

SUBMISSION TO
JOINT STANDING COMMITTEE ON MIGRATION
INQUIRY INTO
MIGRATION LEGISLATION AMENDMENT BILL (NO.2) 2000

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A note about the author

The author worked as a Legal Officer in the Sydney registry of the Refugee Review Tribunal from May 1995 to June 1997, and as Associate to the Principal Member of the Tribunal from May 1994 to May 1995. In those roles, he provided advice to Members of the RRT on matters of domestic and international law, and provided specific advice to Members on legal issues, draft RRT decisions, and court decisions. The author has also written a number of articles on refugee law, and has worked as a consultant on refugee issues for the New York based Lawyers Committee for Human Rights. This submission is made on the basis of the author's experience at the RRT, and therefore focuses on the refugee decision-making process. Views expressed are those of the author alone, and are made in his personal capacity.

Summary

As the Bill is the latest in a series of legislative amendments designed to restrict the role of the Federal Court in providing judicial review of migration and refugee related administrative decisions, the submission focuses on the importance of effective and accessible judicial review of such decisions. Given the author's background in refugee determination process, the submission focuses on the impact of the Bill, and the general legislative move to restrict judicial review, on decisions on refugee status (the "protection visa" decision).

Background to the Migration Legislation Amendment Bill (No 2) 2000 (The Bill)

The Bill is merely the latest in a series of legislative amendments designed to restrict the role of the Federal Court in providing judicial review of migration and refugee related administrative decisions. This series of amendments has been designed to reduce number of individuals seeking judicial review of such decisions. There is clearly significant concern that such litigation is expensive for the Commonwealth, and that it enables some individuals to lengthen their stay in Australia. The submission argues that, given the unique difficulty and the importance of decisions on refugee status, effective judicial review provides an essential safeguard. Effective judicial review provides a means to test the effectiveness of the refugee determination system, ensures that Australia's international obligations under the Refugees Convention are fully met, and ensures public confidence in the integrity of the refugee determination system. Such review also provides valuable guidance to administrative decision makers on questions of law, provides a discipline to RRT decision-makers, and ensures parity of opportunity to seek judicial review of administrative decisions between asylum seekers and persons subject to other forms of administrative decisions. The Bill, in removing the right of individuals to take class actions and of the Federal Court to join cases, can only exacerbate the problems which the High Court already faces as a result of previous restriction of judicial review of refugee related decisions.

The nature of a refugee decision

In arriving at appropriate policy on the question of judicial review of refugee decisions, it is important to first consider the nature of the process of determining refugee status – that is, the "protection visa" decision under the *Migration Act* 1958. Although self evident, the importance of the determination of refugee status is often lost in discussions of statistics, legislation and cost.

As the Committee will be aware, Article 1A(2) of the *Convention relating to the Status of Refugees* defines a refugee as a person who :

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”

A decision as to whether a person comes within this definition is no ordinary administrative decision. It is a decision as to whether a person faces a real chance of a denial of his or her fundamental human rights were he or she to be returned to his or her country. In many cases, an incorrect decision could result in torture or death. As the Australian criminal law system has

(thankfully) long abandoned capital punishment, it is arguable that the decisions made by the RRT on a daily basis have a greater direct impact on the lives of individuals than any Court or tribunal in the country.

The difficulty of making a decision on refugee status cannot be overstated. RRT Members are required to make determinations of fact based on events occurring in other countries, and often some time in the past. Independent evidence on the relevant issues is often non-existent, or difficult to obtain. The Tribunal's findings of fact must then be used as the basis for a decision about the likelihood of an individual facing persecution at some time in the future. Such decisions are made more difficult by the language and cultural differences between decision makers and many asylum seekers.

The importance of judicial review of refugee decisions

Given the gravity of the process of making decisions on refugee status, judicial review of the RRT's administrative decisions on refugee status provides an essential safeguard. The reasons for this are as follows:

- Providing recourse for applicants to seek review of decisions

It is inevitable in any system where thousands of complex decisions are made annually that a small minority of decisions will be made which are unlawful. This is the case even with the highly professional and specialised Tribunal in place. Incorrect interpretation of applicable law, or failure to observe procedural requirements could result in a decision which is wrong in fact. The result could easily be that an individual is denied a protection visa, and wrongly returned to face persecution. Judicial review provides the sole recourse for applicants seeking review of decisions which greatly affect their lives. The Bill provides for further restrictions on the ability of a person to seek, and the Federal Court to consider, an application for judicial review of a refugee decision, and so increases the likelihood that individuals might be wrongly returned to face persecution. Concerns about cost and delay must be weighed against this real possibility.

- Meeting our international obligations

As a party to the Refugees Convention, Australia must meet its international law obligations under that Convention fully. Australia has an obligation under Article 32 of the Refugees Convention not to *refoule* (return) a refugee to his or her country of origin. If a person is assessed not to come within the refugee definition and so returned, when in fact he or she does fall within that definition, Australia breaches its obligation under the Convention to extend protection to all refugees. The RRT has a very good record in making the right decisions. However on occasion the RRT's decisions are set aside on judicial review, and, on being remitted to the RRT for re-decision, the individual is found to be a refugee. A rigorous and accessible system of judicial review provides an essential safeguard to ensure Australia is abiding by its obligation under international law of *non-refoulement*. The Bill, in further restricting judicial review, increases the possibility that individuals who meet the refugee definition will be sent back to face persecution.

Clearly, the obligation to extend protection to persons who come within the Refugees Convention includes an obligation to determine whether a person falls within that definition.

Although there is no express mention of administrative or judicial review mechanisms, Article 16(2) of the Refugees Convention states that:

A refugee shall enjoy in the contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvium*.

This Article, and the Convention generally, contains no statement that this obligation applies only to refugees after their status as such has been recognised. As the receiving state is required to treat asylum-seekers as refugees until their status has been determined, this obligation applies to asylum seekers as well. The restrictions of the rights to judicial review for asylum seekers in respect of administrative decisions which this Bill would introduce mean that, in respect of access to the Courts, such individuals are treated differently from (and worse than) all other groups of individuals in Australia (aside from persons seeking other types of visas). This would appear to be in contravention of Article 16(2).

- Ensuring public confidence in the refugee determination system

Effective and accessible judicial review procedures for administrative decisions also perform a valuable role in ensuring public confidence in the refugee determination system. The fact that such procedures exist – that review may be sought of an administrative decision, and that where that decision is unlawful, the decision will be overturned and remitted for reconsideration – provides a real guarantee of the integrity of Australia’s refugee determination system. It ensures that that system is accountable, independent, unbiased, transparent, and lawful, and is seen to be so. This is particularly important in the case of refugee decision-making, given the politically charged environment in which it must often operate. The Bill, in further restricting judicial review avenues, risks undermining public confidence in the refugee determination system.

- Providing guidance to the RRT on interpretation of the Refugees Convention and other questions of law

It is the author’s experience that Members of the RRT take their very significant responsibilities extremely seriously. Members are also assisted by specialist legal and country research teams in arriving at their decisions. However continued Federal Court oversight provides a crucial component of the refugee decision making process.

Interpretation of the Refugees Convention is an ongoing task for the RRT. There is significant room for reasonable minds to differ in the interpretation of the language of the Convention and in deciding how to approach the refugee decision making process. Over the time of the operation of the RRT, the Federal Courts have provided significant guidance to that body. This is particularly important as the RRT itself has no clear system of precedence for its own decisions. It has been the case in the past that Tribunal members, in the absence of the guiding authority of a court decision, have taken different views on the same legal issue, and thus made inconsistent decisions. Often it is only a Court decision which can provide the single common approach needed to complex issues. The ability of applicants to make, and the Federal Court to hear, class actions on a specific question of law provides a particularly useful way for the Court to fulfil this guidance role.

- Providing a discipline to RRT decision makers

The fact that an applicant may seek judicial review of a decision of the RRT imposes a real discipline on Members of the RRT. Although Members are conscious of the framework which Court decisions provide for their decision making, the possibility that review might be sought of their decisions provides an additional impetus to ensure that such jurisprudence, and relevant legislative requirements, are carefully observed. As a member of the RRT Legal Team, the ability to raise the prospect of judicial review was often a useful tool to encourage a Member to focus on arguments as to why changes to a draft decision might be necessary. Any further restriction on such review risks weakening the valuable role of the courts in guiding RRT decision making.

- Ensuring a parity between rights of review of different types of administrative decisions

Since the introduction of the Administrative Law package in 1975, the centerpiece of which was the Administrative Decisions Judicial Review Act 1977, a general statutory framework has applied to the judicial review of all administrative decisions. Rather than having to rely on the archaic and complicated prerogative writs under common law, individuals aggrieved by an administrative decision could have recourse to a statutorily based judicial review system with clear, enumerated grounds for review. At least, that was the case until changes to Part 8 of the Migration Act in 1996 removed decisions on refugee and migration matters from that framework, and restricted the grounds on which judicial review of such decisions could be sought.

The move to excise a category of decisions from the application of the ADJR Act not only undermined the integrity of the long-standing, and internationally standard-setting, framework for review of administrative decisions – it made the statement that some categories of decisions (specifically, those involving non-citizens) were less worthy of careful judicial oversight than others.

The Bill purports to further restrict the ability of applicants to seek judicial review. In doing so, the rights of asylum seekers, in comparison with those of other individuals, are further restricted. One only needs to observe that an individual might seek judicial review of a tax assessment or planning decision on the entire range of grounds set out in the ADJR Act, and to engage in such action in concert with other individuals by way of class action, but would be severely restricted in seeking judicial review of a decision that he or she is not a refugee. This demonstrates the lack of parity which successive amendments to the Act have brought about, and which the Bill exacerbates.

The impact of existing restrictions on the jurisdiction of the Federal Court to hear refugee related matters

The case against existing limitations on the jurisdiction of the Federal Court in refugee related matters has been put compellingly by Justices of the High Court of Australia in a number of recent cases.

In *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 597; 162 ALR 1 at 17, Gleeson CJ and McHugh J pointed out that:

"[T]he Parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious."

In *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* 2000 [HCA] 1, 21 January 2000, McHugh J made the following statement [footnotes in original generally omitted]:

"8 This case is but one of many applications for prerogative relief against the [Refugee Review] Tribunal currently pending in this Court [The Court noted that, of the 102 pending applications for prerogative relief before the Court, 66 arose under the Migration Act]. Its procedural history vividly illustrates that the serious effect on the Court's business, which Gleeson CJ and I predicted in *Abebe*, is now being experienced. The case also demonstrates, if demonstration were necessary, that the effect of restricting the jurisdiction of the Federal Court to hear applications by persons claiming refugee status will often be to produce two hearings instead of one (a partial remitter to the Federal Court and a hearing in this Court), to lengthen the time taken to dispose of those applications and to use the time of the Federal judiciary inefficiently. A single judge of the Federal Court can, subject to appeal, dispose of a case in the Federal Court. A Justice of this Court can only dispose of an application by holding that the applicant has not overcome the low hurdle for the grant of an order nisi. Even then his or her decision may be subject to appeal. If an order nisi is granted, the matter can only be disposed of by the Full Court of this Court unless it "appears to be one of urgency".

9 The effect of restricting the jurisdiction of the Federal Court must inevitably impose on the Justices of this Court the dilemma of choosing between two unpalatable alternatives. The first alternative is to give preference to the applications of persons held in custody and claiming refugee status to the detriment of the Court's general constitutional and appellate jurisdiction. The second alternative is to continue to give preference to the constitutional and appellate jurisdiction of the Court with the result that claimants for refugee status are detained in custody for longer periods than is likely to have been the case if the Federal Court had retained all of its jurisdiction to deal with refugee cases.

10 One of the principal reasons for the setting up of the Federal Court in 1976 was the recognition that, with more and more matters arising under laws of the Parliament, this Court could not act as a federal trial court and still have adequate time for research and reflection in respect of the important matters falling within its constitutional and appellate jurisdiction.

11 With the setting up of the Federal Court, the days when Justices of this Court would sit alone to hear actions against the Commonwealth or between interstate residents or to hear cases concerning matters such as income tax, intellectual property and customs prosecutions were thought to have ended. In 1984 the Parliament again recognised the need for this Court to confine itself to constitutional and important appellate matters by amending the *Judiciary Act* 1903 (Cth) so that appeals to the Court could only be brought with the leave of the Court. Earlier the Parliament had given the Court and its Justices power to remit certain

matters commenced in its original jurisdiction to the State and the federal courts. In 1983, the Court was empowered to remit most claims for prerogative relief for prohibition and mandamus, such as those involved in this case, to the Federal Court for determination. Subsequent amendments gave the Court power, via s 44(1) of the *Judiciary Act*, to remit to the Industrial Relations Court, and now to the Federal Court, applications for prerogative relief against the Industrial Relations Commission which were becoming frequent.

12 Sir Garfield Barwick, who as Attorney-General began the process of creating the Federal Court, has said:

"My own basic objective in proposing a new federal superior court was to free the High Court of Australia, as of this time but particularly for the future, for the discharge of its fundamental duties as interpreter of the Constitution and as the national court of appeal untrammelled by some appellate and much original jurisdiction with which it need not be concerned ... [T]he jurisdiction, appellate and original, vested in the High Court partly by the Constitution itself and partly by the action of the Parliament under section 76 [of the Constitution], appears now to be too great. Its exercise requires judicial time and energy which would serve Australia better if they could be added to what is now available for the performance of the two fundamental responsibilities of the Court".

13 Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the *Migration Act* 1958 (Cth) ("the Act") which now prevent this Court from remitting to the Federal Court *all* issues arising under that Act which fall within this Court's original jurisdiction. No other constitutional or ultimate appellate court of any nation of which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.

14 There is no ground whatever for thinking that the judges of the Federal Court are not capable of dealing with all issues arising under the Act which fall within this Court's jurisdiction. Although the refugee matters that cannot be remitted to the Federal Court do arise under this Court's constitutionally entrenched jurisdiction, most of them are not constitutional matters as that term is ordinarily understood. The great majority of the matters which cannot be remitted simply involve questions of administrative law with which the Federal Court has long been familiar and in respect of which it has great experience and expertise.

15 The reforms brought about by the amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as "the keystone of the federal arch" and the ultimate appellate court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved."

The impact of the Bill on the Commonwealth, and on the operations of the Federal Court and the High Court

The ability of individuals to bring, and courts to hear, a class action is a highly useful tool of the judicial system. It permits a group of individuals in like situation to obtain access to justice, and

permits a Court to consider and determine, in one case, an issue of importance to many. It provides a valuable jurisprudential function in providing a definitive determination at one time of the cases of many individuals, and saves significant resources for parties and the Court. It has been used to good effect in a number of cases under the Migration Act 1958 – see, for example, *Fazal Din v Minister for Immigration and Multicultural Affairs* [1998] 961 FCA (14 August 1998).

The Bill can only exacerbate the problems for the Commonwealth, the Federal Court and the High Court. If the Federal Court is unable to join applicants or consolidate proceedings, the result can only be a proliferation of similar cases. Individuals, denied the ability to join a class action where a common issue is at stake, will inevitably seek judicial review on the same basis in individual applications. As the Bill would deny the Federal Court the only means it has to rationalise its dealings with such cases, more Court time will be spent on considering such applications. Similarly, more Commonwealth time and money will be spent responding to such applications. It should be noted that the Explanatory Memoranda to the Bill, at paragraph 7, admit this possibility.

Finally, as judicial review to the Federal Court becomes even more difficult, an even greater number of cases will flow to the High Court directly under Section 75(5) of the Constitution, further clogging up that Court's time and preventing it from fulfilling its role.

Conclusion

On the basis of the arguments set out above, it is requested that the Committee recommend that the Bill not be implemented.