Commonwealth OMBUDSMAN

Complaint about delay in the processing of an application for a bridging visa

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

REPORT NO. **05** | 2004

Investigation of a complaint about delay in the processing of an application for a bridging visa

This is an abridged version for publication of Report No. 05|2004 by the Commonwealth Ombudsman.

In May 2004, my office received a complaint from a person in immigration detention that the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) had unduly delayed reaching a decision on his application for a Bridging Visa E (BVE). He contended that, by virtue of the provisions of the *Migration Act 1958*, such delay should have resulted in him being automatically granted the visa he sought, and simultaneously being released from detention.

The *Migration Act 1958* establishes a framework for the administrative detention of people who do not hold a valid visa. Administrative detention is an exceptional power, since it can result in the detention of a person until they are either removed from Australia or granted a visa. The exceptional nature of this form of detention is recognised by s 75 of the Act, which provides for the Minister's delegate to make a decision on a BVE application within a prescribed period (presently two days), in default of which the applicant is taken to have been granted a visa. The two days can been extended by 'agreement' between the applicant and the Minister's delegate.

The prescribed period of two days within which a decision must be made is exceptionally short. This can be read as statutory confirmation of the importance accorded to the detained person's situation. The provision providing for the two days to be extended by agreement, read in context, casts a distinct onus on the Department to ensure that the fact of an agreement with an applicant is unequivocal and verifiable. The potential exists, in the absence of appropriate instructions and quality control by the Department, for an action to be brought by a detainee for false imprisonment.

It transpired in the investigation that the complainant was not, in fact, eligible to make the application that was the subject of his complaint by reason of the sequence of events occurring between him and the Department. Nonetheless, during my investigation I found cause for concern about:

- the adequacy of DIMIA's record-keeping, and in particular the standard of recording of the crucial 'agreement' which was said by the Department to have been reached with the BVE applicant

- the actions of a particular DIMIA officer, who said he had recorded details of the above 'agreement' in his personal diary, providing both DIMIA and my office with only a

photocopy of the relevant entries. When asked to provide the original document, he informed his Department and my office that the original document had been destroyed

- the Department notifying the applicant only orally that one of his BVE applications had been refused, and

- delays in decision making and the apparent lack of a structured departmental process for tracking the processing of, and eventual decision on, BVE applications.

In the light of the foregoing concerns, I reported to DIMIA under s15 of the *Ombudsman Act 1976* and made a number of recommendations to improve the Department's handling and recording of such matters. The Department has accepted all of my recommendations, which included that it:

- amend its internal instructions to ensure that agreements with detainees are appropriately documented and signed by both parties

- require that notification of a determination of a visa application invalidity be given to the applicant in writing

- remind all its delegates about the importance of reaching a true agreement in such matters, and

- improve quality assurance and administrative procedures to ensure that all decision making is lawful, timely and in accordance with departmental instructions.