make an accurate visa application.

If a judgement is to be made that a certain person represents a risk of not returning in accordance with their visa, that question should be considered and resolved prior to the visa being issued and only where false information had been provided or there had been a material change in circumstances, should it be subject to subsequent overturning.

The unrelated case of Ms G discussed on page 147 of my 1995/6 Annual Report to Parliament highlights this same issue.

In summary, my conclusions on the question of the searches are:

- it appears that there was authority for Customs to search Mr B at the airport for drugs although it is unclear whether they did so;
- the direct evidence about the search of Mr B's possessions by DIMA officers at the airport indicates that it was conducted within their powers;
- there is insufficient evidence to corroborate Mr B's claim that he was also strip searched at the airport in the face of DIMA's denial that this occurred; and

In response to my concern at the lack of clarity concerning these events, the Secretary of DIMA in her letter of 29 November 1996 indicated that the new procedures for mandatory completion of a record of interview would

“detail among other things, any search carried out of a person, his or her clothing and/or property.”

4.4 NOTIFICATION OF SPONSOR ABOUT DELAY

The complainant was particularly upset that, as the sponsor, she had not been contacted about Mr B's detention in Perth and that no information had been available through the airline or DIMA officers in Melbourne. She and her daughter had driven hundreds of kilometres to meet Mr B at Tullamarine Airport. After a fruitless and uncomfortable 10 hour wait they then had to drive for many hours to return home.

During this period the DIMA officer in Perth twice rang Ms A's home number, not surprisingly, without success. It was only through the efforts of airline staff to locate Mr B that his whereabouts was passed on to Ms A. The airline then contacted DIMA and arranged for the officer in Perth to ring Ms A and provide an explanation.

This was after the decision to cancel the visa had been taken by the officer in Perth but before Mr B was put on a plane back to Zimbabwe. According to the complainant, the officer in Perth provided his reasons for cancelling the visa but did not offer her an opportunity to seek advice or appeal the decision. The complainant says she was told that the advice was "just a courtesy call".

The former Secretary expressed concern that advice had not been passed on through the Immigration officers in Melbourne. His February 1996 letter stated:

“I am of the view that the circumstances of this case have exposed the need for the Department to make standing arrangements for the advice to relatives and friends where a passenger's immigration clearance is to be inordinately delayed”.

This was confirmed by the Secretary in her November 1996 letter:

“The former Director, Air and Sea Port Facilitation Section wrote to all airport managers on 27 February 1996 about the requirement to contact, at the port of expected arrival, friends, relatives or sponsors of persons delayed in immigration clearance. This requirement will be included in the Airport Inspector's Handbook which is currently being updated.”

4.5. FAILURE TO CONTACT THE SPONSOR

Mr B's visa was cancelled before any contact was made with his sponsor and there appears to have been no attempt to review the situation once contact with Ms A was established.

MSI 69: Cancellation of visas under subdivisions E, D & F requires officers to exercise care when cancelling visas under section 116 of the Migration Act, and, at 10.2.2 provides a non-exhaustive list of factors an Inspector can consider once the Inspector has determined that a ground for cancellation exists. These include:

- the seriousness of the ground for cancellation,
- the purpose of the visit and;
- any hardship that would be suffered by the visa holder or an Australian citizen.

Further, **MSI 51, at 14.5.4** stated that Inspectors should interview relatives and friends to confirm statements made by the visa holder. As recorded above, although the officer in Perth made two phone calls he did not contact the sponsor until after the visa had been cancelled.

Neither did he speak with the other DIMA officers involved in Harare or Geelong. The officer in Perth did, however, obtain a copy of the visa application form and supporting documentation from Harare. It was on this information and his interview with Mr B that the decision to cancel the visa was taken. The appropriateness of this will be discussed further below.

In the circumstances of this case, in my view, the failure to speak with the sponsor prior to cancelling the visa was unreasonable. This is particularly so given that financial arrangements had been submitted by the sponsor, Ms A, and approved by the Post only two days previously.

Decisions to cancel a visa whilst the person is in immigration clearance are only reviewable by the Federal Court on a point of law. However, there is a requirement in section 119 of the *Migration Act* for the visa holder to be notified of the reason and to be allowed a specified time to show that the grounds for cancellation do not exist or that there is a reason why the visa should not be cancelled.

Mr B was handed a notice of intention to cancel his visa. It required his response "promptly" and gave him no specified time to respond. Although the notice included a fair amount of detail about the policy, it gave little elaboration of the reason (namely that he was not a "genuine tourist"). Mr B was not offered any legal advice or an opportunity to talk to his sponsor on whom he was entirely dependent.

In fact, the Department reports that when Mr B was given the opportunity to comment on the grounds for cancellation he replied:

"I wish to shake the hand of my pen pal".

This appears to be a very succinct statement of Mr B's purpose in coming to Australia as a visitor to meet a friend. Mr B was making a statement that he wished to meet the person who had sponsored, and paid for his visit to Australia.

In her November 1996 letter the Secretary provided a new piece of information:

"After cancellation of Mr B's visa, (the officer in Perth) did manage to talk to the sponsor. During this conversation Ms A advised that she had "borrowed" the money for Mr B's airfare. This is inconsistent with her letter of complaint to you where she states that she had raised the money over a three year period. This conversation did not give the officer in Perth cause to alter his decision to cancel the visa."

This adds a further level of complexity. Although the decision had already been taken, the sponsor was only provided with the grounds for the decision during this conversation. Yet, it appears that the DIMA officer was still open to reconsidering the decision based on this phone call. The complainant has since advised that there is a complex story to how the money was raised but that she described it as "borrowed" in this phone call because she wanted to convey how important the trip was. It seems she now regrets doing so but says she felt in a difficult position and did not feel comfortable discussing her financial affairs in such detail.

In my view a sponsor is an essential stakeholder in the visa grant because the sponsor must ensure the conditions are fulfilled. Although it may be difficult for privacy reasons to serve the sponsor with a copy of any notice of intention to cancel a sponsored visa, at the very least, provision should be made for the visa holder to consult with the sponsor within the specified time to enable them to provide a coherent and accurate answer to the grounds for cancellation.

4.5. GROUNDS FOR CANCELLATION

The officer in Perth cancelled Mr B's visa under section 116(1)(a) of the *Migration Act*:

“on the basis of the information before him that the circumstances which permitted the grant of the visa in Harare no longer existed”.

Section 116(1)(a) provides that the Minister may cancel a visa if he or she is satisfied that:

“any circumstances which permitted the grant of the visa no longer exist”.

MSI 51 gave limited guidance about *how* to make a decision to cancel a visa. For example, no guidance was provided on what factors to weigh up and how much weight should be accorded to the post's assessment compared to the views and judgement of the Immigration Inspector on duty.

The key issue about the cancellation is whether the circumstances had in fact changed in the two days since the visa was issued or whether the officer in Perth was remaking a decision which had already been made by others in possession of more information.

In my opinion, the decision to cancel Mr B's visa under section 116(1)(a) may have been legally flawed. My reasons are outlined below.

A DIMA officer in Geelong had interviewed the sponsor, Ms A, at length about her reasons for sponsoring Mr B and her intention to support him during his stay in Australia, and, had advised Harare accordingly prior to the visa being issued. Mr B's lack of funds and Ms A's circumstances of a limited income but a self-sufficient lifestyle on a farmlet in rural Victoria, were well known to both Harare and Geelong before the visa was issued.

The officer in Perth did not speak to officers at either Geelong or Harare in an effort to obtain information about why those officers believed the circumstances supported the issuing of the visa. Instead the officer in Perth was satisfied to obtain a copy of the application and the Harare decision records from which he effectively re-made the decision.

Ms A had provided to the Department a statutory declaration stating that she would bear full responsibility for Mr B's accommodation and keep while he was in Australia. As well she had indicated that she understood her responsibility under the *Migration Act*, as Mr B's sponsor, to ensure that he returned to Zimbabwe at the end of his visit.

In the 2 days between issue of the visa in Harare and Mr B's arrival at Perth airport, there was no substantial and relevant change in Mr B's circumstances. In DIMA's view, the officer in Perth made a new decision on the basis of "changed circumstances" but what this change was has not been spelt out. I tend towards the view that the officer appears to have effectively re-visited the decision made in Harare and cancelled the visa because he decided it was wrongfully issued. This seems to be outside the authority of section 116(1)(a).

In the letter of February 1996 the former Secretary raised an alternative argument that it was the original Harare decision that was flawed.

"In the context of whether Mr B met the prescribed criteria for the grant of a visitor visa, either at the time of the original application or upon arrival, I am satisfied, on the information presented, the requirements for the grant of a visitor visa could not be satisfied That said, the clear implication is of course, that the original visa grant was inappropriate".

However, whatever view one takes of the original decision, I find it hard to accept that there was a change in Mr B's circumstances and hence I am of the view that there were no good grounds for its reversal by an Immigration inspector.

In her letter of November 29 the Secretary did not add to the arguments presented in support of the cancellation. The letter conceded that in March 1995 Immigration inspectors had limited guidance about how to make a decision to cancel a visa but argued that there was "further evidence" available to the officer in Perth and this constituted a change in circumstances.

I do not accept this as it seems there was less rather than more information available and the sponsor was not given an opportunity to contribute to the second decision. Even if there were more information it would have to have included a materially different fact to demonstrate a change in circumstances.

The Secretary does not concede the decision was unlawful.

However, the principle at stake is significant. If a person honestly and validly obtains a visa from an Australian overseas post then they have a legitimate expectation that they will be allowed to enter the country having paid their air fare. No offence is committed unless they do not leave Australia at the end of their visa.

The Secretary has responded that whilst Mr B and Ms A may have had an expectation that he would be permitted to enter, the grant of a visa does not guarantee the right to enter and remain in Australia unless the holder is immigration cleared at the point of entry.

I agree that in the public interest there should always be a reserve power to deny entry but this should only be done for good and sufficient reasons (at the least, the harm expected from allowing the person to enter should be identifiable and greater than the harm to the person concerned). Regard should also be given to Australia's reputation if a visa can be cancelled with insufficient reason.

I am pleased that there is a large degree of agreement on the need to make such decisions carefully. The Secretary has advised that in future there will be involvement at a high level in decisions to cancel visas. She advised in a letter dated 29 November 1996 that:

Border procedures have been reviewed as a result of the Borders Conference held 12-13 October 1995. The First Assistant Secretaries of Overseas Client Services and Australian Client Services Divisions advised all airport managers in a Minute of 7 February 1996 of changes to Departmental policy in the immigration clearance process (Attachment 3). As a result:

- The immigration inspector's role is designed primarily to assist bona fide passengers in the immigration clearance process. It is reasonable to assume, in the absence of objective evidence to the contrary, that the majority of passengers are bonafide on arrival.*
- Customs officers are instructed not to "test" a person's bonafides for immigration purposes unless there is a reason to do so and to refer a passenger only if there is an obvious inconsistency in his/her claims on the incoming passenger card or other objective criteria.*
- In cases where cancellation of a visa is the recommended course of action, State Program Managers and where appropriate State Directors are consulted on each and every case before the visa is cancelled.*

Cumulatively these measures will ensure that cancellations or proposed cancellations in immigration clearance are fully documented and subjected to the closest scrutiny.

Since then there has been the release by the Joint Standing Committee on Migration (JSCM) of a report “Australia’s Visa System for Visitors, 1996” which reinforces the message that any intuitive referrals must be based on objective and substantial indicators.

A minute of 6 June 1997 (Attachment 4) endeavours to give some guidance as to what kinds of indicators might support a decision by airport staff to refer a passenger for further inquiries in order to resolve possible doubts about that person.

5. CONCLUSIONS AND RECOMMENDATIONS:

In summary the conclusions I have reached are that:

1. In the circumstances of this case, in my view, the failure to speak with the sponsor prior to cancelling the visa was unreasonable.
2. Mr B and Ms A had a reasonable expectation that Mr B would be permitted to enter Australia given that he was travelling on a valid visitor visa issued only 2 days previously.
3. There is no evidence of a substantial and material change of circumstances in the period between the issue of the visa and Mr B’s arrival in Perth.
4. The decision to cancel the visa may have been legally flawed in that it may have been outside the authority to cancel contained in section 116(1)(a) of the *Migration Act*.

I am pleased that agreement has been reached on most points with the Department. Appropriate actions have been put in place to refine existing policy and to ensure it is uniformly applied.

Taking all the circumstances into account, I made the following recommendations to the Secretary of DIMA:

1. Ms A should be compensated for the cost of a return air fare from Harare under the compensation scheme for defective administration.
2. Any future application by Mr B for a new visa to visit Australia should be assessed on its merits having regard to the relevant legislative provisions.
3. Border officers should be fully trained in the new procedures and policy requirements. This should include some clarification of what, in the Department's view, constitutes a "change in circumstances".
4. Instructions relating to cancellation of visas at the border should be further clarified to provide guidance on how to weigh up the relevant factors, particularly in the context that such decisions should not be taken lightly.

I am pleased to say that there is substantial agreement on most points. Compensation has been paid to Ms A for the cost of the air ticket. Mr B re-applied to visit Australia but his new application was assessed and rejected. Steps have been taken to implement the other recommendations.

My office will continue to monitor the way in which the powers under s116 are used. The introduction of electronic travel authorities raises new and complex issues about the circumstances in which a person can be refused entry whilst holding a valid entry permit. I hope that the thrust of the policies adopted since this complaint arose will be carried forward in the future.

ATTACHMENTS

1: THE ACCOUNT BY MR B OF EVENTS

PERTH AIRPORT

3-03-95

Very friendly people, everyone talking to everyone else as if we knew each other before. Customs Officers helping others to reach the right places for Customs Clearance.

Long queues at Customs Clearance desks. Waiting is not boring as I study PERTH VISITOR'S GUIDE and chat to other travellers.

I develop an uneasy feeling after a while and then I notice an Immigration Officer staring at me. His uniform is different from other Officers. Maybe he is their Senior. He keeps on staring and I stare at him also. I hold his blue-eyed gaze to show him I wouldn't be outstared easily. I out-stare him. He looks cross and gives instruction to the Officer in charge of my queue. He loiters around, definitely waiting for my turn to reach the Clearance desk.

I change from my long queue to a short one. Senior Officer approaches this clearance desk also and chats to the Officer.

I reach the desk and produce my passport to hand it to the Officer. He gives it to his Senior who examines my visa. Senior hands it back for the Officer to stamp it.

Senior asks if I have any money to declare. When I told him that I had not, he asks again "You have no money whatsoever?" As if its a crime not to have money. I tell him that I do not need money because I'm going to meet my sponsor at Melbourne Airport. I would not be visiting Tourist Resorts nor would I be living in an hotel, but at my sponsor's farmlet.

He asks me to follow him. He leads me to a certain room asks me to wait for him there. He locks the door and goes. I imagine that he is looking for other prey.

I laugh by myself and say to myself, "Well this tiger thinks he has found prey, but he's mistaken, he has come up against another predator, the LION. Soon he will be smiling apologetically and saying he thought I was a drug dealer or smuggler". I dose off.

Wakes me up and interrogates me. Why are you visiting Australia?

I'm visiting my friend and her family and her friends.

Who is your sponsor?

Heather A is my sponsor.

What is the name of your friend?

The same Heather A.

Since when did you know each other?

Since 1989.

Why is she providing you with the air ticket?

Because we are good friends and more than that we are sister and brother.

Is she Zimbabwean?

No she is Australian.

When did she come to live in Australia?

She is Australian by birth, her parents are also Australians.

Why then do you say you are sister and brother?

Because our relationship is much more than that of mere friends.

When did you first meet and where?

We have never met before, we are going to meet for the first time tonite at Melbourne Airport.

He shakes his head in disgust and sort of bangs and locks the door. I dose off again.

Wakes me again, tells me we are going to collect my luggage. I collect my suitcase and we return to the cold room, this time with another Officer. I notice than I'm being guarded and I ask, "Am I being arrested?" They exchange

glances and the Senior says, "No, you are not being arrested, we just want to take a look in your luggage as part of our procedures".

On reaching the room, the other officer puts on elastic gloves and asked me if I'm the one who packed the suitcase and I admit that I'm the one.

He began searching my suitcase while his senior examines my yellow folder. Among the contents of the folder he find Julie's photo and latest letter. He reads Julie's letter. I tell him its a personal letter and therefore confidential. They laugh and the Senior says nothing is confidential to immigration. He asks me Julie's age and I tell him she's sixteen.

He asks if I'm in love with her and I say she's a friend. He asks how I met her and I explain that she's Heather's youngest daughter. He says from what he read in Julie's letter it seems that Julie and I are in love.

I tell him that its just his assumption and his eyes registered anger. I began to be afraid that they may plant drugs in my suitcase. The other officer strip search me while his Senior makes notes while examining contents of my yellow folder. After going through my note book, He questions me again.

Who is this Heather V? She is the same Heather A, she is now using her maiden name because she is now divorced.

What is your purpose for visiting her?

I'm going to partner her daughter Julie at her debutante ball as you have seen in that letter.

Is that the only reason?

Yes.

Why would you spend three months in Australia?

I will be rehearsing for the great deb. Rehearsals begin on the 5th of March and the actual ball is sometime during the month - end of May, that's why I have to stay three months.

Why did they grant you the visa in Zimbabwe in the first place?

Because they saw nothing wrong in my intentions to visit Australia.

Who granted the Visa?

The Australian High Commission of Zimbabwe.

Do you have the contact number of the people you're visiting in Australia?

Yes, here it is.

From then on his questions began to be hurried, unclear and confusing. He would fire a question even before I've been through answering the previous one. He was now twisting my answers and sometimes would not even listen to what I had to say. I felt as if I was being bullied and I asked him to contact my friends at Melbourne Airport.

He asked why he should contact them at Melbourne Airport when I had given him a Victoria number. I told him that I knew no one would be at home in Victoria because the whole family is in Melbourne expecting to meet at the Airport.

He said my friends were not known at Melbourne Airport and I replied that the authorities at Melbourne would easily find my friends by just announcing on their P.A. system that they (my friends) were wanted at a certain office on the phone. He asked if I had the money to make the call, I said I didn't have and so he said he would try to contact them himself at his own time.

He told me that there would be some people coming to take me to a centre where I will be held until my friends are contacted. I asked if I wouldn't miss the flight to Melbourne and he said I would miss it if my friends are not contacted in time. I asked him to contact my friends before I was taken to the centre and he said that's what he is going to do. He asked if I had other identification besides my passport because he thought I looked different from the passport photo. I gave him my I.D. card and he asked me to recite the I.D. Card numbers. I told him that in Zimbabwe its not necessary to know I.D. numbers by heart so I had not bothered to memorise them.

The other officer suggested to cut my hair and I refused. He asked if I was a Rastafarian and I said I am Rasta and not a Rastafarian. The officer laughed and said its the same and I said its not because Rastafarian sounds queer and meaningless whereas Rasta sounds nice and meaningful. They locked the door and left me.

After sometime I was woken up and told to pack and carry my suitcase to the security mini bus outside. I asked if I was being arrested and they said yes. I

asked why and they said they were not sure, they were just carrying out orders. The other one said I was not being arrested as such but just being detained until further instructions from The officer in Perth. I asked who The officer in Perth was and he laughed and said the man whom you made first acquaintance with.

I asked if he was racist and they said he was not, but he is very thorough when he meets non-whites.

When we reached the centre I was searched again and photographed. They searched my suitcase again including my letters, my belt and my cap and hair. After they were satisfied they weighed me and measured my height.

They thanked me for being "too co-operative" and said that they are surprised to be through so quickly. They said normally it took ages to process a detainee.

I said I'm not a detainee and they laughed and said they can't find a better term to call me. I asked them to call me B and they agreed. They gave me some of my clothes to change if I wanted to wash the ones I had on, and they gave me 2 blankets and 2 sheets, 2 pillowcases, 1 plate, 1 cup, toothpaste, 1 soap, 1 towel, 1 bowl, 1 toothbrush and a room with three others. Two Indians and 1 Somali.

ATTACHMENT 2

EXTRACT GIVING COMPLAINANT'S ACCOUNT OF EVENTS

Mr B's connecting domestic flight was due into Melbourne around 11:45pm local time on Friday 3rd March. He was not aboard.

Melbourne Airport 4 March 1995

Midnight to 1.00 a.m.

The staff were extremely helpful but could not find out what happened to B. Company policy prevents disclosure of information.

2.00 a.m. to 5.30 a.m.

The girls and I slept on couches as we had only enough money for petrol to get home. The staff again very helpful told us B was not on the 7.30 a.m. flight.

6.00 a.m. to 9.30 a.m.

We slept in the car in the car park.

10.00 a.m. to 10.30 a.m.

Again staff helpful, told us there was no point in waiting.

11.00 a.m. to 6.00 p.m.

Drove home 500 Ks (after paying \$14 for parking).

6.00 p.m. to 11.00 p.m.

Worked around our house.

11.00 p.m.

Phone call from (Airline staff member) at airport. Told me that B was in Perth and being detained by Immigration and would be sent back to Zimbabwe. He said that B did not have a visa. I told him this was not so. So (Airline Staff member) said he would get in touch with Immigration to ring me.

11.15 to 11.30 p.m.

D rang and said B was being sent back. I asked why and D said:

1. He (personally) did not trust B.
2. B had no money.
3. He did not think I could support B during his stay.
4. He believed (personally) that if allowed to stay B would become an illegal immigrant.
5. His reasoning for this was because he thought that B had no reason to go back to Zimbabwe.
6. He said that B told him that he had other pen pals in Australia.

When I asked B about this he said that he meant Julie (my youngest daughter).

I spent two and a half hours on the phone to Perth trying to find someone to help us. We talked to B for as long as possible and they took him away at 1.35 a.m. (about 10:30 pm WA time).

I asked a woman at D's office why I was not contacted much earlier. I was told that it is not policy and it was just a courtesy call. I was told it was not their job to call sponsors.