YES, MINISTER.

Asylum seekers on the roof of Villawood Immigration Detention Centre, Sydney
Adam.J.W.C.

ANGELA KINTOMINAS

In a climate of constant fear and suspicion the Australian people dependably demand that their leaders protect them from the pervasive ills of our immigration woes: stop the boats, kick out the queue jumpers, protect our borders, control that ungrateful and impatient mob in detention. Through this culture of personal political patronage, the tribunals, courts and the bureaucracy are pushed aside; we defer instead to the supreme and opaque powers of the Minister. Australia's *Migration Act* is littered with multiple non-delegable, non-reviewable and non-compellable Ministerial powers. How often the Minister chooses to exercise these powers, and the Minister's reasons for exercising them, however, remains almost entirely within the Minister's personal discretion. The Minister cannot be compelled to use to these powers, there is no scope for review, and these powers are not equally accessible. This culture of unquantifiable Ministerial power is vulnerable to human rights abuses, exploitation, inefficiency, and is bar to more meaningful and holistic reform.

There are countless areas where unfettered Ministerial power and discretion has a critical level of influence within policy. For the purposes of this article, I will begin with the role of the Minister in our mandatory detention regime.

In 2008, the Government released a "Key Immigration Detention Values" Statement in response to growing national and international condemnation of potential human rights abuses and Australia's non-compliance[1] with international law. In this Values Statement, the Minister emphasised that immigration officials should now try to "ensure the inherent dignity of the human person". "Children … and, where possible, their families, will not be detained

in an immigration detention centre." The Policy also stated that indefinite or otherwise arbitrary detention "is not acceptable". Finally, it highlighted that "immigration detention centres *are only to be used as a last resort and for the shortest practicable time.*"

This Values Statement is perversely contrasted, however, with the unchanged terrain of Australia's *Migration Act*. The pivotal section of the *Migration Act* is s 189. Under this section, an officer must detain a person, even if that person is only reasonably *suspected* of being an unlawful non-citizen. Section 189 does not mention anything that is listed in the Values Statement. Because of the strictness of s 189, people such as permanent resident Cornelia Rau were *lawfully* detained for many months. The non-discretionary nature of this provision means that in reality, an officer cannot adopt alternatives to detention because of the non-citizen's age,[2] health or other condition,[3] their low security risk, or the amount of time they have already been detained.[4] The new provisions accompanied by this new Values Statement do nothing to alter the profoundly clear intent of s 189.

In lieu of introducing more holistic reform of s 189, the Migration Act instead inserted new Ministerial powers alongside s 189. Under s 195A, if the Minister thinks that it is in the public interest to do so, the Minister may grant a visa to a person in mandatory detention. The caveat to this provision, however, is that the Minister is not under any duty to consider whether to exercise the power (s 195A(4)). Further, this power can only be exercised by the Minister personally, and not anyone else beneath the Minister's rank (s 195A(5)). Under s 197AB, the

Minister *may* also determine that the unlawful non-citizen can reside at a specified place rather than in detention. However, this power is also non-delegable to anyone beneath the Minister (s 197AF), and the Minister cannot be compelled to consider exercising it (s 197AE).

Therefore, this Values Statement introduced in 2008 is nothing more than smoke and mirrors, disguising the unchanged brutality of our mandatory detention regime. In reality, hundreds of children remain in mandatory detention in 2011. Vulnerable persons, people who present no threat to the Australian community, and people who will suffer extraordinary mental harm in detention, have no real mechanism to compel the Minister to consider their case. Most damningly, because we do formerly have a (albeit, under-utilised and inaccessible) mechanism of Ministerial intervention in place, it is unlikely that s 189 will be meaningfully reevaluated in the short term.

The mandatory detention regime is not the only place that extraordinary Ministerial power replaces proper process. The *Migration Act* also permits the Minister to use powers to cancel and refuse visas, and force the removal of non-citizens. Sections 501, 500A and 501A grant the Minister very broad powers to cancel or refuse a visa on character grounds. If the power is personally exercised by the Minister, rules of natural justice do not apply (s 501(5)), except where there is jurisdictional error. These powers of cancellation are very broad and can take into account predictive and subjective criteria, as well as an objective criminal record. In *Haneef v Minister for Immigration and Citizenship,*[5] the Court emphasised that: "s 501(3) of the Act confers a discretion to the minister which is in terms 'unconfined'."

There has been a steady increase in the number of removals and rejections based on character grounds,[6] arguably coinciding with the increase of international fears about containing nebulous terrorist and other security threats. During the 2008-2009 financial year, 116 visas were cancelled by the Minister via s 501. During the entire previous decade, by contrast, there were less than 10 cancellations.[7]

Another area of immense Ministerial power is the Minister's ability to substitute decisions of review tribunals with his or her own decision (ss 351, 391, 417, 454 and 501J). Like other powers in the *Migration Act*, they are explicitly non-delegable, non-reviewable and non-compellable. Just like the powers to intervene in the mandatory detention regime, the formal power of the Minister to overturn decisions in an applicant's favour disguises the underlying inadequacies of the visa system. For instance, until the Complementary Protection Bill was finally passed in September 2011, asylum seekers were unable to rely upon the *Convention Against Torture, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child* when arguing their case before an officer or tribunal. Legislatively, the tribunal and department officers were only legally allowed to consider whether someone falls within the 1951 *Refugee Convention*. Only a Minister, exercising their personal powers to intervene could consider whether an asylum seeker has a case under these other Conventions. As opposed to being a mere formal "safety-net" exercised infrequently by the Minister, there

were thousands of ad hoc, annual decisions that the Minister was required to make. When the use of Ministerial power is so pivotal to ensuring just results, it is profoundly important to remember the sort of people who are more likely to compel the Minister to intervene. Whilst all applicants are formally able to approach the Minister, there is a difficult task in "getting applications onto the Minister's desk".[8] Representations by colleagues, parliamentarians, lawyers and powerful community leaders are thus much more likely to capture the Minister's attention, interest and sympathy. Therefore, Ministerial power in the visa system slows down more meaningful, overarching reform, and is unlikely to reach those who need it most.

In our cultural climate, we prefer to defer to this wisdom of the all-knowing, and all-capable Minister instead of allowing the bureaucracy, tribunals and courts to do their job. As a society, our fears about unauthorised arrivals and dangerous non-citizens have brought about a dangerous combination of sweeping Ministerial power and a legislative framework that is unable to comprehend human rights. In reality, the Minister does not have the requisite time to scrutinise the merits of thousands of individual cases in great depth or detail. By contrast, tribunals and case officers have the time and the resources to fairly and equitably consider the merits of each individual case. Where Ministerial attention fails, human rights abuses and severe harms to individuals are likely to follow. Whilst Ministerial powers were implemented in order to be used as a last resort or to provide a final safety net, they are now being used with increasing frequency, as shown by the huge increase of cancellations of visas on character grounds. Similarly, escalation of the use of Ministerial discretion often disguises latent deficiencies within the visa and detention regimes. High levels of Ministerial power are unaccountable to the public, and protected from review or scrutiny. Most importantly, unlike the tribunals or the bureaucracy, the Minister is incredibly sensitive to spikes in public opinion and public demands. Perhaps even more than in other areas of government, unfettered Immigration Ministerial powers are endemically liable to abuse and public pressure. If we continue to depend solely on the Minister to provide these humane solutions, Australia will perpetually fall short of a fair regime that guarantees "the inherent dignity of the human person".

REFERENCES

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