

Time limits on migration court appeals

Australian governments for the last ten years or more have tried to reduce the use of the Australian court system by people refused the right to stay in this country. Various methods have been tried by governments of both persuasions—with limited success. This research note focuses on the key method in the latest legislation to address this issue: the Migration Amendment (Judicial Review) Bill 2004.

The migration caseload

In October 2003 the Attorney-General, the Hon. Philip Ruddock MP, announced a 'Migration Litigation Review'. According to Mr Ruddock, 'much court time is being wasted at taxpayer expense ... Great strain is being placed on the courts and the migration system more generally by unmeritorious applications.'¹

These are not new concerns. Former Immigration Minister Gerry Hand (ALP) told a Senate inquiry in 1998 that throughout his time as Minister, he was concerned with the 'amount of public resources consumed in judicial review processes which ultimately did not alter the situation that the person was not entitled to remain in Australia.'²

The migration appeal process

A person wishing to stay in Australia who has been refused a visa or whose visa has been cancelled can appeal—depending on the nature of their particular case—to the Migration Review Tribunal, the Refugee Review Tribunal or the Commonwealth Administrative Appeals Tribunal. Each of these

tribunals will conduct 'merits review' of the particular matter, i.e. they will review *the facts* of the case and the relevant law as if they were the original decision-maker, and either substitute their own decision or send the matter back to the appropriate immigration officials for a new decision.

If the person is unsuccessful at the tribunal stage, they can appeal directly to the Minister, or seek judicial review in the Federal Magistrates Court, the Federal Court or the High Court. Judicial review involves a *review of the legality* of the tribunal's decision.

Restricting judicial review of migration matters

As prominent barrister John Basten QC says, 'the history of immigration law reform over the last decade has been dominated by attempts to restrict judicial review of decision making'. Previous restrictions in the Migration Act on court appeals were based on reforms introduced in 1992 by the Keating Government. But Labor's reforms 'suffered from serious technical difficulties'³ and were only partially effective in a legal sense.

After the Coalition Government came to power in 1996, it contemplated 'a more radical set of restraints on judicial review'⁴ in immigration matters. In 2001 Parliament approved a new Part 8 for the Migration Act, including new section 474 which said that visa decisions by an immigration official or one of the tribunals would be '*final and conclusive and must not be challenged, appealed against,*

reviewed, quashed or called in question in any court.' Minister Ruddock explained that the amendment 'will restrict access to judicial review in all but exceptional circumstances.'⁵

Plaintiff S157

In 2003 the High Court in the case of *Plaintiff S157* made the restriction on court appeals in section 474 largely ineffective. The High Court said that a migration decision affected by what it called a 'jurisdictional error' or mistake was 'in law ... no decision at all'. Any decision with such an error was not properly 'made under' the Migration Act and was not covered by the restriction on court appeals in section 474.

The effect of the ruling in *Plaintiff S157* was to allow people refused a visa to appeal to the federal or High Courts because of more or less any mistake by an immigration official or tribunal. In *Plaintiff S157* itself, for example, the Refugee Review Tribunal did not give a person seeking a protection visa a fair hearing.⁶ This mistake meant the refusal of the visa by the tribunal was not a decision properly 'made under' the Migration Act.⁷ So the restriction on appeals in section 474—as well as, importantly, the strict time limit for appealing to the High Court in section 486A—were not applicable,⁸ and the person could appeal to the High Court, and could do so even though the time limit had expired.

The 2004 Bill

The main aim of the legislation currently before the Parliament is to counter the effect of the High Court's judgment in *Plaintiff S157* and to re-impose or re-introduce restrictions on court appeals, especially through strict time limits. The Bill does this by saying that invalid or 'purported' decisions—that is, decisions involving some mistake or error—are covered by the Migration Act, except, importantly, for the purpose of section 474. So the restriction on court appeals in section 474 will have no real effect, even with this Bill.

But other parts of the Migration Act, including those imposing time limits for appealing to a court, will apply. The Bill sets a 28 day period for lodging an appeal to the Federal Magistrates Court, the Federal Court or the High Court, although the courts can extend this period by up to a further 56 days if it is 'in the interests of the administration of justice to do so'.

The Bill also removes the current requirement in the Migration Act for a person to be 'actually' notified of an adverse visa decision before the time period for an appeal to the High Court starts to run.

Constitutional issues

The Bill does not try to make the blanket restriction in section 474 on any appeal to any court legally effective—because the High Court made it clear in *Plaintiff S157* that it would not accept this. The High Court said that if the Migration Act was amended to prevent people appealing to the court against any decision—even those containing mistakes or errors, then the Migration Act 'would be in direct conflict with section 75 of the Constitution'.

Section 75 of the Constitution states that the High Court has 'original jurisdiction' (i.e. the authority to hear cases) in all matters in which the Commonwealth is a party or where a legal remedy is sought against 'an

officer of the Commonwealth'. This provision ensures that the actions of the Commonwealth and its officers—including immigration officials and migration tribunals—can be tested in the High Court. As the Court itself said, section 75:

'is a means of assuring ... that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them ... In the end ... this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review'

As Chief Justice Gleeson said, the ability of the High Court 'to require officers of the Commonwealth to act within the law cannot be taken away by Parliament'.⁹

Time limits

The Commonwealth could validly pass legislation preventing migration appeals to the Federal and Federal Magistrates Courts. The jurisdiction of these courts—unlike the High Court—is controlled by statute and is not enshrined in the Constitution. But the Bill does not seek to do this. Instead it imposes—or re-imposes—a time limit on appeals to the two courts. This is plainly within the Commonwealth's constitutional authority.

In *Plaintiff S157* High Court justice Ian Callinan said the Commonwealth Government can also impose time limits on appeals to the High Court, but not if this stops people having access to the court. Justice Callinan said the existing time limit of 35 days in the Migration Act for appealing to the High Court was invalid since the type of people who want to appeal 'may be incapable of speaking English ... and will often be living or detained in places remote from lawyers'. So in practice the Migration Act as currently worded can deny such people access to the High Court, in conflict with section 75.

However the Bill currently before Parliament further reduces the time for appealing to the High Court to 28

days, although it does give the High Court the discretion to allow an appeal within a further set period of 56 days. An important point to note is that even setting this longer period amounts to an absolute prohibition on appeals to the High Court outside this time, with no allowance for the circumstances of any particular case. As Chief Justice Gleeson noted, the problem with such an approach is that some grounds for appealing—such as fraud or a 'corrupt inducement' to make a decision in a certain way—might not be discovered until after such a fixed time limit for appealing expires.

Further reading:

See [Bills Digest No. 118 2003-04](#).

1. P. Ruddock, transcript of press conference, 27 October 2003.
2. Senate Legal and Constitutional Committee, Report into Migration Legislation Amendment (Judicial Review) Bill 1998, p. 7.
3. J. Basten, 'Revival of procedural fairness for asylum seekers', *Alternative Law Journal*, June 2003, p.114.
4. *ibid*.
5. P. Ruddock, Second reading: Migration Legislation Amendment (Judicial Review) Bill 2001, House of Representatives, *Debates*, 26.9.01, p. 31559.
6. Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution', (2003) 14 *Public Law Review* 219 at 221.
7. *Plaintiff S157* 211 CLR 476 at 506.
8. *ibid* at 514.
9. *ibid* at 482.

Peter Prince Law and Bills Digest Section Information and Research Services

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