

## MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSIs)** relate to: the *Migration Act 1958*; the *Migration Regulations 1994* and other related legislation [as amended from time to time].

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This instruction replaces MSI 225.

### THIS INSTRUCTION CONTAINS THE FOLLOWING LEGISLATIVE REFERENCES

<b>Migration Act 1958:</b> Sections 198, 345, 351, 391, 417, 454 and 501J.	<b>Migration Regulations 1994:</b>	<b>Other legislation:</b> <i>Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Covenant on Civil and Political Rights; Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees.</i>
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## 1 PURPOSE OF THESE GUIDELINES

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- 1.0.1 The purpose of these Guidelines is to:
- explain the circumstances in which I may wish to consider exercising my public interest powers under s 345, 351, 391, 417, 454 or 501J of the *Migration Act 1958* (the Act) to substitute for a decision of a review tribunal a decision which is more favourable to the visa applicant(s);
  - explain how a person may request my consideration of the exercise of my public interest powers, and
  - inform officers of the Department of Immigration and Multicultural and Indigenous Affairs when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest.

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## 2 THE POWERS AVAILABLE UNDER LEGISLATION

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### 2.1 Public interest powers

- 2.1.1 Under s 345, 351, 391, 417, 454 and 501J of the Act, I have the power to substitute, for a decision made by one of the review tribunals, a decision that is more favourable to the visa applicant(s), if I consider it is in the public interest to do so. In this MSI, these powers are referred to as my public interest powers.

### 2.2 Review tribunals

- 2.2.1 These public interest powers are available in respect of decisions that have been taken by the following review tribunals:
- the former Migration Internal Review Office (MIRO - ceased operation on 31 May 1999);
  - the former Immigration Review Tribunal (IRT - ceased operation on 31 May 1999);
  - the Migration Review Tribunal (MRT - commenced operation on 1 June 1999);
  - the Refugee Review Tribunal (RRT); and
  - the Administrative Appeals Tribunal (AAT).

### 2.3 Powers are non-compellable

- 2.3.1 My public interest powers are *non-compellable*: that is, the powers are available to me, but under the legislation, I do not have a duty to consider whether to exercise those powers (see s 351(7) and 417(7)).

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## 3 WHEN THE POWERS ARE NOT AVAILABLE

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### 3.1 Only a more favourable decision

- 3.1.1 As my public interest powers only allow me to substitute a more favourable decision for a decision of one of the review tribunals (see 2.2.1 above), I am not able to use these powers until *after* a decision has been made by the relevant review tribunal.

### **3.2 When powers are not available**

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3.2.1 These public interest powers are not available:

- if the primary decision was not reviewable by the relevant tribunal, or
- if no review decision has been made, or
- if the review tribunal has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case;
  - in this situation, there is no longer a review decision available for me to substitute a more favourable decision.

if a decision is quashed or set aside by a Court and the case is remitted to the review decision maker to be decided again, I am not able to use my public interest powers. This is because there is no longer a review decision in existence for which I can substitute a more favourable decision.

### **3.3 When I consider a case “inappropriate to consider”**

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3.3.1 I consider the following types of cases inappropriate to consider:

- Cases where there is migration-related litigation that has not been finalised;
- Cases where there is another visa application concerning the subject of the review authority decision ongoing with my Department;
- Cases where there is an ongoing Ministerial request under a different public interest power;
- Cases where there has been a remittal or a set aside from a review authority; and
- Cases which were decided by MIRO and are now at the MRT.

3.3.2 Case officers should generally not bring these cases to my attention.

### **3.4 Court proceedings may affect use of public interest powers**

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3.4.1 Because it may affect the exercise of my public interest powers, case officers **must**, when referring a case to me, inform me of the commencement and outcome of Court proceedings challenging a decision in relation to any case that is being referred to me for possible consideration of my use of the public interest powers.

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## **4 UNIQUE OR EXCEPTIONAL CIRCUMSTANCES**

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### **4.1 Public interest**

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4.1.1 The public interest may be served through the Australian Government responding with care and compassion where an individual's situation involves unique or exceptional circumstances. This will depend on various factors, which must be assessed by reference to the circumstances of the particular case.

- 4.1.2 I will generally only consider the exercise of public interest powers in cases that exhibit one or more unique or exceptional circumstances.

## **4.2 Unique or exceptional circumstances**

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- 4.2.1 The following factors may be relevant, individually or cumulatively, in assessing whether a case involves unique or exceptional circumstances.

- Particular circumstances or personal characteristics of a visa applicant which provide a sound basis for believing that there is a significant threat to their personal security, human rights or human dignity on return to their country of origin, including:
  - persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or
  - persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but where such mistreatment does not amount to persecution under the Convention relating to the Status of Refugees 1951, as amended by the Protocol relating to the Status of Refugees 1967 (Refugees Convention) or has not occurred for a Convention reason.
- Substantial grounds for believing that a person may be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
  - Article 3.1 of the CAT states:

*No State Party shall expel, return (“refoule”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.*
  - **Torture** is defined by Article 1.1 as:

*“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.*
- Circumstances that may bring Australia's obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration.
  - Article 3 of the CROC provides:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*<sup>1</sup>
- Circumstances that may bring Australia's obligations as a signatory

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<sup>1</sup> The best interests of the child must be treated as a primary consideration, but this needs to be balanced against any countervailing considerations.

to the International Covenant on Civil and Political Rights (ICCPR) into consideration. For example:

- A non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty (no matter whether lawfully imposed);
- Issues relating to Article 23.1 of the ICCPR are raised. Article 23.1 provides:  
*"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State."*<sup>2</sup>

- Circumstances that the legislation does not anticipate.
- Clearly unintended consequences of legislation.
- Circumstances where application of relevant legislation leads to unfair or unreasonable results in a particular case.
- Strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident).
- Circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia.
- The length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community.
- Compassionate circumstances regarding the age and/or health and/or psychological state of the person.

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## **5 POSSIBLE ADVERSE INFORMATION**

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### **5.1 Relevant information**

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- 5.1.1 Cases identified as involving unique or exceptional circumstances will sometimes raise other issues that I may wish to take into account, in considering whether to exercise my public interest powers.
- 5.1.2 Whilst the following issues are relevant, officers should bring to my attention any information that they consider may be relevant to my consideration.

### **5.2 Relevant issues**

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- 5.2.1 Where cases are assessed as involving unique or exceptional circumstances and are referred to me, the following issues, if relevant, should be brought to my attention:
  - whether the continued presence of the person in Australia would pose a threat to an individual in Australia, to Australian society or security, or may prejudice Australia's international relations,
  - whether Australia's international obligations in relation to matters of

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<sup>2</sup> This needs to be balanced against any countervailing considerations.

extradition, or other relevant multilateral or bilateral agreements may be engaged,

- whether there are character concerns in relation to the person, particularly in relation to criminal conduct,
  - information regarding any offence or fraud involving the migration legislation is relevant and should be specifically brought to my attention,
- whether the person would not be required to return to a country where a significant threat to their personal security, human rights or human dignity has occurred or is likely to occur, because they are able to enter and stay in another country,
- where the person is likely to face a significant threat to their personal security, human rights or human dignity if they return to a particular area in their country of origin and they could safely and reasonably relocate elsewhere within that country; and
- the degree to which the person co-operated with the Department and complied with any conditions on their visa.

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## **6 APPLICATION OF THESE GUIDELINES**

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### **6.1 Minister's instruction**

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- 6.1.1 The procedures set out below are to be followed, in order to ensure the efficient administration of my public interest powers.

### **6.2 Action to be taken after a decision by a review tribunal**

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- 6.2.1 When a case office receives notification of a review tribunal's decision to affirm a primary decision, they may assess the visa applicant's circumstances against these Guidelines, and:
- if the case falls within the ambit of these Guidelines, bring the case to my attention in a submission, so that I may consider exercising my public interest powers, or
  - if the case falls outside the ambit of these Guidelines, write a file note to that effect.
- 6.2.2 When a review tribunal member holds the view that a case falls within the ambit of these Guidelines, they may refer the case to my Department and their views will be brought to my attention using the process outlined in 6.3.3 below:
- comments by members of review tribunals in their decision records do not constitute an initial 'request' for the purposes of 6.3 below.

### **6.3 Requests for the exercise of my public interest powers**

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- 6.3.1 A person can request the exercise of my public interest powers in writing or by electronic transmission.
- 6.3.2 Their agent or supporters can also make the request relating to the person's case.
- 6.3.3 When a first request for me to exercise my public interest powers is received, an officer is to assess that visa applicant's circumstances against these Guidelines, and:

- for cases falling within the ambit of these Guidelines, bring the case to my attention in a submission so that I may consider exercising my power, or
  - for cases falling outside the ambit of these Guidelines, bring the case to my attention through a short summary of the issues in schedule format, so that I may indicate whether I wish to consider the exercise of my power.
- 6.3.4 Where a case is in the process of being litigated, indicated above at 3.1, case officers are to advise me of the status of the case.
- 6.3.5 Where a case is in the process of being litigated, the following approach should be adopted depending on the circumstances:
- where a visa applicant has started the litigation, I generally consider it inappropriate to consider as specified in paragraph 3.3.1.
  - where there is a class action, started before 1 October 2001<sup>3</sup>, involving the visa applicant(s), the case officer may use their discretion to process the request;
  - where there is a Bridging E visa refusal, the case officer may use their discretion to process the request if it falls within these guidelines.

#### **6.4 Subsequent requests for the exercise of my public interest powers**

- 6.4.1 If a request for me to exercise my public interest powers in respect of a person is received and I have previously considered the exercise of my public interest powers (whether in a schedule or as a submission) in respect of that person (whether in respect of the person's present or any previous visa application) a case officer is to assess the request, and:
- for such cases falling within the ambit of these Guidelines, bring the case to my attention as a submission so that I may consider exercising my power, or
  - for such cases remaining outside the ambit of these Guidelines (because the request does not contain additional information or the additional information provided, in combination with the information known previously, does not bring the case within the ambit of these Guidelines), reply on my behalf that I do not wish to consider exercising my power.

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## **7 OUTCOME OF MINISTER'S CONSIDERATION**

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- 7.0.1 If I choose to consider a case for substitution of a decision for that of a review tribunal, I may ask that health and character assessments be carried out, or some form of surety be arranged before I determine whether or not I wish to substitute a more favourable decision.
- 7.0.2 If I choose to consider a case for substitution of a decision, I may choose not to substitute a more favourable decision for that made by a review tribunal.
- 7.0.3 If I choose to substitute a more favourable decision for that of a review tribunal by granting a visa, I will grant what I consider to be the most appropriate visa.
- 7.0.4 If I choose to consider the substitution of a more favourable decision for that of a review tribunal, I must be kept informed of any cases that may

<sup>3</sup> New s 486B of the Act, in force from 1 October 2001, prevents class or similar actions except in limited circumstances.

amount to a potentially high health cost to the Australian community.

- 7.0.5 Every person whose case is brought to my attention is to be advised of the outcome of my consideration, whether I decline to consider exercising public interest powers, or a determination following consideration of the exercise of that power.

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## **8 NO LIMITATION TO MINISTER'S POWERS**

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- 8.01 These public interest powers exist whether or not a case is brought to my attention in the manner described above (providing that a review tribunal decision has been made and that review decision has not been overtaken by subsequent events).
- 8.02 Where I consider it appropriate, I will seek further information to enable me to make a determination on whether to consider application of my public interest powers, or whether to consider the exercise of my public interest powers.

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## **9 REMOVAL POLICY**

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- 9.0.1 Section 198 of the Act, broadly speaking, requires the removal of unlawful non-citizens in immigration detention who are not holding or applying for a visa.
- 9.02 A request for me to exercise my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions.

Philip Ruddock  
Minister for Immigration and Multicultural and Indigenous Affairs