Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application

Report under section 35A of the *Ombudsman Act 1976*

August 2001

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1 EXECUTIVE SUMMARY

This report arose out of an investigation undertaken by my office into a complaint about the refusal of a humanitarian visa application made on family reunion grounds.

The investigation identified defective administration on the part of the Department of Immigration and Multicultural Affairs (DIMA) in regard to the decision-making process as well as some systemic issues relating to the treatment of split family applications.

At the centre of this complaint was DIMA's decision to refuse to exercise the discretion available to waive the health requirement in respect of a disabled child who, together with her mother and two sisters, were seeking to join their husband and father, who had earlier been granted a refugee visa to settle in Australia.

The history of this case is one of administrative ineptitude and of broken promises. Four and a half years after Mr Shahraz Kiane first attempted to bring his family to Australia, he is dead as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. According to his brother, Mr Kiane's desperate act arose out of long term frustration and an apparent loss of hope of ever being reunited with his wife and children.

Mr Kiane, recognised by DIMA as a refugee in 1996, had been waiting for the outcome of the third visa application his wife was forced to make after the earlier two applications were refused. I had formed the opinion that the second refusal had been affected by error and possibly, by bias or prejudice. DIMA agreed that "the documentation of the reasons for not waiving the health requirement was liable to create a perception of bias".

DIMA had been warned about Mr Kiane's deteriorating mental state and risk of suicide by a letter dated 23 March 2001 from an ACT counselling service. Despite this advice, there were further delays in DIMA in the referral of a request for a waiver of the health requirement to the Minister and as a consequence of DIMA setting additional requirements for the family to meet.

An analysis of complaints received by my office in the past two years suggests that although complaints of this kind are infrequent, the issues which arose in this matter are not unique and are, in my opinion, deserving of broader consideration.

In that context, I note that DIMA has commenced an internal review of the legislation relating to the offshore component of the Humanitarian Program. DIMA recently circulated a discussion paper titled *Australia's humanitarian resettlement program – A review of legislation and policy advice* which covers many important issues and, in my opinion, provides a sound basis for the review. My office has made a submission to this review.

Whilst it is my usual practice to remove from my public reports all personal details which may identify any of the individuals involved, I have decided not to do so in this case. Most, if not all, of the personal information relating to Mr Kiane and his family contained in my report has been widely canvassed in the public arena by the media. Mr Kiane's brother, who had been pursuing a complaint to my office on his behalf, has given me permission to release the personal information. In the circumstances, I am of the opinion that it is in the public interest to release my report in its entirety.

As required by my Act, I provided DIMA with a document (in the form of a draft report) setting out the opinions I considered I was likely to reach. In response, the DIMA Secretary, Mr Farmer provided detailed comments in support of his view that my commentary and tentative opinions were wrong. He requested that, should I be minded to make this report public without amendment, I include a copy of his comments.

While I have made some minor changes, I was not persuaded by DIMA's arguments and assertions to change my tentative opinions. In fact, I consider that aspects of the response strengthen the basis for the opinions I have formed about DIMA's delay and apparent bias in dealing with Ms Yasmin's applications. In the circumstances, I have decided to attach a full copy of DIMA's response to this report. My observations on DIMA's response follow.

Health criterion waiver in split family cases

DIMA's response confirms that, other than in relation to the health requirements applying to one child, Ms Yasmin's last two applications met the criteria for grant of the visa. The response goes on to set out the different bases for assessing the health criterion for onshore and offshore visa applicants. In essence:

- when a humanitarian application is made offshore, Australia has no obligation under the UN Refugee Convention to grant a visa. The application, in these circumstances, is considered on its merits in relation to the whole family as a single unit. Thus "where one member of the family fails any of the public interest criteria, the entire family unit fails"; but

- when an application for a protection visa (refugee status) is made onshore in relation to a family unit, the application is considered against the Convention conditions and the health requirement is not a criterion. This is because "Australia has an obligation to provide protection to persons, irrespective of their health status, who have been found to engage Australia's protection obligations onshore".

The distinction arises because, unlike some other countries, Australia chooses, but is not obliged to assist some people through resettlement under an offshore humanitarian program. Australia, as it is entitled to, chooses to apply a health test to such persons as one of the factors considered in deciding whether or not they will be accepted. The class currently considered to be covered by this policy includes the immediate family members of persons in Australia granted refugee protection after their arrival.

In my opinion, where Australia has acknowledged an obligation to at least one member of a split family unit, it seems illogical to apply an additional criterion which would inhibit or prevent the reunion of an immediate family member. Whether or not that criterion applies currently depends on whether the whole family happened to be present in Australia when a protection visa was granted.

My criticism is not directed to what DIMA indicates is a longstanding bipartisan policy requiring consideration of health costs in offshore humanitarian cases generally. Rather, my concern is that the detailed manner in which the policy is expressed and applied by DIMA can lead to anomalous outcomes for some refugee families.

Taking into account irrelevant factors

When Ms Yasmin made her second application in March 1998, Mr Kiane, her husband and sponsor, was a resident of Australia under a protection visa. His application for refugee status had been granted in October 1996 by DIMA on the basis of his application and the information it considered relevant at the time.

When Ms Yasmin's second application was lodged, because the sponsor had been found to be a refugee, it was irrelevant, in my view, to consider it on other than family reunion grounds. As quoted later in this report[1], the Migration Regulations require that an application for a Subclass 202 visa be assessed either under sub-regulation 202.211(1)(a) or sub-regulation 202.211(1)(b). Put simply, a visa applicant qualifies **either** by his or her own circumstances **or** by being a family member of a person who meets one of a

[1] See **2.2.1 Migration Regulations**

number of requirements. As a permanent resident (and later a citizen) who had been granted a protection visa, Mr Kiane met one of those requirements. Ms Yasmin's position in relation to discrimination in Pakistan, considered against the Procedures Advice Manual 3 (PAM3)[2] criteria (which cover a range of visa classes) was thus irrelevant. DIMA had previously accepted in its response to my investigation of this case that the decision-maker's reference to humanitarian considerations in the case notes was misleading. I am therefore not persuaded by DIMA's reference to PAM 3 in its response and the argument that the humanitarian criterion should have been introduced in this manner.

DIMA also argues that a split family facing no immediate danger should not receive priority over others for places in the Humanitarian program. I am unable to accept this argument. In my opinion, the Migration Act and Regulations appear to recognize implicitly the importance of the family unit, for example through restricting the Minister's powers to set limits on numbers of visas issued each year to spouses or dependant children of Australian citizens and permanent residents. It is not, in my opinion, reasonable to require that the claims of the split family members be compared or tested against the claims of people being considered for offshore humanitarian entry.

Other Issues

DIMA's response is, in my view, further clouded by references to Mr Kiane returning to Pakistan in March 1999 (after he became an Australian citizen). DIMA now suggests that the issue of Mr Kiane's ability to return to Pakistan was relevant to the assessment of his family's application under the split family policy. However, the provision referring to "factors preventing the sponsor from joining the applicant in the applicant's own country" was added to the PAM3 guidelines subsequent to the July 1999 decision on Ms Yasmin's application. I note, that this factor was not considered by the decision-maker at the time of Ms Yasmin's second application and; in fact, from the file record it appears to have only been raised after the tragic event of 2 April 2001.

This issue is, in my opinion, ultimately irrelevant. First, if the application had been treated in a timely manner, the argument would not have arisen at all. Consideration could only have been given to circumstances applying at the time of the application, not a year later, especially when the trip may not have needed to occur but for the delay in bringing the family to Australia. In addition, DIMA accepted Mr Kiane's application for a protection visa in 1996, and had done nothing to change his status subsequently.

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[2] DIMA's policy guidelines – see **2.2.3. Policy guidelines**.

Second, I have considerable concern at the implications of what would appear to be attempts to raise doubts about the decision that gave Mr Kiane his protection visa. Those doubts (which may or may not have been well-based) appear to have been intended to prejudice consideration of the split family applications. However, Mr Kiane was never afforded an opportunity to respond to the concerns being raised without his knowledge. This, in my opinion, amounts to a fundamental failure to accord natural justice.

There is nothing in DIMA's response, which adequately explains why it took over four years to enable a refugee granted a protection visa to obtain appropriate consideration of his request to be reunited with his family. Despite the significant increased workload on DIMA during this period, this delay does not seem to me to represent reasonable process, particularly given the human factors involved. If this is considered a normal period in split family cases, it raises questions about the reasonableness of the process and/or the resources allocated to it.

Finally, I understand that a decision on Ms Yasmin's application is still awaited. I hope that the provision of this report will assist in its early determination.

R N McLeod
Commonwealth Ombudsman

2 THE COMPLAINT

On 11 August 1999 Mr Shehzad Kayani complained to my office on behalf of his brother, Mr Shahraz Kiane and his sister-in-law, Ms Talat Yasmin, about the refusal of Ms Yasmin's Class BA (Global Special Humanitarian) visa application by the Australian High Commission in Islamabad.

2.1 BACKGROUND

Mr Shahraz Kiane, who travelled to Australia alone, was accepted as a refugee by DIMA and granted a Protection Visa on 21 October 1996. Included in his application were his wife, Ms Yasmin, and their three children: Asma, Anum and Afia. On 25 November 1996 Ms Yasmin lodged an application in Islamabad for a permanent entry visa on Refugee or Humanitarian Grounds which included a 'Refugee and Special Humanitarian Proposal' form completed by Mr Kiane. The application was supported by the Torture Rehabilitation and Network Service in ACT which had been treating Mr Kiane.

On 15 January 1997 Ms Yasmin's application was rejected by DIMA officials at Australia's Islamabad post. Ms Yasmin was found not to meet the criteria for a Refugee and Humanitarian Class BA visa. However, there is no indication on the relevant DIMA file of how the decision was made and Ms Yasmin was not interviewed.

On 25 March 1998 Ms Yasmin lodged a new application for a Class BA visa on Refugee or Humanitarian Grounds.

The criteria for a Subclass 202 visa[3] now included a 'split family provision' which allows Protection Visa holders to propose for entry to Australia their immediate family members. I understand that these new regulations, which came into effect on 1 July 1997, were introduced to overcome an anomaly which previously compelled immediate family members separated from the humanitarian or refugee visa holder to apply under the migration program.

Ms Yasmin was interviewed on 19 August 1998 and asked to undertake medical and police checks. Additional medical checks were requested on 24 September 1998. On 16 November 1998 the post received an opinion from the Medical Officer of the Commonwealth (MOC) which stated that one of the children, eight years old Anum, failed to meet the health requirements due to a range of medical problems, including cerebral palsy. A Waiver Opinion was

[3] Class BA visa comprises a number of subclasses, including Subclass 202 (Global Special Humanitarian) visa.

also provided. Under the heading “Cost to the Australian Community”, the MOC stated:

> *In my opinion, the likely cost to the Australian community of health care or community services is $430,745 (in special education, sheltered employment and residential care).*

The post wrote to Ms Yasmin on 3 December 1998 to advise that Anum did not meet the health requirements. The decision-maker indicated that he wished to consider whether there was a basis to waive the health criterion and offered Ms Yasmin the opportunity to provide comments on whether the child would cause an undue cost to the Australian community or undue prejudice to the access of Australians to health care.

In her reply, received by the post on 8 January 1999, Ms Yasmin advised that Anum’s epilepsy was under control with the use of medication and that she has learnt to provide physiotherapy to her daughter. Ms Yasmin also stated that her sister-in-law, an Australian citizen, worked with young disabled people and would be able to provide assistance and respite care.

The application was rejected by the Islamabad post on 23 July 1999.

2.2 REGULATORY FRAMEWORK

2.2.1 Migration Regulations

The criteria for the grant of a Subclass 202 visa are set out in regulations 202.1 to 202.4 of the *Migrations Regulations*. In so far as is relevant to this case, the primary criteria at the time[4] Ms Yasmin lodged her second visa application included the following provisions:

202.211 (1) The applicant:
- (a) is subject to substantial discrimination, amounting to gross violation of human rights, in the applicant's home country and is living in a country other than the applicant's home country; or
- (b) satisfies the requirements of subclause (2).

(2) The applicant satisfies the requirements of this subclause if:
- (a) the applicant's entry to Australia has been proposed in accordance with approved form 681 by an Australian

[4] The Migration Regulations have since been amended. For example, Statutory Rule 304 of 1998 added the requirement for the application to be made within 5 years of the proposer’s visa being granted.

permanent resident (in this subclause called 'the proposer'); and

(b) either:

(i) the proposer is, or has been, the holder of a Subclass 202 visa, and the applicant was a member of the immediate family of the proposer on the date of grant of that visa; or

(ii) the proposer is, or has been, the holder of a Subclass 866 (Protection) visa, and the applicant was a member of the immediate family of the proposer on the date of application for that visa; and

(c) the applicant continues to be a member of the immediate family of the proposer; and

(d) before the grant of that visa, that relationship was declared to Immigration.

The applicant must also meet certain public interest criteria set out in Schedule 4 of the Migration Regulations.

2.2.2 Criterion 4007

This criterion, which applies to a range of different visa subclasses in addition to those which are humanitarian based, contained the following relevant provisions at the time Ms Yasmin second application was lodged[5]:

4007 (1) The applicant:

(a) ...

(b) ...

(c) subject to subclause (2), is not a person who has a disease or condition that, during the applicant's proposed period of stay in Australia would be likely to:

(i) result in a significant cost to the Australian community in the areas of health care or community services; or

(ii) prejudice the access of an Australian citizen or permanent resident to health care or community services: and:

(d) ...

(2) The Minister may waive the requirements of paragraph (1) (c) if:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and

(b) the Minister is satisfied that the granting of the visa would be unlikely to result in:

(i) undue cost to the Australian community; or

(ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

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[5] Criterion 4007 was subsequently amended.

2.2.3 Policy guidelines

DIMA policy guidelines require that decision makers consider waiver, if the health requirement is not satisfied even though the power to waive is non-compellable. DIMA's policy manual, PAM3, sets out a detailed process to be followed where an official is inclined to waive or not inclined to do so. An opportunity must be given to make submissions and reasons for not waiving the requirement must be documented fully. At the time Ms Yasmin's second application was assessed, the policy guidelines[6] required officers to consider a range of factors including:

- the medical opinion;
- the level of care likely to be required;
- educational or occupational needs and prospects;
- potential for applicant's health to deteriorate;
- lifetime charge to Australia;
- willingness and ability of the sponsor or others to provide care and support at no cost to the public; and
- the merits of the case, including the strength of any humanitarian or compassionate factors.

There is particular mention of the need for officials to asses whether the prejudice is 'undue' having regard to the purpose of the visa subclass.

[6] See Attachment 1, Procedures Advice Manual 3 (PAM3), Schedule 4, Public Interest Criteria – Criterion 4005-4007, effective 22/7/99 – 31/8/99, reproduced from DIMA's LEGEND CD-ROM. The guidelines were subsequently amended. Current PAM3 guidelines expand on the list of relevant factors; these are reproduced at Attachment 2.

3 INVESTIGATION

Following preliminary inquiries, my office requested DIMA's files on Ms Yasmin's applications on 21 September 1999. One file was provided by DIMA on 28 October 1999 and the other on 5 November 1999. Further information was sought from DIMA in a letter dated 2 February 2000. In particular, comments were sought on the decision-making process and some potentially prejudicial statements recorded on DIMA's file.

3.1.1 Decision-making process

Guidelines contained in PAM3 indicate that a health waiver can only be considered if the applicant has satisfied all of the other criteria for the visa. The decision record on file indicates that the decision-maker considered all relevant criteria to have been satisfied with the exception of public interest criterion 4007 (health requirement). Despite this, case notes recorded on DIMA's computer data base indicate that the decision-maker assessed that "The story of persecution does not ring true" and decided to not exercise the waiver because he was "not satisfied of the merits of the case" and because he considered humanitarian claims "questionable". However, as Ms Yasmin's application was made on family reunion grounds (subclause 202.211(2)), she should not have been required to also be assessed under the humanitarian criteria (subclause 202.211(1)).

The PAM3 states that, where an officer is not inclined to give favourable consideration to waiving the health requirements,

> *Reasons for not waiving* must *be fully documented (on both the case file and data base).*

However, the decision record held on DIMA's file gives no indication what factors were taken into account in deciding not to exercise the waiver in this case.

While the case notes show that the decision-maker took into account the likely cost of health and community services, there is no record that any consideration was given to the evidence provided by Ms Yasmin in relation to the support available from family members or to the compassionate aspects of this case. The key fact that DIMA found Mr Kiane to be a refugee and, therefore, accepted he was unable to return to his country of origin and be reunited with his family there, because of a well-founded fear of persecution, does not appear to have been taken into account.

3.1.2 Appearance of bias

A number of adverse comments were noted on the DIMA file and data base. These included observations such as: "(the applicant) appears to be telling me a few whoppers"; "both the interpreter and myself are of the opinion that she was making up answers to questions"; and "The sponsor's brother in Australia has been involved in the support of Pakistani nationals on visitor visas who have subsequently become OP[7] applicants".

One apparently adverse conclusion recorded on the data base seems to be clearly incorrect. The decision maker stated that:

> *Her husband has also left it for nearly 2 years before seeking to be reunited with his spouse who had a very young child at the time of his departure.*

It is not clear on what basis the decision maker arrived at this conclusion as Mr Kiane proposed Ms Yasmin for migration in November 1996, only a month after being granted a Protection Visa.

3.1.3 DIMA's first response to Ombudsman

DIMA's response to the issues identified above, was received by my office on 5 April 2000. DIMA advised that the additional information provided by Ms Yasmin was taken into account by the decision maker in coming to his decision not to waive. DIMA further stated that:

> *The Migration Regulations allow a waiver of the need to meet the health requirement in some circumstances. The waiver is available if an application is based on humanitarian considerations or very close family relationship. However, in deciding whether to grant a waiver, the decision maker must balance a consideration of compassionate grounds with one of public cost. …*
>
> *In this case, the decision maker was satisfied that the level of care required by the applicant would result in a significant cost to the Australian community in the areas of health care and community services. As Ms Yasmin was advised, the estimated costs also took into account sheltered employment and residential care. In these*

7 Onshore Protection, in this context, applicants for a Protection Visa

circumstances the decision maker did not accept that compassionate grounds outweighed the costs involved.

DIMA further advised that the "allegations of 'unfairness' in decision making" had been investigated. DIMA agreed that there appeared to be "some degree of inconsistency" in the case notes and the decision record and "that reference to humanitarian claims in the case notes are misleading". Some statements made by the decision maker and recorded on file were termed by DIMA as "unfortunate". The response concluded that, if Ms Yasmin chose to submit a fresh application, it would be considered by a new decision maker on its merits.

3.1.4 Second letter to DIMA

A second letter was sent by my office to DIMA on 14 April 2000 as the first response was not considered to have adequately addressed the issues raised. It was put to DIMA that the policy guidelines for waiver of the health requirement did not appear to have been properly taken into account. It could be argued that the error in the assessment of Ms Yasmin's 'humanitarian' claims may have tainted any consideration of the waiver criteria, especially the compassionate and humanitarian grounds for waiver.

In any event, it was not clear how the decision to not exercise waiver of the health criterion was made in this case. DIMA's response of 3 April 2000 did not clarify how the relevant considerations were weighed.

My office put to DIMA that, in the absence of evidence that the decision maker properly determined that the costs in this case outweighed other relevant factors, such as the compassionate circumstances and ability and willingness of others to provide care and support, the decision not to exercise the waiver seemed to have been based on flawed reasoning and did not meet the guidelines for documentation of such decisions. A reasonable remedy in the circumstances appeared to be that the application for waiver be reconsidered against appropriate guidelines and properly documented.

While the costs estimated by the MOC in this case are significant, it is my view, even in such cases the possibility of compassionate factors outweighing the financial costs must remain open. If the circumstances of this family were not considered sufficiently compelling to warrant a waiver, where the fate of Mr Kiane's four immediate family members being able to be reunited with him, rested on a favourable decision in relation to his disabled daughter, it is difficult to imagine in what circumstances favourable consideration might be given. It is also relevant to note that waivers have been applied in a number

of other cases where the estimated health costs to the Australian community have been considerably in excess of those in this case.[8]

3.1.5 Second response by DIMA

In regard to the question of whether the policy guidelines related to the health waiver were followed in the assessment of Ms Yasmin's application, DIMA responded on 28 June 2000 that the case notes make specific reference to two factors outlined in Departmental policy: the significance of cost to the Australian community and humanitarian considerations. The policy guidelines were, therefore, followed in DIMA's view.

In regard to whether the application should be reconsidered, DIMA stated that the decision maker did refer to additional evidence provided by the applicant and that the decision whether to exercise the health waiver is not a separate stage in the processing but rather integral to the overall decision as to whether the applicant satisfies the health criterion.

No further remedy was offered.

3.1.6 Draft report under section 15 of the *Ombudsman Act 1976*

As I formed the opinion that DIMA had acted defectively and had failed to offer an appropriate remedy in all the circumstances of this case, I decided to issue DIMA with a report pursuant to section 15 of my Act. The draft report was provided to DIMA for comment, as required under section 15(2) of the *Ombudsman Act 1976*, on 1 August 2000.

The draft report included the following preliminary opinions:

3.1.6.1 Preliminary opinions

> *Mr Kiane was granted a Protection Visa by DIMA in 1996 and has since become an Australian citizen. As the spouse of a Protection Visa holder who is apart from her husband, Ms Yasmin is entitled to be considered for Class BA (Subclass 202) visa and the couple's dependent children can also be considered for entry.*
>
> *I consider that the suggestion that Ms Yasmin may choose to begin afresh by submitting a third application under the Refugee and Humanitarian Program does not offer a*

[8] See details in attachment to DIMA's response to my draft report (Attachment 4).

reasonable remedy to the problems identified in the investigation.

3.1.6.2 Ms Yasmin's case

In Ms Yasmin's case, the letter of 3 December 1998 indicated that the decision maker wished to consider waiver, however, it did not seek information which might be relevant to all the factors required or able to be considered. The response provided by Ms Yasmin on 4 January 1999 addressed Pakistani social expectations, the behaviour and communication skills of the child, the level of illness and the fairly modest need for treatment as well as the availability in Australia of family assistance at no cost to the Australian public. On 25 February 1999 and 7 June 1999 the Embassy was provided with information about difficulties said to be experienced by the family in Pakistan. The DIMA file also contains two denunciations of the refugee claim of Mr Kiane.

The decision made on 23 July 1999 refers to the criteria for grant of a Class BA, Subclass 202, visa. The only requirement which was not met was criterion 4007(1)(c)(i) in relation to Anum Shahraz Kiane. There does not appear to have been any attempt on behalf of the decision maker to address or discuss the waiver criteria. A case note of 23 July 1999 does address this issue but refers in uncomplimentary terms to the genuineness of Ms Yasmin's humanitarian claims as well as to the cost of care for the child.

DIMA has accepted that the reference to humanitarian claims in the case notes was misleading, as Ms Yasmin was not required to meet the 'humanitarian criteria' for the grant of the Subclass 202 visa.

In my preliminary view, the decision to refuse Ms Yasmin and her children the visa was defective because:

- *the decision maker appears to have taken into account an adverse factor (assessment of Ms Yasmin's credibility based on unsourced allegations) upon which he did not allow the applicant to comment;*
- *that factor is, in any case, of limited relevance to the question of waiver;*
- *there is no evidence to support the conclusion that the decision maker had any or adequate regard to Mr Kiane's successful protection claim and presence in Australia, which in my view is clearly relevant;*

- *there is no evidence that the decision maker considered the compassionate factors created by Mr Kiane's presence in Australia and inability to return to Pakistan; and*
- *there is no evidence that the decision maker took into account the claims made about sources of support and assistance that would be available if the child comes to Australia.*

3.1.6.3 Policy issues

In my preliminary view, there is also a need for DIMA to consider the broader policy implications arising out of this case. The outcome that an Australian citizen (and refugee) will never be able to be joined by his immediate family is not, in my opinion, reasonable and would seem to contradict the principle of family unity supported by various international instruments to which Australia is a party.

3.1.6.4 Appearance of bias

While I have not formed a view as to whether the decision maker approached the consideration of the waiver with an open mind, I am concerned that a number of the comments and observations recorded on the file are not indicative of an impartial approach. I have noted and accepted DIMA's advice that any further application by Ms Yasmin will be considered by a fresh decision maker.

My report contained the following draft recommendations:

3.1.6.5 Draft recommendations

1. The decision to refuse Ms Yasmin a Subclass 202 visa be vacated and the application re-assessed by a different decision maker in accordance with the applicable regulations and policy guidelines.

2. That DIMA give consideration to the broader policy issues arising out of this case.

3. That DIMA provide guidance and training to staff in assessing Class BA visa applications based on the 'split family' provision.

3.1.7 DIMA's response to the draft report

Following its receipt and consideration of the draft report DIMA agreed that the documentation of the reasons for not waiving the health requirement was liable to create a perception of bias. On 15 August 2000, the Secretary of DIMA, Mr Bill Farmer, responded to my draft report in the following terms:

> *"Having read your report and discussed the case with departmental officers involved in the investigation of the complaint, I agree that the documentation of the reasons for not waiving the health requirement was liable to create a perception of bias.*
>
> *Nonetheless the decision to refuse to grant a visa was lawfully made and therefore cannot be vacated.*
>
> *To resolve the matter, I invite Ms Yasmin to make a new application which will be processed expeditiously in Canberra, with the cost of prescribed health checks met by DIMA. In the meantime the Minister will be sent a request to consider waiving the health requirement in respect of the child.*

In the circumstances I formed the opinion that the course of action proposed by DIMA was reasonable and offered a suitable remedy to the defective administration identified above. I particularly welcomed DIMA's undertaking to expedite the processing of the new application.

My office advised the complainant of DIMA's offer on 25 August 2000.

4 THE FINAL APPLICATION

Ms Yasmin lodged her new Subclass 202 visa application at the Australian High Commission in Islamabad on 14 September 2000. However, about a month later Mr Kayani contacted my office concerned about progress as the family had heard nothing further from DIMA. On 16 October 2000 my office contacted DIMA to ascertain whether the application was being processed in Canberra in line with the undertaking provided by DIMA. On 25 October 2000 DIMA advised that the file with the application had reached Canberra and a case officer had been assigned to process it without further delay.

In response to a further inquiry from my office a month later, on 30 November 2000 DIMA advised that "the case has reached its final stages". The Australian High Commission in Islamabad was asked to sight the original documents relevant to the application and to carry out the health and character checks which had expired. DIMA advised that once these were done, DIMA would "submit a request for a health waiver to the Minister and once the Minister makes a decision (DIMA) will be able to finalise this (application)". According to the complainant, the new medicals were completed by the family on 6 January 2001.

After two further follow up inquiries by my office, on 29 March 2001 DIMA advised that there was a problem with Ms Yasmin's application as the projected health care costs had increased. DIMA decided to request additional information from Mr Kiane regarding his and his relatives' employment history in Australia. This was despite DIMA's earlier advice on 7 March 2001 that the health waiver submission was expected to be provided to the Minister the following day. While my office undertook to pass on DIMA's request to the complainant to avoid any further delays, my investigating officer also expressed concern to DIMA about the delay with the processing of the application, despite DIMA's clear undertakings to expedite the matter. Following contact with the complainant, my office informed DIMA that according to his brother, Mr Kiane had been employed but was no longer able to work due to stress related to his concerns about his wife and children.

On 2 April 2001 Mr Kiane set himself on fire in front of Parliament House in Canberra. His brother later informed my office that, after hearing of further delays and additional requirements being imposed, Mr Kiane appeared to lose hope of being reunited with his family in Australia. On 26 May 2001 Mr Kiane died from massive infection resulting from the burns suffered.

4.1 SECOND OMBUDSMAN INVESTIGATION

4.1.1 Request for documents

On 3 April 2001 the acting Ombudsman requested DIMA to provide advice, including all documents, of the actions taken by DIMA since August 2000 and the reasons for delay in the processing of Ms Yasmin's application. DIMA was requested to provide the response as soon as possible and a deadline of 12 April 2001 was agreed upon.

On 11 April 2001 my office was advised that DIMA could not meet this timeframe as the Secretary was taking a personal interest in the matter but would be away over the following week. An extension of time until 23 April 2001 was requested and agreed to in the circumstances.

On 23 April 2001 DIMA provided this office with a chronology of events, including reasons for delay, and with file OPF2000/10056 relating to some aspects of the processing of Ms Yasmin's application. The file on Ms Yasmin's actual Subclass 202 visa application was not provided, nor was there a copy of the health waiver submission – a document central to the application and the complaint, despite the request for all relevant documents. This omission was pointed out to DIMA on 26 April 2001 and a copy of the health waiver submission specifically requested. After two further follow up inquiries by my office, the submission was finally provided by DIMA on 1 May 2001.

4.2 DIMA'S UNDERTAKING TO THE OMBUDSMAN

The undertaking given to me by DIMA on 15 August 2000 was very clear[9]. It consisted of three elements:

- the new application was to be "processed expeditiously in Canberra";
- the cost of prescribed health checks was to be met by DIMA; and
- in the meantime, the Minister was to be sent a request to consider waiving the health requirement in respect of the child.

4.2.1 Processing of the final application

Documents provided by DIMA confirm, in my view, that the processing of Ms Yasmin's application was unnecessarily delayed on a number of occasions. Despite the fact that the Humanitarian Program Section asked the Islamabad

[9] See Attachment 3.

post on 24 August 2000, and again on 15 September 2000, to notify them once the new application was lodged, the post informed Canberra on 15, 18 and apparently again on 29 September 2000, that it had no record of a further application being lodged.

Although my office was subsequently advised that the post was too busy to forward the application to Canberra immediately on receipt, DIMA's file OPF2000/10056 indicates that it took Islamabad four weeks to identify that the application had been in fact lodged on 15 September 2000.

On 25 October Humanitarian Program section advised my office that the application had been received in Canberra and it appears that by 20 November 2000, the case officer concluded that Ms Yasmin and her daughters had met most of the criteria for the visa. The post was then asked to sight original documents relating to the application and to arrange for medical and police checks. DIMA's records indicate that the case officer made arrangements to send the application file back to Islamabad on 8 November 2000. However, it appears that the file was somehow again delayed in transit and was only located in Islamabad some three or four weeks later. A letter requesting Ms Yasmin to undertake medical checks and to provide a police clearance was sent out by the Islamabad post on 12 December 2000. There appears to be no reason why the medical and police checks could not have been requested sooner, given the history of this case.

4.2.2 Cost of the health checks

Following a further inquiry from my office as to progress of the application, the Australian High Commission in Islamabad advised on 10 January 2001 that they were "still awaiting medicals from applicant". This was apparently due to the fact that the applicant had written to the post querying payment of medical checks. An examination of documents on DIMA's file OPF2000/10056 indicates that, despite the reminder from the Humanitarian Section, the post failed to advise Ms Yasmin in the letter of 12 December 2000 that the cost of the medicals was to be covered by DIMA. It appears that, as Ms Yasmin was not able to present the Panel Doctor with evidence of DIMA's undertaking to cover the medical checks, she was forced to pay for the examinations herself and to seek reimbursement later. This was not in accordance with the undertaking given by DIMA to my office and served to contribute further to processing delays as Ms Yasmin attempted to clarify the situation with the Australian High Commission.

4.2.3 Assessment of health care costs

On 2 March 2001 my office again sought advice from DIMA on the progress of Ms Yasmin's application. We advised DIMA that, according to the applicant, the medicals had been completed on 6 January and she herself advised the post of this by letter dated 15 January 2001. On 5 March 2001 DIMA responded that it was awaiting advice as to overall health costs for Anum from the Medical Officer of the Commonwealth (MOC). Inquiries subsequently made by DIMA internally revealed that the results of the local medical examinations had been forwarded by the Islamabad post on 18 January 2001 and received in the Health Assessments Service (HAS) in Australia on 25 January 2001. The health results as assessed by the MOC were then sent by email back to the post on 29 January and again in hardcopy on 2 February 2001.

It is not clear from the documents provided by DIMA what happened to the results which were subsequently re-sent by HAS. As I understand it, the Australian High Commission in Islamabad claims not to have received them. It would appear unlikely, however, that both the email version as well as the hardcopy of the results would have gone missing. It is of concern to me that the matter was not followed up more quickly by DIMA and that this further problem contributed to an additional delay of approximately one month.

4.2.4 The health waiver submission

The Health Waiver Costing Advice provided by the MOC on 29 January 2001 estimates the lifetime costs of caring for Anum at approximately $750 000. The previous MOC advice dated 3 November 1998 estimated the costs at $430 745. DIMA's file contains no explanation for the significant difference in costs other than a brief comment from the MOC dated 7 March 2001 indicating that improvement in Anum's condition is "less likely and the higher costing is appropriate".

The first mention of the health waiver submission on DIMA's file OPF2000/10056 is dated 6 March 2001 and relates to a request for comments from the Health Policy section of DIMA.

On 7 March 2001 DIMA advised my office that the waiver submission was to be sent to the Minister's office the following day. It is apparent that this did not happen and the contents of the submission continued to be discussed between the relevant sections of DIMA. On 14 March 2001 the Director of one section made the following comments in an internal email message:

> *"…I personally am not particularly sympathetic, and my guess would be that the Minister is not, either, given the*

> *size of the costing and the circumstances of the family's applications, which do resemble a strong attempt at circumvention of safeguards in place to protect Australia's public interests …"*

In my view, the above comments suggest a continued bias against the family and a lack of willingness to assess the health waiver on relevant, policy based, criteria.

The officer further suggested that the draft health waiver submission be amended to point out that the offer made by Anum's family to continue to care for her "is not plausible in the Australian context, and cannot be enforced". The final submission provided to the Minister on 10 April 2001 includes words to this effect and adds that "long-standing policy is that such offers should not be given any significant weight".

This approach is, in my opinion, inconsistent with the PAM3 policy guidelines which specifically identify "the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost" as a relevant factor to be considered.

The health waiver submission was further delayed when on 29 March 2001 DIMA decided to seek further information from Mr Kiane regarding factors which, in DIMA's opinion, may mitigate the cost to the community of approving his family's application.

4.2.5 Mr Kiane's status as a refugee

Since Mr Kiane's case was drawn to public attention in the media, comments have been made publicly suggesting that Mr Kiane may not be a genuine refugee. I have no view on whether Mr Kiane's claims to refugee status were genuine. What is clear, in my opinion, is that DIMA itself recognised Mr Kiane as a refugee on the available evidence at the time and, unless a lawful basis exists for a review of that decision, DIMA's subsequent dealings with Mr Kiane and his family should not be inconsistent with its own finding.

I am concerned that the prejudicial comments previously recorded on Ms Yasmin's file have continued to influence the Departmental attitude towards this family's attempts at becoming reunited in Australia.

5 OPINIONS

In my opinion, DIMA has failed to honour its undertakings given to me in August 2000 following my draft report under section 15 of the *Ombudsman Act 1976*. Ms Yasmin's final application was not processed expeditiously but was subject to a number of further unwarranted delays.

Available evidence suggests, in my opinion, that officers in the Department continued to take irrelevant factors into account in dealing with Ms Yasmin's application and ignored other relevant factors.

The exercise of the health waiver discretion involves balancing one factor against countervailing considerations. The existence of the health waiver provision for immediate family members of Protection Visa (PV) holders acknowledges the powerful humanitarian objectives involved in this visa class. While the debate in this case centred on the extent of the health care needs and costs of Mr Kiane's daughter, Anum, what seemed to be forgotten was the effect of any decision on the remaining family members. In my opinion, the fact that in this case the waiver decision would irrevocably affect the lives of four applicants appears not to have been given any explicit consideration by DIMA in judging the weight of the humanitarian and compassionate objectives expressed in the policy framework.

DIMA's recent discussion paper on the review of Australia's offshore humanitarian program identifies a need for clearer instructions on the exercise of the health waiver in Humanitarian Program cases. In addition to the issues surrounding the manner in which Ms Yasmin's 1998 application was processed, the complaint raises a more fundamental policy issue of whether applicants in this category should be subject to the health requirement at all.

As mentioned earlier in this report, factors to be taken into account in considering a health waiver are set out in policy and, aside from projected costs, now include[10] matters such as:

- reasons preventing the sponsor from joining the applicant in the applicant's home country; and
- the merits of the case, eg the strength of any humanitarian or compassionate factors.

In a situation where the proposer has been granted permanent residence in Australia after being recognised as a refugee, the factors preventing him or

[10] See Attachment 2 – guidelines applicable at the time of assessment of Ms Yasmin's final application.

her from being reunited with their immediate family in their country of origin are, in my opinion, both very strong and clear. Refusal of a family reunion application on health grounds in such a situation could appear to raise the question of reasonableness from a humanitarian and compassionate point of view. It could also lead to inconsistent and unfair outcomes. For example, had the proposer's family travelled with him or her to Australia and made a successful joint Protection Visa (PV) or Temporary Protection Visa (TPV) application at the same time, they would not be required to meet the health criterion at all. While PV and TPV applicants must undergo medical examinations to be granted a visa, they do not have to satisfy public interest criterion 4007, as it is not a requirement for this class of visa. The reasons for this appear to be obvious. Australia could not validly accept only healthy refugees and return ailing refugees, or their immediate families, to a real risk of persecution.

I note that, in regard to humanitarian considerations in the context of the health waiver, DIMA's discussion paper acknowledges the following:

> *Feedback from overseas posts suggests that there remains some confusion surrounding the application of the legislation and policy to Humanitarian Program applications. In contemplating the grant of a Humanitarian Program visa a decision maker is already acknowledging that the applicant has strong humanitarian needs. Inclusion of a humanitarian or compassionate factor with the merits of the case seems to point to the need for an applicant to demonstrate additional compassionate or compelling circumstances beyond those already advanced in their application. This raises the possibility that the threshold for waiver in Humanitarian cases might end up higher that (sic) other cases.*

In the experience of my office, this appears to be a valid argument which also goes to the fundamental issue of the purpose of Australia's offshore Humanitarian Program. However, when applied to split family cases specifically, there can be little doubt in my view as to the existence of "additional compassionate or compelling circumstances".

The fact that these applications must be assessed against public interest criterion 4007 also appears to affect visa processing times. With cost being the primary consideration in contemplating whether to exercise a health waiver, complaints received by my office suggest that decision-makers sometimes appear to be hesitant in reaching a conclusion, thereby prolonging the waiting time for the family in question.

DIMA also has identified the need to reduce offshore processing times as an important factor in the context of its review of the Humanitarian Program. Another significant factor identified by DIMA in its discussion paper is the recent growth in the number of split family applications. This is perceived by DIMA to create pressures on the number of places available to applicants who seek a humanitarian visa in their own right. However, complaints received by my office suggest that, in practice, it is often the split family members who are being given a low priority in the processing of their visa applications. DIMA has supported this approach by arguing that split family members have the option of seeking to enter Australia under the family stream of the migration program. In my opinion, while lodging a spouse visa application may be an option for some, this is not always appropriate for refugee/humanitarian stream entrants, as the family may not be able to meet the cost of a spouse visa application nor have the means to provide an acceptable Assurance of Support.

In my view, DIMA should be making a special effort to deal quickly and efficiently with applications made by spouses and dependent children of refugee and/or humanitarian visa holders. A possible way of resolving the tension between family reunion cases and other humanitarian applicants with claims in their own right, also identified by DIMA in the discussion paper, would be the creation of a separate class of visa for split family cases.

In my opinion, the issues discussed in this report point to a need for regulatory changes to the processing of family reunion cases under the Humanitarian Program. I consider that the grant of a refugee based visa should carry with it an expectation that the refugee's immediate family members would normally be permitted to settle in Australia unless there were exceptional circumstances to the contrary. Introduction of cost factors to outweigh the compassionate considerations involved would seem to be at odds with the basic objectives of the Humanitarian Program. The current arrangements, as they stand, appear to leave open the possibility for unfair and oppressive outcomes.

The length of time involved in the processing of visa applications for persons seeking residence in Australia in most cases is a function of the numbers applying, the resources committed to assessing the claims and the quotas set annually by the Government. Delays are inevitable when the claimant numbers exceed the places available.

In the case of split family applicants under the Humanitarian Program, there are no legislative limits on the number of places available annually. In my opinion, where a person is granted refugee status and seeks to have their immediate family members join them in Australia, DIMA should seek to expedite the administrative considerations involved, in recognition of the

compassionate factors present. There is no evidence in the history of the handling of this case that DIMA was seized with the need to deal with the various applications expeditiously, in the interests of reducing to a minimum the period of uncertainty facing the family. In my view, the time delays involved in the administrative processes in this case were unreasonable.

Notwithstanding any changes which might improve the processing of future cases of this kind, an examination of the handling of this case, in my view also, demonstrates a lack of sensitivity to the personal circumstances of the applicants.

What remedies remain available to the Kiane family ? The unfortunate death of Shahraz Kiane has changed his family's circumstances dramatically and permanently.

An apology or expression of regret on part of the Department for the administrative failures in processing the applications more quickly, with an absence of bias or prejudice, could be regarded as a hollow gesture.

A recommendation that some form of financial compensation be offered could be regarded as an inadequate response to the loss the family has suffered.

There is also the question of not pre-empting the outcome of the coronial inquiry into Mr Kiane's death. In the circumstances I make no recommendation at this stage but leave it to the Government to consider its position once the coroner has reported.

From an administrative viewpoint, the handling of this case is a tragic reminder to all Government officials that in applying bureaucratic processes and procedures, they should never lose sight of the human dimension of their work.

6 RECOMMENDATIONS

1. That DIMA considers the issues arising out of this case in the context of its current review of Australia's Humanitarian Resettlement Program.

2. That DIMA reviews the Migration Regulations with a view to introducing a separate visa category for immediate family members of individuals who gain permanent residence in Australia on refugee or humanitarian grounds.

3. That the health requirements for immediate family members be no different than those for their proposers.

7 LIST OF ATTACHMENTS

1. Procedures Advice Manual 3 (PAM3), Schedule 4 – Public Interest Criteria – Criterion 4005-4007, **18 Assessing the Criterion 4007 Health Waiver**, effective 22/7/99 – 31/8/99, reproduced from DIMA's LEGEND CD-ROM.

2. PAM3, Schedule 4 – Public Interest Criteria – Criteria 4005-4007, Part D – Health Assessment, Permanent/Provisional Visa Applicants, **32 The 4007 Health Waiver**, current guidelines , reproduced from DIMA's LEGEND CD-ROM.

3. DIMA's letter of 15 August 2000 inviting Ms Yasmin to make a fresh application.

4. DIMA's response of 19 July 2001 to my tentative opinions presented to DIMA in the form of a draft report.

ATTACHMENT 1

PAM3, Schedule 4 – Public Interest Criteria – Criterion 4005-4007, effective 22/7/99 – 31/8/99, reproduced from LEGEND CD-ROM.

18 ASSESSING THE CRITERION 4007 HEALTH WAIVER

18.1 Limit to the waiver

18.1.1 The health waiver in criterion 4007 provides for officers to waive the requirements of criterion 4007(1)(c) only i.e.

'(i) the disease or condition is such that a person who has it would be likely to
(A) require health care or community services; or
(B) meet the medical criteria for the provision of a community service; during the period of the applicant's proposed stay in Australia ... [and]
(ii) provision, to a person who has the disease or condition, of the health care or community services relating to the disease or condition would be likely to
(A) result in a significant cost to the Australian community in the areas of health care or community services; or
(B) prejudice the access of an Australian citizen or permanent resident to health care or community services'

18.1.2 There is no provision to waive the criterion 4007 health requirement if the applicant fails to satisfy criterion 4007(1)(a), 4007(1)(b) or 4007(1)(d) i.e. the provisions relating to TB, public health and the health undertaking.

18.1.3 The effect of regulation 2.25A is that officers may consider the waiver provision [criterion 4007(2)] only if the MOC has provided an opinion to the effect that the applicant does not satisfy 4007(1)(c). As well, criterion 4007(2)(a) requires the applicant to have satisfied all other criteria for the grant of the visa applied for.

18.2 Assessment factors

Overview

18.2.1 Provided the requirements described in section 18.1 above are met, criterion 4007(2) in effect allows officers to grant a visa provided

'(b) ... the granting of the visa would be unlikely to result in:
(i) undue cost to the Australian community; or
(ii) undue prejudice to the access to health care or community services of an Australian citizen or permanent resident'

18.2.2 It is apparent that, in practice, assessment of criterion 4007(2) requires officers to consider whether granting the applicant their visa would result in undue cost to the Australian community or unduly prejudice the access of Australian

residents to health care or community services ("Community services" include supported accommodation, home and community care, special education and - as indicated by its regulation 1.03 definition - social security benefits and the like.)

18.2.3 It is policy that officers consider such matters as the following.

The opinion of the MOC

18.2.4 As indicated in section 12.2 above, the MOC will in these cases provide a description and estimate of the cost for health care and community services and advice in relation to the extent (if any) to which the applicant will prejudice the access of Australian residents to health care and community services. [Note that, as stated criterion 4007(1)(c), it is irrelevant whether those services will be used in connection with the applicant.]

18.2.5 The estimated costs for health care and community services will include a description of the services involved and a range of costs relevant to the individual applicant. The MOC will also indicate the order of cost that is most likely to be incurred.

Other factors

18.2.6 Officers should also consider

. the extent of social welfare, medical, hospital or other institutional or day care likely to be required in Australia. Officers should not assume that the applicant's current circumstances accurately reflect their future care needs. The fact that an applicant does not currently use such services, for example, may be due merely to the non-availability or the cost of such services or the applicant's current state of health (e.g. the applicant's disease may be in remission);

. the education and occupational needs of, and prospects for the applicant in Australia over the whole period of intended stay;

. the potential for the applicant's state of health to deteriorate, taking into account not only the known medical factors but also influences such as the strains of adjusting to a new environment, life-style, occupation etc (as applicable to the visa class and the individual);

. the overall lifetime (or lesser period according to the intended length of stay) charge to Australian public funds;

. the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. In this regard it needs to be recognised that commitments such as payment of private health insurance or undertakings do not exclude the possibility of public cost (all permanent residents have a right to Medicare treatment, for example);

. the merits of the case e.g. the strength of any humanitarian or compassionate factors (reasonable weight is to be given to humanitarian circumstances).

ATTACHMENT 2

PAM3, Schedule 4 – Public Interest Criteria – Criteria 4005-4007, Part D – Health Assessment, Permanent/Provisional Visa Applicants, 32 The 4007 Health Waiver, current guidelines reproduced from LEGEND CD-ROM.

32.7 Assessment factors

Overview

32.7.1 Criterion 4007(2) in effect allows officers to grant a visa provided

[4005(2)(b)]
... the granting of the visa would be unlikely to result in:
(i) undue cost to the Australian community; or
(ii) undue prejudice to the access to health care or community services of an Australian citizen or
permanent resident'

32.7.2 It is apparent that, in practice, assessment of criterion 4007(2) requires officers to consider whether granting the applicant their visa would result in undue cost to the Australian community or unduly prejudice the access of Australian residents to health care or community services. (Community services include supported accommodation, home and community care, special education and - as indicated by its regulation 1.03 definition - social security benefits and the like.)

32.7.3 It is policy that officers consider such matters as the following.

The opinion of the MOC

32.7.4 The MOC will in these cases provide a description and estimate of the cost for health care and community services. The MOC will also advise in relation to the extent (if any) to which the applicant will prejudice the access of Australian residents to health care and community services.

32.7.5 Note that, as stated in criterion 4007(1)(c), it is irrelevant to the MOC whether those services will be used in connection with the applicant; the MOC must take no notice of stated intentions not to apply for community support.

32.7.6 The estimated costs for health care and community services will include a description of the services involved and a range of costs relevant to the individual applicant.

32.7.7 Under regulation 2.25B, the MOC's opinion must be taken as correct by the officer. If other medical opinions are received, these should be referred to the MOC for comment.

Compelling circumstances

32.7.8 In considering the waiver, officers should also take into account any compelling circumstances.

32.7.9 It is not sufficient to waive the health requirements simply on the basis that the applicants have met all other requirements for the visa. Circumstances should go beyond that which is required by the threshold criteria for that subclass. For example, the genuine relationship between the applicant and the sponsor is not sufficient reason to waive the health requirements for a spouse case.

Other factors

32.7.10 Other factors that should be taken into account include (but are not limited to):

the extent of social welfare, medical, hospital or other institutional or day care likely to be required in Australia. Officers should not assume that the applicant's current circumstances accurately reflect their future care needs. The fact that an applicant does not currently use such services, for example,

- may be due merely to the non-availability or the cost of such services or the applicant's current state of health (e.g. the applicant's disease may be in remission);

- the education and occupational needs of, and prospects for the applicant in Australia over the whole period of intended stay;

- the potential for the applicant's state of health to deteriorate, taking into account not only the known medical factors but also influences such as the strains of adjusting to a new environment, life-style, occupation etc (as applicable to the visa class and the individual);

- the overall lifetime (or lesser period according to the intended length of stay) charge to Australian public funds;

- the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. In this regard it needs to be recognised that commitments such as payment of private health insurance or undertakings do not exclude the possibility of public cost. All permanent residents have a right to Medicare treatment, for example, and all private health insurance for Australian residents is based on Medicare covering 85% of costs;

- factors preventing the sponsor from joining the applicant in the applicant's own country;

- whether there are Australian children of the relationship who would be adversely affected by a decision not to waive;

- the location and circumstances of family members of the applicant and the sponsor;

- the merits of the case e.g. the strength of any humanitarian or compassionate factors (reasonable weight is to be given to humanitarian circumstances).

If the costs could exceed A$200 000

32.7.11 Officers who are of a mind to waive the health requirement where costs are estimated by the MOC to exceed $200 000 should consult Health Policy Section, DIMA CO, before deciding the case. Full details of the case should be forwarded, in accordance with section 33 below.

ATTACHMENT 3

Department of Immigration and Multicultural Affairs
Office of the Secretary

OPF1999/2607
C/99/14969

RECEIVED
17 AUG 2000
Office of Commonwealth Ombudsman

Mr R N McLeod AM
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr McLeod

Re: complaint by Mr Shehzad Kayani on behalf of Ms Talat Yasmin regarding the processing of a subclass 202 visa application

Thank you for the opportunity to comment on the draft section 15 report on this matter.

Having read your report and discussed the case with departmental officers involved in the investigation of the complaint, I agree that the documentation of the reasons for not waiving the health requirement was liable to create a perception of bias.

Nonetheless the decision to refuse to grant a visa was lawfully made and therefore cannot be vacated.

To resolve the matter, I invite Ms Yasmin to make a new application which will be processed expeditiously in Canberra, with the cost of prescribed health checks met by DIMA. In the meantime the Minister will be sent a request to consider waiving the health requirement in respect of the child.

I understand that Ms Jenny Bedlington, First Assistant Secretary, Refugee and Humanitarian Division, has informally conveyed this offer to the investigating officer in the absence of Mr John Taylor, Senior Assistant Ombudsman, Melbourne.

I trust this solution is acceptable to all parties.

Yours sincerely

W. J. Farmer

15 August 2000

Benjamin Offices, Chan Street Belconnen ACT 2615
PO Box 25 Belconnen ACT 2616 • Telephone (02) 6264 1111 • Facsimile (02) 6264 2747

ATTACHMENT 4

Department of Immigration and Multicultural Affairs
Office of the Secretary

Mr R N McLeod AM
Commonwealth Ombudsman
GPO Box 442
CANBERRA CITY ACT 2601

Dear Mr McLeod

DRAFT REPORT ON AN APPLICATION BY MS TALAT YASMIN

Thank you for the opportunity to comment on your draft section 35A report on the investigation into a complaint about the processing and refusal of a subclass 202 visa application made by Ms Talat Yasmin. The department regrets the tragic death of Mr Shahraz Kiane, and our sympathy is extended to Ms Talat Yasmin and her children. Our responsibility, of course, remains to process applications from her and her children according to law and government policy.

I have a number of significant concerns about the content and the conclusions of your draft report. The concerns relate to the selective use of information, often without the necessary context, and the failure to recognise that application of the health criterion is based on long-standing government policy. This has led to commentary and conclusions in your report, which are, in my view, wrong. In particular, I do not accept that the administrative processes in this case were unreasonable, nor, as you claim in your draft report, that the department lost sight of the human dimensions of its work.

The two major points made in the report are that:

- the health criterion should not apply in split family cases as health waiver should be automatic; and
- the department took into account irrelevant factors in considering the health waiver and that investigations into these led to unreasonable delays.

The first is essentially a policy issue. While it is up to you whether you disagree with long-standing government policy, it is important that your report make it absolutely clear that this is a policy which has had support from successive governments at least since the health criterion was last reviewed by the Joint Standing Committee on Migration in the early 1990s.

On the second issue, the report greatly over-simplifies the complexities of a health waiver decision and suggests that the cost aspects of this should have been ignored in order to make a rapid decision.

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The report also suggests that the question of whether Mr Kiane could have returned to Pakistan to live with the applicant is an irrelevant consideration. This view is clearly wrong and I draw your attention to the PAM guidelines on consideration of the health waiver which state, inter alia, that the factors that may be taken into account include "factors preventing the sponsor from joining the applicant in the applicant's own country".

The report correctly points out that DIMA found Mr Kiane to be a refugee in 1996. This was on the basis of information available at that time and Mr Kiane's alleged fear of persecution in Pakistan due to his association with Ahmadis. It is also true, however, that subsequent information suggested that it may well have been possible for Mr Kiane to return to Pakistan in safety. Given the PAM guidelines on consideration of the health waiver, it was quite appropriate for DIMA to consider the fresh information and, as requested by the Minister, to investigate the matter further. This inevitably took time.

Our enquiries revealed, inter alia, that:

- Mr Kiane did in fact return to Pakistan to 'visit family and friends' after he obtained refugee status;
- Mr Kiane and his family were being assisted by a family acquaintance who is an official in the Pakistan Ministry of Foreign Affairs;
- Mr Kiane's family was living with Mr Kiane's father (a retired captain in the Pakistan Army) in a military cantonment; and
- the Director of the Ahmadi Foreign Missions Office in Rabwah, Pakistan, who had been in contact with his colleagues in the family's home town of Jhelum, advised that Mr Kiane had nothing to do with Ahmadis, not even in a social capacity.

Some examples of the family not honouring commitments can be identified from the case chronology. Other examples can be provided if required.

Given the very considerable concerns outlined above and detailed in the attachment, it is important that very careful consideration be given to these prior to any public announcement of your report. However, should you decide to release your report, then given my views that much of your commentary and conclusions are wrong, it would be inappropriate to deviate from your usual practice and identify individuals within my Department. Additionally, at the very least, a copy of this letter and the detailed response which is attached, should be included with any release.

We stand ready to discuss this matter further with you should you wish.

Yours sincerely

for W.J. Farmer
19 July 2001

COMMENTS ON DRAFT REPORT **ATTACHMENT A**

The basis of your report can be summarised as follows:

- you appear not to agree with the application of the health criterion (Public Interest criterion 4007) to the Humanitarian Program. You recommend that, if the health criterion must apply in 'split family' humanitarian cases, the offshore applicant should be treated in the same manner as the proposer who was granted a protection visa onshore, effectively making the health waiver automatic;

- you raise concerns about aspects of the department's handling of the case, including:
  - that the department took into account irrelevant factors in considering the health waiver;
  - that the department demonstrated a lack of sensitivity to the personal circumstances of the applicants; and
  - that the delays were unreasonable.

To understand the sequence of events in this case I believe you should consider the full chronology of events, which is at Attachment D. To mention, as your draft report does, only particular aspects of the case does not reflect the full basis on which departmental officers had to make decisions. This includes the policy framework within which the Humanitarian Program, and the health criterion, operate.

Humanitarian Program

Each year the government determines the number of places that it will make available under the Humanitarian Program. As a signatory to the Refugees Convention, Australia has international obligations to provide protection to persons in Australia found to engage our protection obligations. In relation to refugees and others in humanitarian need outside Australia, the government has chosen to assist international efforts to resolve humanitarian crises by making available a number of resettlement places to those for whom this is an appropriate solution. The Humanitarian Program thus has two components – onshore for those granted protection visas in Australia and offshore for those selected overseas for resettlement to Australia.

The government accepts that humanitarian entrants are likely to be a significant cost to the Australian community. Amongst the range of factors the government considers in determining the size of the Humanitarian Program is the capacity of the Australian community to support humanitarian

entrants. This includes consideration of the costs involved in the settlement process including health, welfare, income support, education and housing.

Globally, with approximately 22 million refugees and persons of concern to the United Nations High Commissioner for Refugees (UNHCR), the demand for places offshore under the Humanitarian Program is far greater than the number of people Australia can resettle. Maintaining the integrity and objectivity of the program is a paramount consideration for both the Australian community, who bear the cost, and for the millions seeking a permanent solution to their forced displacement. It is therefore incumbent upon decision-makers to ensure that places under the Humanitarian Program are granted only to applicants who fully meet visa criteria.

'split family'

Although the Refugees Convention does not incorporate the principle of family unity in the definition of the term 'refugee', Australian governments have adopted, of their own volition, regulations and policies to facilitate family reunion. There is no international treaty requirement that family reunion should be preferential, or fast. Emergency or priority humanitarian resettlement can be effected in visa categories other than family reunion, if such action becomes necessary. Many family members overseas do not express fears of persecution if they are still within their country of nationality; nor do they complain of lack of effective protection in their country of first asylum. Family reunion is considered within the context of Australia's changing priorities in its large annual immigration intake, both humanitarian and non-humanitarian.

The 'split family' provisions were introduced into the offshore Humanitarian Program in July 1997. The purpose was to facilitate reunion of immediate family where a family had been separated, in some instances forcibly, and one of its members had been granted an offshore humanitarian visa to resettle in Australia. When the immediate family member(s) later successfully apply offshore they can be granted a visa in the same category as the proposer's visa. They are given priority in processing, and, for refugees, the Australian Government pays for medical examinations and airfares.

Although persons granted protection visas onshore were also able to avail themselves of the 'split family' provisions, the split family members of protection visa holders are by regulation to be considered for a subclass 202 (Special Humanitarian Program) visa, rather than a refugee visa. This means that their proposers in Australia are responsible for payment of airfares and medical examination costs. This reflected the government's intention to give to split family members of protection visa holders a lower priority than

offshore refugee visa holders, as many protection visa holders had made a decision to separate from their family and have paid to come to Australia.

In a Humanitarian Program with limited numbers of places, priority must be given to refugees and others who are in urgent need of the protection that resettlement offers and have no other avenue of finding a solution to their plight. It would be an anomaly for split family members who face no immediate dangers, and who do have the option of applying under the family stream of the Migration Program, to use a place in the Humanitarian Program ahead of those in greater need.

The health criterion

(a) background

The Australian Migration Act has always contained provisions relating to health requirements. These provisions have consistently been given bipartisan parliamentary support. All persons entering Australia under the Migration Act need to meet health criteria, unless a decision is made in individual cases to waive these requirements. Federal Court cases related to the health criteria accept this basic framework. Parliament, when passing the Disability Discrimination Act (DDA), included an exemption for immigration decisions.

The health component of the public interest criteria is designed to protect the Australian community from public health risks and from significant drains on health and welfare services in terms of costs or use of health resources in scarce supply. It nevertheless retains a mechanism to look at individual cases to see if all the circumstances of the case justify putting aside the health requirement.

The health criterion is central to the maintenance of the Migration and Humanitarian Programs. Not having the health criterion would require significant additional public expenditure in the health and welfare budgets. This is not a position that the government and indeed the general community would accept.

Humanitarian resettlement is part of Australia's contribution to sharing the responsibilities of international protection. Per capita our resettlement program has consistently been first or second largest in the world. The Australian Government makes decisions about the extent of burden-sharing, based partly on the cost. If a large percentage of the funds available for resettlement is absorbed by the high costs of a relatively few numbers of cases resettled, then numbers re-settled must decrease.

(b) differing health criteria for offshore and onshore applicants

One consequence of accepting people as a result of international obligations onshore, in contrast to selecting for resettlement from offshore, is the differing requirements in relation to the health criterion. Australia has an obligation to provide protection to persons, irrespective of their health status, who have been found to engage Australia's protection obligations onshore. This clearly is not the case for persons the government has chosen to assist through resettlement in Australia under the offshore Humanitarian Program. The health status of such people is one of the factors considered in deciding whether or not they will be accepted by Australia.

In the case of all permanent applicants offshore, the Australian government makes every effort to treat families cohesively in one application, whether this is under the Migration Program or under the Humanitarian Program. Where one member of the family unit fails any of the public interest criteria, the entire family unit fails. In a situation where an Australian citizen, or a permanent resident who is a protection visa holder seeks to bring out immediate family members, the family applicants offshore are required to meet the health criterion. This is irrespective of whether they are being sponsored under the family stream of the Migration Program or proposed under the 'split family' provisions of the Humanitarian Program. Where an applicant does not meet the health criterion, a waiver of the health criterion can be considered.

Your view (pp 33 and 34) appears to be that had the proposer's family travelled with him to Australia and made a successful joint Protection Visa (PV) or Temporary Protection Visa (TPV) application they would not have had to meet the health criterion at all. This is, and can only be, irrelevant speculation. In granting Mr Kiane his visitor visa, the IRT cited the fact that, since his wife and children were in Pakistan, it was likely that Mr Kiane would return to Pakistan. One could equally speculate that had a visitor visa application been lodged in Pakistan for the whole family, it is unlikely that a visitor visa would have been granted in the first place, and therefore the family would have been ineligible for an onshore PV or TPV.

(c) waiver consideration

Waiver is not automatic. This consideration is reserved for applications generally in the spouse/partner, children or humanitarian visa classes, where the level of compassionate and compelling circumstances is already strong.

The decision to admit a person to Australia when a health concern has been identified is a complex and sensitive issue. In exercising the waiver provision, the decision-maker is noting that an applicant has already been found by the Medical Officer of the Commonwealth (MOC) not to meet some parts of the

public interest criterion 4007 (or 4006A, in the case of some temporary entrants).

The waiver provision is triggered when an applicant has been found to come within the scope of 4007(1)(c). Paraphrased, this means that a person would be likely to require health care or community services likely to result in (a) significant costs or (b) prejudice to the access of an Australian citizen or permanent resident to care.

It is the MOC who determines that the estimated costs would be likely to be beyond a significant level, using costings drawn from

- medical fee schedules
- surgery costs
- Diagnostic Related Group costings
- special education requirements
- social security benefit schedules
- disability assessment tables
- pharmaceutical benefits schedules.

The estimate is to be a lifetime cost (for benefit payment this is assumed to be to age 65) and to be a nationwide average, rather than what might actually be available in a particular location.

The MOC is required only to find that costs 'would be likely' to be incurred, that is, a 51% likelihood, but in practice, the MOCs aim for a minimum of 70% certainty in costings. The estimates on the whole tend to the conservative, even though they can reach hundreds of thousands of dollars or over a million dollars.

This finding is compared to an Australian average use of health and related welfare services per annum. An MOC would not usually find a person to have exceeded that amount until costs of above $20,000 were clearly entailed.

Delegates of the Minister are able to exercise waiver on cases where they have determined that the cost is not 'undue', and may do so without a further referral process when costs are below $200,000. The tally of estimated costs with waiver exercised has reached between $15 million and $25 million per year since 1997. In view of the increasing aggregate figures, the Minister asked in 1997 to see all cases costing greater than $200,000 where the visa officer was of a mind to waive. Where the visa officer is not of a mind to waive the health criterion there is no requirement to refer the case.

Attachment B lists approved cases where the estimated cost to the Australian community was equal to, or greater than $430,000 (as requested in your letter of 14 June 2001). Records prior to September 1999 were not kept and are therefore not available.

In relation to what is relevant and what is irrelevant for exercise of the health waiver, your report mentions some considerations given in the PAM. However, you do not provide the full list (the relevant text of PAM is at Attachment C), and you have not included the instruction that the list is not exhaustive. This has led to a very one-sided analysis in your report of how the department considers health waivers.

Processing of Ms Yasmin's applications

(a) Ms Yasmin's first application

At the time of Ms Yasmin's first application, in November 1996, 'split family' provisions under the Humanitarian Program were not available. The option of an application as a spouse under the Migration Program was open to her, with sponsorship by her husband. A spouse migration application would have required a fee and an expectation that the sponsor and not the government would provide settlement support. They did not apply under the Migration Program and instead Ms Yasmin lodged an application under the offshore Humanitarian Program with her husband as proposer.

As a person living in her home country, Ms Yasmin was eligible for consideration in only one of the humanitarian subclasses – In-country Special Humanitarian Program, for which the threshold criterion is that a person be subject to persecution in their home country. Ms Yasmin was unable to meet this criterion.

On page 4 of your draft report, you state that 'Ms Yasmin was not interviewed' in relation to this application, implying that this is a failing on the part of the processing office. At the Australian High Commission in Islamabad between 500 and 1,000 persons per month apply for a humanitarian visa for Australia. The post also receives significant numbers of applications for migration (non-humanitarian) and temporary entry.

Over the past few years, the pipeline of humanitarian applicants awaiting processing at Islamabad has been as high as 16,000. With this volume of cases it is not practicable to interview all applicants. Decisions on whether to proceed to interview are made initially on the strength of the claims in the application. Ms Yasmin had the opportunity to put her claims, and the post considered these to be not strong enough to warrant calling her for interview.

You also state that 'there is no indication on the relevant DIMA file of how the decision was made'. There is on file a copy of the refusal letter informing Ms Yasmin that her application was not successful, accompanied by a copy of the decision record sent to Ms Yasmin to indicate the regulatory selection

criteria she did meet. These two documents fulfil DIMA's legal obligations when refusing a case overseas.

(b) Ms Yasmin's second application

This application was lodged at Islamabad in March 1998 and was prima facie eligible for consideration under the 'split family' provisions. When the middle daughter Anum was found to be likely to cause an estimated cost to the Australian community of $430,750 if the family were granted visas and entered Australia, the decision-maker looked at the factors in PAM listed as relevant to the health waiver. The strength of any humanitarian factors is one of the considerations. You regard the decision-maker's notes (your page 11) as indicating that he took irrelevant material into account because he made assessments about the veracity of the persecution claims, and found humanitarian claims questionable, and according to your report's page 19, referred in 'uncomplimentary terms to the genuineness of Ms Yasmin's humanitarian claims'.

Although it has been accepted that the language of the documentation of the waiver decision in Islamabad was inappropriate, the matters mentioned are indeed relevant. PAM requires consideration to be given to compassionate and humanitarian factors. These matters are relevant to the credibility of the applicants and the proposer; they are relevant to the Australian community's acceptance of what might be 'due'; and, they are relevant to the consideration of the sorts of compelling or compassionate circumstances that may exist for this case, above others.

You express a concern that '…officers in the Department continued to take irrelevant factors into account. …' (Page 32). Waiver consideration, especially when there are very high monetary amounts involved, is a very complex judgement to make. The decision-maker must decide whether, when an MOC has determined that there are significant costs involved, the costs are 'not undue' to the Australian community. Clearly, in reaching a decision, the decision-maker needs to assess the compassionate circumstances of the case and interests of the proposer and applicant against the interest of the Australian community in accepting such costs. In considering waiver, a very wide range of factors have a bearing on this question not just the narrow range implied in your report.

(c) Ms Yasmin's current application

Following negotiations with your office a fresh application was accepted at Islamabad on 15 September 2000 for forwarding to a decision-maker in Australia. Applications covering more than 1,200 people arrived at Islamabad during September and October 2000. The application from Ms Yasmin was

one of those received at that time, and unfortunately was not identified immediately on receipt. As the post has already explained, they were also busy with the urgent processing of a group of refugees in danger of refoulement.

Ms Yasmin's application was considered under the 'spit family' provisions of the offshore component of Australia's Humanitarian Program. Although she was prima facie eligible for grant of a humanitarian visa, the health criterion needed to be investigated for consideration of exercising the waiver.

The estimate of costs attracted by Anum Kayani's conditions had increased to $750,000. The increase in the estimate resulted from the MOCs having, with the passage of time, a firmer basis to calculate costs as well as the ability to take into account long-term income support. In 1999, a decision of a single judge of the Federal Court (the Seligman case) meant that income support could not be counted at the time of decision on Ms Yasmin's second application. Following an appeal to the Full Federal Court, income support can again be estimated and taken into consideration for an opinion on 'significant costs'. The most recent costing for Anum therefore takes into account the full estimated costs. The potential cost of $750,000 is made up of:

- special education to age 16 ($60,000);
- Disability Support Pension ($637,000); and
- carer payment, mobility support and community resources ($53,000).

At all times, Departmental officers were aware of the undertaking to expedite this case. However, the very significant costs in question, involving possible waiver of the health criterion, required that all procedures be carefully followed. Cases for waiver are accorded one of the highest priorities both in Health Policy section, and the Minister's office.

You are concerned that there were further significant delays 'despite' advice by an ACT counselling service about Mr Kiane's deteriorating mental state and risk of suicide (expressed in the executive summary of the draft report). This advice was received on 27 March. On Monday 2 April, Mr Kiane inflicted self-harm. The question of dealing with Mr Kiane's health condition was one that rested with health professionals, not the department.

The department receives large numbers of representations on the health condition of sponsors and proposers in apparent attempts to force decision-makers to act hastily and without full information. I am sure you would agree that decisions should not be made under this sort of duress.

Preparation of the submission to the Minister regarding the health waiver was started as soon as information relating to estimated costs came to hand. As you are aware, there was a significant difference between the costs estimated for Anum in 1999 and in 2001 and this needed to be confirmed. Preparation of the submission cannot be a swift task because of the complexities, not least in establishing the costs involved.

So far as the payment for the medical examination is concerned, we are confident that Ms Yasmin was informed, through your office and her husband, that DIMA would accept the charge. Indeed DIMA did meet the cost of the family's medical examinations by reimbursement.

Personal circumstances of the proposer

Your report comments on the drafting of the submission to the Minister regarding the possibility of waiver, with regard to the willingness and ability of Mr Kiane, a family member or another person or body to provide care and support at no public cost. In that context you have expressed the view that comments by the Director of the relevant Section, that the offer of care was 'not plausible in the Australian context and cannot be enforced', were inconsistent with the consideration of the offer of care and support. What you have not said is that the message of the Director goes on to seek exploration of factors that would favour the Kiane family in consideration of the health waiver. By selectively quoting the Director you have drawn a conclusion that is not supported by all the facts.

Consideration of this factor requires not only acceptance of the willingness of the sponsor or related parties to undertake care and support, but also an assessment of the viability of this occurring. If the visa were granted, Anum Kayani would be entitled to a very high level of care and support provided by professionals with appropriate training and facilities. She would also be entitled to disability income support. In assessing the offer of care for Anum such that she would not represent an undue cost to the Australian community, the decision-maker must assess whether the offer is plausible and therefore what weight to give to it. Also relevant in this context is whether other undertakings given by the family were honoured or not.

Against this background, I do not accept your view that the comments by the Director go to show a continued bias against the family, nor that they show a lack of willingness to assess the health waiver on relevant policy based criteria.

You have regarded as irrelevant any consideration made as to factors preventing Mr Kiane from rejoining his family in Pakistan, simply because he was accorded refugee status. At the time Mr Kiane's refugee status was

considered in 1996, a decision was made on the information available and he was granted a protection visa. However, the factors that led to the grant of a protection visa in 1996 may not continue to be relevant in 2001 when considering all the aspects for a health waiver in relation to Ms Yasmin.

It was in this context that the Minister asked for more information on this and related issues after he received the first health waiver submission. As a result, more research was undertaken, including a re-examination of allegations in Islamabad regarding the family's circumstances, and confirmation of Mr Kiane's trip to Pakistan. The 'key factor' that you mention in page 12, that Mr Kiane was unable to return to Pakistan was, as discovered, directly contradicted by Mr Kiane's own actions. This could not be ignored and goes to the issue of credibility of the applicant and the proposer. Further, in making her recent visitor visa application and obtaining Pakistani documentation we know that Ms Yasmin, and her late husband, had been receiving assistance from a family acquaintance who is an official of Pakistan's Ministry of Foreign Affairs.

It was also found that Ms Yasmin and her children live with Mr Kiane's father, a retired Pakistani military officer, in a military cantonment in Jhelum. According to his brother Shazad's statement to the Immigration Review Tribunal (IRT), his father had completed over 40 years of military service, the last 30 years being with the Pakistan army. Other evidence presented to the IRT shows that his sister's husband in Pakistan holds the military rank of lieutenant colonel, and that Jhelum was free from civil disturbance. All of these matters and other information were relevant to the central issue of the family's humanitarian need to be in Australia and the "factors preventing the sponsor from joining the applicant in the applicant's own country".

At page 33 you infer from DIMA's discussion paper that DIMA 'identifies a need for clearer instructions' in relation to the health waiver. As part of a current review of regulations the department has produced a discussion paper for consideration by individuals and organisations with an interest in the Humanitarian Program. The paper canvasses ideas and views to be explored, possibly leading to changes, possibly not. It is misleading to quote the discussion paper as if it is an official and completed critique of departmental policy and procedures. The discussion paper is just that, a discussion paper, prepared with input from government agencies, non-government agencies, community bodies and individuals.

Your recommendations

I now turn to the recommendations you have made in your report. In relation to your first draft recommendation, while not accepting your preliminary

findings, issues coming out of this case will be considered in the context of the current review of Australia's humanitarian resettlement program.

Your second recommendation is for a separate visa category for immediate family members of individuals who gain permanent residence in Australia on refugee or humanitarian grounds. This will also be considered in terms of the Humanitarian Program review. However, factors such as how it is likely to impact on others who may be in greater need of resettlement will be an important consideration.

Your third recommendation is that health requirements for immediate family members be no different from those of their proposers. For protection visa holders this effectively means an automatic health waiver for immediate family members offshore. This is a decision for governments to make, but I have no indication that the government would want to move from the long-standing bipartisan position that all offshore applicants are required to meet the health criterion unless a decision is made to waive that requirement.

- END -

ATTACHMENT B

Approved cases involving health costs greater than $430,000

Estimated cost $	Referral date	Subclass
1,600,000	30.05.99	200 (Refugee offshore)
525,000	5.08.99	100 (Spouse of Australian)
2,433,000	1.09.99	102 (Adopted child of an Australian, onshore)
485,000	23.09.99	101 (Child of an Australian)
670,000	26.09.99	200 (Refugee offshore)
1,014,000	13.10.99	101 (Child of an Australian)
1,643,000	27.01.00	309 (Provisional spouse)
520,000	4.02.00	102 (Adopted child of Australian)
500,000	29.05.00	200 (Refugee offshore)
600,000	05.06.00	209 (Citizens of former Yugoslavia)
1,221,400	9.06.00	802 (Adopted child of an Australian, regularised onshore)
561,400	22.06.00	820 (Spouse of an Australian, onshore)
560,000	15.07.00	820 (spouse of an Australian, onshore)
1,430,000	17.07.00	200 (Refugee offshore)
1,065,000	25.07.00	850 (Resolution of Status–temp.)
540,000	28.08.00	851 (Resolution of status onshore, usually of long-standing difficulties)
680,000	15.11.00	851 (Resolution of Status, onshore, usually long-standing difficulties)
550,000	04.01.01	201 (Special humanitarian – offshore)
500,000	23.01.01	200 (Refugee offshore)
905,600	14.02.01	820 / 801 (Fiancée / spouse of an Australian, onshore)
1,130,000	1.04.01	200 (Refugee offshore)

ATTACHMENT C

Health Waiver

From PAM3 Schedule 4 Public Interest Criteria 4005-4007 Part D/32:

Factors that may be taken into account include (but are not limited to):

- *the extent of social welfare, medical, hospital or other institutional or day care likely to be required in Australia. Officers should not assume that the applicant's current circumstances accurately reflect their future care needs. The fact that an applicant does not currently use such services, for example, may be due merely to the non-availability or the cost of such services or the applicant's current state of health (eg. the applicant's disease may be in remission);*

- *the education and occupational needs of, and prospects for the applicant in Australia over the whole period of intended stay;*

- *the potential for the applicant's state of health to deteriorate, taking into account not only the known medical factors but also influences such as the strains of adjusting to a new environment, life-style, occupation etc (as applicable to the visa class and the individual);*

- *the overall lifetime (or lesser period according to the intended length of stay) charge to Australian public funds;*

- *the willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. In this regard it needs to be recognised that commitments such as payment of private health insurance or undertakings do not exclude the possibility of public cost (all permanent residents have a right to Medicare treatment, for example);*

- *factors preventing the sponsor from joining the applicant in the applicant's own country;*

- *whether there are Australian children of the relationship who would be adversely affected by a decision not to waive;*

- *the location and circumstances of family members of the applicant and the sponsor;*

- *the merits of the case eg. the strength of any humanitarian or compassionate factors (reasonable weight is to be given to humanitarian circumstances).*

TALAT YASMIN & SHAHRAZ KIANE: CHRONOLOGY TO 18 JULY 2001[11]

INTRODUCTION

Following the undertaking with the Ombudsman's office that this case would be dealt with expeditiously by Humanitarian Program section in Canberra, a case officer and a decision maker were assigned. To process the application the following stakeholders were involved:

- Post in Islamabad for contact with applicant in relation to receiving application and progressing medical checks;
- Health Assessment Service for assessment of medicals and costings;
- Health Policy section in Canberra for submission on the health waiver;
- Ombudsman, Privacy and Freedom of Information section (OPFOI) as the initial request from the Ombudsman's office was lodged with this section.

1 Mr Kiane's application and movement history

1.1 Mr Kiane's first visit (1982)

- In May 1982 Shahraz KIANE arrived in Australia on a three-month temporary entry visa issued by the Australian High Commission in Islamabad.
- In November 1982 he was deported from Townsville airport. In later applications he volunteered the information that he overstayed unintentionally and subsequently repaid the debt to the Commonwealth.
- The file containing the deportation order indicates:
  - a guarantee was given on his behalf, by a relative, that he would not work or seek an extension of stay;
  - when apprehended Mr Kiane was working on a tobacco farm;
  - he had insufficient funds for voluntary departure and the air ticket he held had depreciated considerably in value; he did not offer to supplement the ticket's value with the money he had; although he had expressed his willingness to depart, he either could not or would not commit himself to doing so.
  - the Department wrote to Mr Kiane in April 1983 requesting he pay $295.80 for the cost of his deportation;
  - in his reply he stated that the main purpose of his visit had been to learn tobacco farming with a view to growing tobacco on his family's land; the tobacco farmer had advised him to work on the farm to gain a thorough knowledge, assuring him that he would arrange for the extension of his visa; the Commonwealth police had agreed to recover deportation costs from the wages owed to him by the tobacco farmer; and he had had a

[11] This chronology reflects subsequent amendments made by DIMA after the response from the Secretary on 19 July 2001.

valid return air ticket and should not be made to cover the cost of the ticket purchased for him by the police to suit their own requirements;
- after further correspondence, Mr Kiane paid his deportation costs in December 1985, some three years after his deportation.

1.2 Mr Kiane's first migration application (1988)

- Mr Kiane applied unsuccessfully to migrate to Australia under subclass 302 (emergency (permanent visa applicant)) of the Migration Program.

1.3 Mr Kiane's second visit (1995)

- Mr Kiane's application for a subclass 674 short stay (close family) visa to enable him to attend a relative's wedding was refused by the post in Islamabad in September 1994.
- The IRT subsequently overturned the decision and he arrived in September 1995.

1.4 Mr Kiane's protection application (1995)

- In December 1995, shortly before his visitor visa expired, Mr Kiane lodged an application for a subclass 866 protection visa, on the basis of persecution from religious leaders arising out of his support and friendship with Ahmadis. On 21 October 1996 Mr Kiane was granted a protection visa by DIMA. As a permanent resident Mr Kiane was eligible to sponsor his family under the family stream of the Migration Program.

1.5 Mr Kiane's acquisition of Australian citizenship (1999)

- Mr Kiane became an Australian citizen in January 1999.

1.6 Mr Kiane's absence from Australia (1999)

- Mr Kiane departed Australia in March 1999 and returned in July of the same year. He indicated in his passenger card that he would be spending most of his time in Pakistan and ticked the box 'visiting friends or relatives'.

2 Ms Yasmin's application history

2.1 Ms Yasmin's first humanitarian entry application (1996)

- In November 1996 (before the introduction of the "split family" provisions of the Humanitarian Program), Mr Kiane's wife and three dependent daughters made an application for subclass 202 special humanitarian program visas.
- The key criterion for this subclass requires that the applicant be "subject to substantial discrimination". The decision maker was not satisfied Ms Yasmin met this criterion. Accordingly, the application was refused in January 1997.
- In March 1997 Ms Yasmin wrote to the post concerning the effect of their separation on her husband's health and enquiring about the possibility of a visitor visa for herself and one of her daughters.
- Although Ms Yasmin had the option of applying for a spouse visa, she did not do so.

2.2 Ms Yasmin's second humanitarian (first "split family") application (1998)

- In March 1998 Mr Kiane proposed Ms Yasmin and their three dependent daughters for humanitarian entry under the newly created 'split family' provisions of subclass 202.
- The middle daughter has permanent and significant disabilities and requires substantial assistance with activities of daily living. She did not satisfy the health criterion.
- The decision maker declined to waive the health criterion, in view of the estimated cost to the community $430 750 in special education, sheltered employment and residential care.
- The application was refused in July 1999.

3 The Ombudsman's involvement

3.1 First letter (February 2000)

- On 2 February 2000 the Senior Assistant Ombudsman wrote to the Department concerning a complaint made by Mr Kiane's brother on behalf of Mr Kiane and Ms Yasmin.
- The letter noted the complaint raised two main issues:
  - the decision record did not indicate the factors that were taken into account in the decision not to exercise the health waiver and no weight was apparently given to the support available to the daughter from family members, nor to Mr Kiane's inability, as a refugee, to return to Pakistan to reunite with his family (Mr Kiane did return to Pakistan in 1999);
  - the decision maker's comments concerning the applicant's credibility (recorded on file and on the IRIS record) suggested a lack of objectivity;
- The letter sought the Department's advice on action that could be taken to reconsider the case.
- On 3 April 2000 the Refugee and Humanitarian Division, replied.
- In the reply, the department maintained that the procedure for considering whether to exercise the health waiver had been followed, and in spite of some unfortunate statements, the fact remained that the visa was refused because one of the applicants failed to meet health requirements.
- The reply further stated that, while there was no right of review of the decision, it was open to Ms Yasmin to make a fresh application which would be considered by a different decision maker.

3.2 Second letter (April 2000)

- On 14 April 2000 the Senior Assistant Ombudsman responded to the Department's reply.
- In his view it had not adequately addressed his concerns. He was not satisfied that the policy guidelines were properly taken into account and requested that the exercise of the health waiver be reconsidered.
- The Department's suggestion that the applicant make a new application did not offer a reasonable remedy in his opinion.

- On 28 July 2000 the Refugee and Humanitarian Division, replied to the Ombudsman's second letter.
- The reply reiterated the Department's position that the guidelines had been followed.
- The decision on the health waiver could not be reconsidered because it was not a decision in its own right but part of the decision as to whether the applicant satisfies the requirements for a visa.
- The invitation to make a fresh application was repeated.

3.3 Third letter (August 2000)

- On 1 August 2000 the Ombudsman wrote again to the Department. He noted that although the Department had acknowledged some problems in the decision making process, no reasonable remedy had been offered and he was considering issuing a report under section 15 of the Ombudsman Act 1976. The Ombudsman invited the Department and the decision maker to make comments on the draft report.
- On 15 August 2000 the Department replied to the Ombudsman's letter.
- In this letter the Department acknowledged that case records could be seen as creating a perception of bias, but maintained that the decision was lawfully made and therefore could not be vacated.
- To resolve the matter, the Department invited Ms Yasmin make a fresh application which would be processed expeditiously in Canberra. The cost of prescribed health checks would be met by DIMA, the results of the previous health checks having by then expired.
- On 24 August 2000 the Post in Islamabad was advised of the arrangements and asked to forward the application as soon as it was lodged to Humanitarian Program.
- On 7 September 2000 the Minister for Sport and Tourism made a representation on Mr Kiane's behalf. This was responded to on 9 October 2000 with advice that the Department as of 29 September 2000 had not been notified of the lodgement of Ms Yasmin's application.

3.4 Ms Yasmin's third humanitarian (second "split family") application (2000)

- On 15 September 2000 Ms Yasmin lodged a fresh application under the "split family" provisions of subclass 202. On this same day an e-mail was sent to the post enquiring about lodgement of the application. The post responded that there was nothing recorded on IRIS. (There can be a delay between the receipt of an application and its recording on IRIS.)
- On 18 September 2000 Humanitarian Program section sent the Post in Islamabad a reminder. The post advised the application had not yet been received.
- On 16 October 2000 the Ombudsman's office contacted OPFOI for news on the progress of the new application.
- The decision maker again contacted the post on 18 October 2000 questioning the fact that according to the Ombudsman's office the applicant

had lodged an application on 15 September. The post explained that due to a large group of refugees that needed to be processed because they were in danger of refoulement, the lodgement had not been immediately picked up. Ms Yasmin's file was sent to Humanitarian Program arriving on 25 October 2000.

- On 25 October 2000 Humanitarian Program advised the Ombudsman's office by e-mail that the application had now been received in Central Office and a case officer assigned to it. The Ombudsman's office was informed by e-mail that the post had been unable to forward the application sooner as it had been fully occupied with the processing of a group of refugees in danger of refoulement.
- On 27 October 2000 the case officer sought confirmation from Onshore Protection that Mr Kiane's immediate family had been declared in his protection application. Confirmation was received on 6 November 2000.
- On 8 November 2000 the file was copied and despatched to the post in advance of public interest checks to avoid delays. The Post was advised this had been done on 10 November 2000.
- On 27 November 2000 the Post in Islamabad was advised that the decision maker was satisfied the applicant met threshold criteria and was asked to arrange for her assessment against the public interest criteria. The Department's undertaking to pay for health checks was repeated.
- On 29 November 2000, a relative in Australia, enquired about the progress of the case at the ACT regional office. In reply to a query from that office, the Post in Islamabad advised that they were still waiting for the return of the file.
- On 30 November 2000 the decision maker informed the Ombudsman's office that processing had reached public interest checking, with a progress report expected from the post by 10 December.
- On 14 December 2000 the Post Islamabad confirmed they had received the file and that a letter asking the applicant to undergo health and character checks had been sent to her on 12 December 2000.
- On 22 December 2000 Ms Yasmin wrote to the post seeking clarification as to the matter of payment for the health checks. The post replied on 2 January 2001 advising Ms Yasmin that the Department would cover the cost of the medicals. The decision maker conveyed this information to the Ombudsman's office by e-mail on 11 January 2001.
- On 16 January 2001 OPFOI forwarded by fax a copy of the letter to Ms Yasmin dated 2 January 2001 to the Ombudsman's office.
- On 1 February 2001 Belconnen Community Service wrote to the Minister on Mr Kiane's behalf. He had presented to the service in an obviously depressed state and asked for assistance in approaching the Minister for help in the matter of his family's visa application. A response by Senator Patterson was sent on 27 March 2001 stating that the case was under careful

consideration and nearing completion and comments received would be passed on to the case officer.

- On 20 February 2001 the Post Islamabad advised Humanitarian Program and OPFOI that one of the daughters had not met the health criterion and that they were awaiting the MOC's assessment of costs. (The relevant Medical Officer of the Commonwealth (MOC) operates from the Health Assessment Service (HAS) which is in the Department in Sydney).
- On 2 March 2001 the Ombudsman's office sought a further progress report on the case, noting that the applicant and her daughters had completed health checks on 6 January 2001.
- On 5 March 2001 the decision maker advised that we were now waiting for the MOC's assessment of costs, and undertook to make another progress report in a fortnight.
- On 6 March 2001 the case officer sought Health Policy's assistance in expediting the MOC's assessment. HAS subsequently advised that:
  - the documents had been sent from the post on 18 January 2001 and had arrived at HAS on 25 January 2001; and
  - the results (i.e. the MOC's opinion and health waiver costing advice) had been e-mailed on 29 January 2001 and posted on 2 February 2001 to the post.
- Also on 6 March 2001, HAS e-mailed the results again to the post as the post had apparently not received the waiver advice. The Post asked HAS to provide reasons for the large difference between the new estimate of costs ($750 000) and the previous one ($430 745).
- Later on 6 March 2001, the case officer sent a draft health waiver submission to Health Policy for comments.
- On 7 March 2001 the case officer received Health Policy's comments on the first draft of the submission.
- On 13 March 2001 the case officer sent the second draft to Health Policy for comments which were received the next day.
- On 20 March 2001 a third draft was sent to Health Policy.
- On 27 March 2001 the case officer received a covering letter and letter from Companion House, an agency that assists survivors of torture and trauma. The letter detailed Mr Kiane's mental health since he was first seen at the agency in 1996. It noted that at that time he had marked post-traumatic stress disorder and depression and his separation from his family contributed significantly to his distress. The covering letter from a psychologist at the agency stated that Mr Kiane's mental health was continuing to deteriorate and his suicide risk to increase.
- Also on 27 March 2001, the case officer contacted Health Policy to enquire about the progress of the health waiver submission with a view to adding information from the Companion House letters.
- Later on 27 March 2001, Health Policy advised that the submission had not yet been signed as they wished some changes to be made, including the

addition of any information concerning factors that might mitigate the cost to the Australian community of granting the middle daughter's visa. Health Policy suggested this could be the employment history of the family, including English ability. Health Policy recommended we request this information.

- On 29 March 2001, to expedite the request for further information, the decision maker made the request by telephone to the Ombudsman's office by telephone and explained that the information concerning the employment history of Mr Kiane's relatives in Australia could be used as mitigating factors against the costs in the deliberative process for consideration if the waiver. It was put to the Ombudsman's Office that the Department would be happy to request the information in writing but this was likely to further delay finalisation. The Office undertook to pass the request on to Mr Kiane's brother (the complainant).
- On 2 April 2001 Mr Kiane set himself alight in front of Parliament House.
- On 3 April 2001 the acting Ombudsman proposed to finalise the section 15 report and requested copies of all documents concerning all action taken by the Department since August 2000; the reasons for delay and how it was now proposed to resolve the matter.
- On 4 April 2001 OPFOI advised the acting Deputy Ombudsman had agreed to 12 April as the deadline for compliance with the acting Ombudsman's request.
- On 10 April 2001, a brief was forwarded to the Minister seeking his views on the exercise of the health waiver in respect of the middle daughter. The brief was returned by the Minister with a request for further information.
- On 11 April 2001 OPFOI sought an extension of the deadline for responding to the Ombudsman's 3 April letter. The acting Deputy Ombudsman agreed to the undertaking to deliver the documents early in the week beginning 23 April.
- On 20 April 2001, in response to the Ombudsman's 3 April request, the Department sent the Ombudsman's office the file and a chronology of events.
- On 12 June 2001, in response to the Minister's April request for further information relevant to the consideration of the waiver of the health criterion, the Post reported the following:
  - an Ahmadi organisation in Pakistan, which had been in contact with colleagues in the family's home town of Jhelum, advised that Mr Kiane had nothing to do with Ahmadis, not even in a social capacity;
  - the police report of a February 1999 armed home invasion and robbery (which Ms Yasmin had mentioned in her application, implying that it was related to her husband's association with Ahmadis) indicated the incident was a common armed robbery, of which there are many in Pakistan, without any apparent motive other than theft;

  The Post also confirmed that the family lives in a cantonment (a permanent military station).

- On 14 June 2001 the Ombudsman wrote to the Department to seek comments on the draft report of the investigation into the complaint about the processing and refusal of Ms Yasmin's previous application. He also requested some information concerning cases where the health waiver had been exercised.
- On 24 June 2001 Companion House wrote to the Minister on Ms Yasmin's behalf with some details of the middle daughter's medical condition.
- On 26 June 2001 the family friend in Australia wrote to the Minister asking him to resolve the case by using his discretionary power to grant the family visas. Enclosed with the letter were an undertaking by a close relative to cover all costs associated with the middle daughter's disability should she be granted residence in Australia; a letter dated 20 June 2001 from Companion House, requesting the Minister to grant the family residence on compassionate grounds and undertaking to support the middle daughter within the agency's capacity; and another letter to the Minister, dated 24 June 2001, from the Australian Catholic Migrant and Refugee Office, asking that Ms Yasmin's application be processed before the visitor visas expire to spare the family the expense of unnecessary travel.
- On 9 July 2001 the Minister replied to the family friend in Australia and the two letters enclosed with his. In his reply the Minister pointed out that his public interest powers were not available for him to exercise in respect of a class BA application. The Minister also advised that class BA visas can only be granted outside Australia. Consequently processing of the application would resume after Ms Yasmin's return to Pakistan.