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Ministerial intervention in migration matters

A PROCESS NOT A PLATFORM

Ministerial intervention powers provide a process for visa applicants to obtain a more favourable decision from the Minister following a negative outcome at the Administrative Appeals Tribunal (AAT). It is important for practitioners to understand that applications for ministerial intervention involve an established process.

Applications seeking intervention should not rely on legal arguments which are outside of the accepted ministerial intervention guidelines, nor should they be used as a platform, including in the media, to rail against current Australian migration policy. The pathways and considerations relevant to successful applications will be the basis for this article.

MINISTERIAL INTERVENTION POWERS

There are a range of discretionary powers available to the Minister under the *Migration Act 1958* (Cth) (*Migration Act*).[1] For the purposes of this article, the discussion will be limited to the discretionary powers given to the Minister by ss351, 417 and 501J of the *Migration Act*. These powers allow the Minister to substitute a decision by the AAT with a decision that is more favourable to an applicant. Ministerial intervention is personally exercised by the Minister, however, applications for ministerial intervention proceed through a department specifically

tasked with processing all applications. This department does not make a final determination to substitute a more favourable decision, but applications may be refused by persons other than the Minister. Applications should be drafted in a manner that is consistent with well-established ministerial intervention processes to increase the likelihood of referral to the Minister.

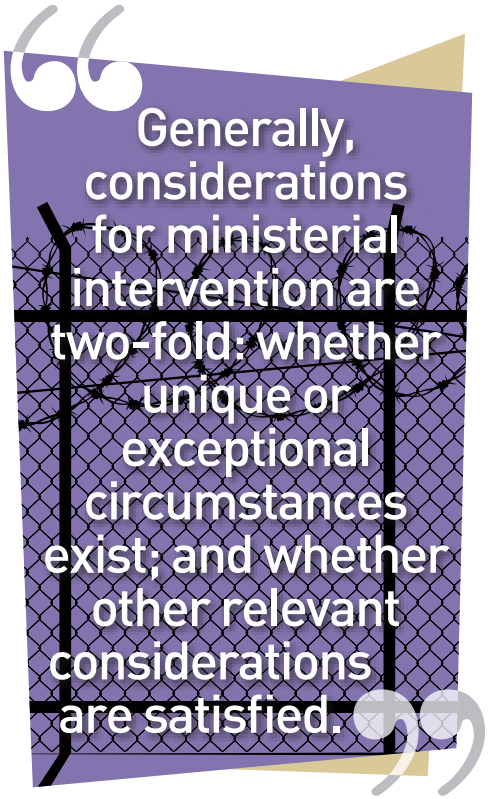
PATHWAY TO MINISTERIAL INTERVENTION

Ministerial intervention will not occur without the AAT first making a review decision.[2] A determination by the AAT that it does not have jurisdiction to review a migration matter is not considered to be a review decision for the purposes of ministerial intervention.[3] Therefore, no application for ministerial intervention is possible if the AAT has determined that it has no jurisdiction to review a matter.

Judicial review of an AAT decision occurs independently of an application for ministerial intervention. Importantly, consideration of an application for ministerial intervention that is made while the related AAT decision is undergoing judicial review is likely to be delayed until a judicial review decision has been made.[4] The setting aside, or remittance, of an AAT decision by the AAT or a court will render any related ministerial intervention application inappropriate and the Minister will not consider it.[5] Accordingly, it is advisable to delay an application until the judicial review process, including a subsequent decision by the AAT after a remittance, provides an unfavourable outcome.

LIMITATIONS ON APPLICATIONS FOR MINISTERIAL INTERVENTION

The limitations on applications for ministerial intervention can be found in the *Minister's guidelines on ministerial powers (s351, s417 and s501J)* (*Minister's guidelines*) which can be accessed through LEGENDcom, an electronic database (subscription only) of migration and citizenship legislation and policy documents. As mentioned above, ministerial intervention powers are not available without the existence of a review decision.[6] Additionally, ministerial powers are exhausted in relation to a tribunal decision once the Minister has intervened to grant a visa.[7]



Ministerial intervention applications are further limited by the *Minister's guidelines* through instructions on which applications should be considered inappropriate. While a thorough discussion of inappropriate applications is beyond the scope of this article, practitioners should acquaint themselves with this section of the *Minister's guidelines*. Some of the more critical inappropriate applications relate to the nature of the person making the ministerial intervention request; whether the subject of the application is an unlawful non-citizen; and whether a legitimate partner visa pathway exists.

The *Minister's guidelines* regard applications which are not made by the subject of the application or their authorised representative as inappropriate.[8] For example, applications from community groups wanting to keep asylum seeker families in Australia will receive short shrift from the ministerial intervention department.

The migration status of an applicant is a very relevant consideration. Applicants who do not resolve their status and remain unlawful non-citizens 'throughout the course of their ministerial intervention request' will be considered inappropriate applications.[9] A migration history which includes periods of unlawfulness does not preclude an application; however, these periods should be disclosed and explained in an application.

An application is inappropriate if a 'person may be able to apply for a partner visa onshore'.[10] The ever-increasing timeframes for visa processing and AAT reviews make it likely that an applicant may become eligible for a partner visa throughout their visa and review processes. We recommend that practitioners continue to inform themselves about their clients' relationship status in order to make use of partner visas when appropriate.

It is important for practitioners to fully understand the limitations of the ministerial intervention powers to avoid falsely raising clients' hopes.

MINISTERIAL INTERVENTION CONSIDERATIONS

Ministerial intervention applications should adopt the same process-based approach that is used for other migration matters; although they are not intended to be a continuation of the visa application process.[11] Applications should consider the overarching 'public interest' consideration which governs the use of these powers.[12] However, the broad statutory criterion of 'public interest' should not be seen as an opportunity to argue any social justice or policy platform which, in the practitioner's mind, relates to the 'public interest'. For example, applications based solely on non-refoulement arguments will be deemed inappropriate applications.[13]

Generally, considerations for ministerial intervention are twofold: whether unique or exceptional circumstances exist; and whether other relevant considerations are satisfied.[14] It is recommended that applicants seek to establish the existence of unique or exceptional circumstances before turning their minds to the latter.

These considerations reinforce the view that applications for ministerial intervention involve a process rather than a platform for social commentary. The unique or exceptional circumstances can be made out even if

only one of the circumstances applies.[15] However, it is good practice to seek to establish as many circumstances as the facts will allow in submissions. The list of unique or exceptional circumstances in the *Minister's guidelines*, which includes considerations of hardship to Australian citizens and compassionate circumstances, is not intended to be exhaustive. The phrase 'such as those described below'[16] implies that there may be unique or exceptional circumstances beyond those listed in the *Minister's guidelines*. Nevertheless, we recommend that practitioners act cautiously if clients request ministerial intervention where none of the listed circumstances can be reasonably made out. Applications which seek to establish unique or exceptional circumstances through a platform rather than a process should be avoided.

It is important to specifically address each of the other relevant information considerations[17] because they have the potential to strengthen the overall application. This other relevant information is also not an exhaustive list due to the phrase, 'including the following'.[18] However again, the comprehensive nature of this list generally precludes the need to make submissions beyond them. Considerations such as Australia's international obligations[19] provide applicants with the opportunity to make more generalised submissions, but caution should be given to avoid entirely generalised submissions which make no reference to an applicant's specific circumstances.

The *Minister's guidelines* provide a clear process for making submissions in support of applications for ministerial intervention. It is critical for practitioners to engage constructively with the unique or exceptional circumstances and other relevant information considerations. In our experience, there is limited need to make submissions outside of these considerations in order to achieve a favourable result.

EXAMPLES OF MINISTERIAL INTERVENTION

The unique and exceptional circumstances and other relevant information considerations are perhaps better understood when shown through examples. The following examples demonstrate some factual scenarios where these circumstances have been made out.

Example one

The Department refused the applicant a permanent visa on the grounds that the applicant did not satisfy the relevant income threshold requirement. This decision was affirmed by the AAT on the basis that the operative clause had been interpreted correctly. However, the AAT was satisfied that the applicant's matter outlined in our submissions raised issues which were appropriate for referral to the Minister in accordance with the principles set out in the *Minister's guidelines*, and referred the matter to the Department. These issues were subsequently included in our submissions to the Minister.

Our submissions on hardship to an Australian citizen or an Australian family unit were based on the applicant's close connection to their children and grandchildren, who are Australian citizens. It was submitted that these family members would have suffered significant emotional and financial hardship as a result of the applicant's departure. A psychological assessment of these family members was included to evidence this hardship. We also provided additional material demonstrating the closeness of their relationship to the applicant.

Our submissions also relied on compassionate circumstances: if the applicant was forced to depart from Australia, they would suffer ongoing and irreversible harm and continuing hardship. The applicant had no personal ties to any other country and removal would have resulted in the loss of connection to their children and grandchildren. Additionally, the applicant held a significant and well-established property and agricultural investment which would be effectively forfeited.

Submissions were also made regarding the application of the income threshold provision to circumstances which would not have been anticipated by legislators. A literal reading of the income threshold clause did not account for unforeseeable variation of yearly income caused by extreme weather events which uniquely impact the agriculture sector. In this matter, the application of legislation which did not account for this type of variation resulted in an unfair and unreasonable result.

Our submissions were further strengthened by letters of support from the local federal member and from the leader of a relevant local industry.

In response to our submissions, the Minister exercised his discretion to waive the age requirement for an alternate permanent visa pathway which would allow the applicant to remain in Australia.

Example two

At the time of the application for ministerial intervention, the applicant was a young teenager living in Australia with a carer and their children; the applicant's half-siblings. The applicant's remaining parent resided overseas but was not able to provide appropriate care. In the time leading up to the AAT hearing, both the applicant's carer in Australia and remaining parent overseas passed away. The deceased carer's partner then assumed primary care of the applicant. The applicant was refused a protection visa on the basis that the delegate was not satisfied that the applicant was a person in respect of whom protection obligations were owed due to the 'significant harm' threshold not being met. The AAT affirmed the Department's decision to refuse the application (noting it had 'no option'), but referred the matter for ministerial intervention. Our submissions for ministerial intervention were based on grounds which were accepted by the AAT.

Our submission, based on hardship to an Australian citizen or an Australian family unit, stemmed from the applicant's strong bond with their family and carers who are Australian citizens. The recent death of the applicant's carer and the applicant's forced departure would have created additional emotional and financial strain on the already bereaved Australian family. Letters of support

from the applicant's Australian family members were provided to support this submission.

We also made submissions about the existence of compassionate circumstances: the prospect of removal from family and community at such a young age meant that the applicant was particularly vulnerable. A highly detailed psychological assessment provided in support found that the applicant suffered from PTSD arising out the applicant's exposure to harm in the country to which they would be compelled to return.

We also submitted that there were circumstances in this matter which were not anticipated by the legislators. Our submissions highlighted the poor arrangements within the protection visa scheme when it comes to the needs of unaccompanied and separated children who fall outside the definition of 'significant harm' but are nonetheless at grave risk of serious harm owing to their unique vulnerability as children.

Our application directed the Minister to the AAT's positive response to our other relevant information submissions. These submissions referred to Australia's obligations as a party to the *Convention on the Rights of the Child*, Article 3, which states, 'In all actions concerning children … the best interests of the child shall be a primary consideration'. The AAT noted that it was clearly in the best interest of the applicant for them to remain with their family in Australia, as opposed to returning to their home country where no familial support existed. We provided letters of support from the local federal member, the applicant's principal (which included a school petition), and various other community members.

Our submissions led to the grant of a temporary visa, with the applicant then being in a position to apply for a permanent visa in the future.

MEDIA – USE WITH CAUTION

Practitioners will be aware that advocates have, at times, engaged with the media. Presumably, this engagement with the media is based on a belief that media attention and the resultant public sympathy will place pressure on the Minister to intervene and lead to a positive outcome for an applicant. Admittedly, there have been occasions in recent years where such an approach has resulted in the Minister intervening.[20] Based on our experience, however, such media attention does not ordinarily result in that hoped-for outcome because ministerial intervention is often a quietly employed power.[21] In exceptional circumstances, a well thought out media strategy may be appropriate. Therefore, the use of media should not be automatically ruled out. However, we consider that engagement with the media may incline a Minister to reject the application in order to present a tough immigration stance to the Australian and international communities.[22] We are reminded here that we as practitioners must act in the best interests of our clients. Accordingly, we would urge caution when considering engaging with the media. It is also important to manage client expectations around outcomes which may result from engaging the media during a ministerial intervention process. Practitioners should ensure that clients understand that ministerial intervention requires a process-based approach in order to gain an outcome in their favour.

EFFECTIVE MINISTERIAL INTERVENTION MEASURES

There are a number of measures which, in our experience, increase the likelihood of achieving a positive outcome from the Minister. These include:

- involving the AAT in the referral process;
- specifically requesting the grant of a particular visa;
- ensuring the Minister has all the relevant documentation; and
- the effective use of support letters.

Practitioners should turn their minds to the possibility of ministerial intervention during the AAT review process. Applicants are able to request that a matter be referred to the Minister by the AAT after the completion of an AAT review.[23] The AAT will consider the *Minister's guidelines* prior to making any referral.[24] Submissions relating to the *Minister's guidelines* should be made in AAT submissions where a matter is likely to lead to an application for ministerial intervention. These submissions will assist an inclined AAT member with their referral and may persuade a disinclined member. No statutory power is granted to the AAT to make a binding recommendation for ministerial intervention,[25] however, in our opinion, a referral by the AAT gives significant weight to an application. On occasion, the AAT may decline a request for a referral but will include support for ministerial intervention in its decision. In our experience, proactively involving the AAT in the ministerial intervention process increases the likelihood of a positive result from the Minister.

Ministerial intervention powers are exhausted upon the granting of a visa.[26] In our experience, the Minister tends to grant a visitor (subclass 600) visa which allows a non-citizen to apply for a visa for which they are eligible. Practitioners should not assume that a positive ministerial intervention will result in a successful outcome for any subsequent visa applications. Subsequent visa applications will be considered on their merits and within a timeframe consistent with similar applications which did not eventuate after ministerial intervention. Circumstances are likely to arise where a non-citizen is ineligible to apply for another visa which would provide them with a permanent residency outcome. The broad ministerial intervention powers provide the Minister with alternatives beyond the granting of visitor (subclass 600) visas. It is entirely appropriate, and on occasion essential, that an application for ministerial intervention specify the visa sought. Such an application may need to include a request for certain visa criteria to be waived.

The *Minister's guidelines* imply that the Minister will be provided with all the information related to a visa application and AAT review.[27] In practice, it is best not to assume that all relevant information will be provided to the Minister. Remember that the Minister will only see the information after it has been processed

by the ministerial intervention department. Therefore, it is likely the ministerial intervention department will not have all the information at the time of the application because there is no requirement for the information to be provided to the Minister by that time. Similarly, the ministerial intervention department may not proactively seek out information to support an application. Practitioners should adapt their 'decision ready' visa application processes to produce similar applications for ministerial intervention. It is good practice to provide all relevant documents with a ministerial intervention application.

Finally, letters supporting an application can be effective if used appropriately. Practitioners should consider seeking support letters from high profile public figures, including members of parliament and community leaders. Members of parliament are often reluctant to provide support letters for persons who are not known to them, so it is advisable to determine the relationships the applicant has with community members who could facilitate such a support letter. A personal connection between the author of any support letter and the applicant should be clearly set out in a support letter. Additionally, the letters should support the unique or exceptional circumstances the application is seeking to establish.

It is likely that letters of support will contain a social justice platform or political commentary. Keep in mind that these letters are intended to be read by a parliamentarian, the Minister, and content which is not appropriate in the actual application for ministerial intervention may be appropriate in a letter from a voting Australian citizen. Inclusion of a political platform in a support letter is unlikely to detract from the overall letter as long as the substantive content of the application is directly supported by the main message in the letter. Often members of the public, as well as members of parliament, will welcome a draft letter from a practitioner to help them provide appropriate support for an application.

The preceding measures to assist applications are not prescriptive and their appropriateness should be assessed on a case-by-case basis.

CONCLUSION

Applications for ministerial intervention should be made in line with accepted processes. It is not recommended that the ministerial intervention process be used as a platform for political or social commentary. Generally, submissions should be limited to the considerations identified in the *Minister's guidelines*, but practitioners should not shy away from specifying the type of visa or any waivers sought. Engagement with the AAT is more likely to return a favourable outcome than engagement with the media. Practitioners should understand ministerial intervention to adopt the same process mindset as is used in other migration matters. ■

Notes: **1** K Carrington, 'Ministerial discretion in migration matters: Contemporary policy issues in historical context', *Current Issues Brief*, No. 3 of 2003–04, 15 September 2003, 6. **2** *Procedures Advice Manual 3*: Act – Ministerial powers – Minister's guidelines on ministerial powers (ss351, 417 and 501J) (reissued 29 March 2016) (*Minister's guidelines*), 6. **3** Administrative Appeals Tribunal, *Migration and Refugee Division Procedural Law Guide*, 3 September 2018, 34.3.1 (AAT Law Guide). **4** *Minister's guidelines*, above note 2, [5]. Other relevant information states, 'For all cases referred to me under these guidelines, the Department will provide information on any other relevant issues, including the following: … details of any ongoing court proceedings challenging a decision related to the case and any outcome available before I consider the case'. **5** Ibid, [7]. 'Inappropriate to consider' states: 'Cases which do not meet these guidelines for referral, and with the types of circumstances described below, are inappropriate for me to consider. The Department will finalise these cases without referral to me and advise the person or their authorised representative in writing: … the person has had a remittal or a set aside decision from a relevant review tribunal or a court'. **6** Ibid, [6]. **7** Ibid. **8** Ibid, [7]. **9** Ibid. **10** Ibid. **11** Ibid, [3]. **12** *Migration Act 1958* (Cth), ss351(1), 417(1), 501J(1). **13** *Minister's guidelines*, above note 2, [7]. **14** Ibid, [4]–[5]. **15** Ibid, [4]. **16** Ibid. **17** Ibid, [5]. **18** Ibid. **19** Ibid; see *Convention on the Rights of the Child* and *International Covenant on Civil and Political Rights*. **20** B MacKenzie, 'Immigration backflip means six-year-old Sienna gets to stay in Australia', *ABC News* (online), 16 February 2017, <https://www.abc.net.au/news/2017-02-16/tippett-family-pleased-by-immigration-backflip/8277570>. **21** B Doherty, 'Peter Dutton could grant visas to the Biloela family – his powers are broad and sweeping', *The Guardian* (online), 3 September 2019, <https://www.theguardian.com/australia-news/2019/sep/03/peter-dutton-could-grant-visas-to-the-biloela-family-his-powers-are-broad-and-sweeping>. **22** R Ferguson, 'Scott Morrison: Tamil family has to leave', *The Australian* (online), 2 September 2019, <https://www.theaustralian.com.au/nation/politics/dutton-tamil-asylum-family-can-never-remain/news-story/b6ed4b6fd2b5a79506b6d211224e7a92>. **23** AAT Law Guide, above note 3, 34.3.2. **24** Ibid, 34.3.4. **25** Ibid, 34.3.2. **26** *Minister's guidelines*, above note 2, [6]. **27** Ibid, [5].

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