Dissenting Report

Senator Sarah Hanson-Young

Migration Amendment Bill 2013 [Provisions]

Introduction

1.1 The Migration Amendment Bill 2013 [Provisions] seeks to amend Australia's rigorous refugee determination process by overturning a number of High and Full Federal Court decisions. The amendments proposed are inconsistent with Australia's international obligations, do not afford procedural fairness and further entrench the current practice of indefinitely detaining men, women and children who have been found to be genuine refugees, but deemed a security threat by the Australian Security Intelligence Organisation (ASIO).

1.2 Overwhelmingly the majority of submissions made to the committee on this Bill were not supportive of the proposed changes and concluded that the Bill should not proceed.

1.3 The Australian Greens do not support the Bill as it is just another step by the government to limit the protection avenues for refugees who are in genuine need of Australia's assistance. The amendments fail to address the long standing criticisms held regarding the processing of asylum seeker claims in Australia and are contrary to Australia's international obligations.

Schedule 1: When decisions are made and finally determined

1.4 The amendments proposed in the Bill seek to overturn a decision of the Full Federal Court which determined that the Refugee Review Tribunal (RRT) and the Migration Review Tribunal (MRT) ought to have the ability to revisit their own decision up to the point where the applicant and the secretary have been notified of the terms of the decision.

1.5 As argued by the Refugee Advice and Casework Service (RACS) in its submission, the amendments:

> …fetter decision makers by preventing the reconsideration of a decision, [which] could create situations where formality takes precedence over fairness.[1]

1.6 Evidence heard by the committee outlined circumstances where new information or claims may come before the committee in the later stage of the decision making process. These documents or developments are necessary for the Tribunal to consider in order for them to make a correct and preferable decision.

In the view of Justice Barker:

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[1] *Submission 1*, p. 3.

> there is no compelling reason in public policy why the RRT should not have the ability to recall the reasons for recording a decision arising from the review process under the Act before it has been communicated to a party….after all, the whole point of the review process is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decision making.[2]

1.7 When procedural fairness is afforded the RRT and MRT have the ability to consider this information and revise their decision if necessary. The Australian Greens believe that any amendments to the contrary would be inconsistent with the aims of the Tribunal to provide a review process which is fair, just, economical, informal and quick.

Schedule 2: Bar on further applications for protection visas

1.8 The amendments outlined in Schedule 2 seek to circumvent a decision by the Full Federal Court which determined that a person could make a subsequent claim for protection on the basis that the application relied on a different criterion.

1.9 The amendments proposed reject the importance of procedural fairness and due process by precluding a number of people from having their claims processed on complementary protection grounds, as now contained in section 36 of the Migration Act.

1.10 In the view of the UNHCR:

> ….the practical effect of the statutory bar is to prevent further applications for protection visas in circumstances where the complementary protection criteria did not exist at the time when the earlier application was refused or cancelled.[3]

1.11 Australia is party to the International Covenant on Civil and Political Rights, the Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child and must fulfil its obligations by protecting those people who may not qualify as a refugee under the 1951 Convention but are in need of protection based on non-refoulement obligations.

1.12 Whilst the Department stated that it was 'not that these people did not get any consideration of their complementary protection claims; they got them considered just in a different way'[4], it is important to note, as outline by many of the submitters to the inquiry, this was not an adequate process for determining complementary protection claims as the decision resided with the Minister and the determinations were non-reviewable and non-compellable.

1.13 As stated by the UNHCR 'it is preferable to provide a legislative basis for ensuring that a person will not be returned to a place where he or she may suffer

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[2] [2012] FCAFC 131, para 58.

[3] *Submission 9*, p. 2.

[4] Ms Vicki Parker, General Counsel, Legal and Assurance Division, Department of Immigration and Border Protection, *Proof Committee Hansard*, 4 February 2014, p. 40.

'significant harm'' and 'it is important to afford procedural fairness to the person concerned who is unable to appeal the Minister's decision.'[5]

1.14 The Australian Greens believe that the proposed statutory bar on further applications for protection is just another step by the government to limit the protection avenues for refugees who are in genuine need of Australia's assistance. Those who have not fulfilled the requirements under the Refugee Convention however may have substantiated claims for protection under the aforementioned international human rights instruments, should be given the ability to apply on complementary grounds.

Schedule 3: Security Assessments

1.15 The amendments proposed by Schedule 3 of the Bill fail to address the longstanding criticisms of the ASIO security assessment process and instead further entrench a process that has led to the indefinite detention of approximately 50 refugees, including 5 children.

1.16 These amendments are unnecessary, fail to provide adequate appeal rights, entrench the practice of indefinite detention, and breach Australia's international obligations.

The amendments are unnecessary

1.17 As highlighted by a number of submitters to the inquiry, including the RACS and the Refugee Council of Australia (RCOA), Section 501 of the Migration Act already sets out broad provisions relating to the Minister's power to refuse to grant, or cancel an individual's visa based on character. The RCOA submitted that 'existing legislation has proved sufficient to deny visas to these individuals.'[6]

1.18 Further, the UNHCR highlights that:

> ….the 1951 Convention contains specific provisions which allow states to protect their right to safeguard national security, while at the same time protecting the rights of refugees.[7]

The amendments fail to provide adequate appeal rights which leads to the indefinite detention of genuine refugees

1.19 The changes fail to provide a person with adequate review avenues should they receive an Adverse Security Assessment (ASA) which results in the indefinite detention of approximately 50 men, women and children.

1.20 Many of the submitters, including the UNHCR and Amnesty International Australia, were very concerned about the limited abilities to contest a negative ASIO assessment and therefore be afforded procedural fairness or natural justice.[8]

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[5] *Submission 9,* p. 3.

[6] *Submission 10,* para 2.4.

[7] *Submission 9,* p. 3.

[8] *Submission 1* and *Submission 9.*

1.21 As submitted by the Australian Lawyers Alliance:

> The rule of law is applicable to all persons in Australia, regardless of their citizenship status. To deem an individual unworthy of access to justice as a result of their maritime means of arrival…..does not accord with the standards of natural justice.[9]

1.22 As it currently stands, Australian citizens and permanent visa holders are able to seek merits review of adverse ASIO assessments, but protection visa applicants are not afforded these same rights.[10]

1.23 The Joint Select Committee on Australia's Immigration Detention Network, Chaired by Mr Daryl Melham MP and Senator Sarah Hanson-Young, stated in its report that 'there is no compelling reason to deny non-residents the same access to procedural fairness' as Australian residents.[11]

1.24 In its final report the Committee made a number of recommendations to afford refugees with ASAs an opportunity to appeal the grounds of their assessment and therefore their indefinite detention. The committee resolutely rejected the indefinite detention of people without any right of appeal.[12]

1.25 The Committee recommended that the Australian Government and ASIO should establish and implement periodic reviews of adverse refugee security assessments to ensure that genuine refugees were not subject to indefinite detention.[13]

1.26 The Committee went on to recommend that the A*ustralian Security Intelligence Organisation Act* should be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review ASIO security assessments of refugees and asylum seekers.[14]

1.27 It is the view of the Australian Greens that these recommendations should be adopted by the government to ensure procedural fairness is afforded and the practice of indefinite detention is ended.

1.28 The Greens welcomed the announcement in late 2012 of the Independent Reviewer as an important acknowledgement that, under current Australian law, there is no fair legal process for refugees to find out the reasons of their ASA or challenge the merits of the ASA. The Australian Greens acknowledge the work of the Hon Margaret Stone in reviewing a number of ASIO ASAs, however, the Greens share the unanimous concerns of the witnesses that appeared before the inquiry that the

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[9] *Submission 6*, p. 7.

[10] Human Rights Law Centre, *Submission 5*, p. 5.

[11] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report,* March 2012, para 6.150.

[12] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report,* March 2012, para 6.148.

[13] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report,* March 2012, para 6.151.

[14] Joint Selection Committee on Australia's Immigration Detention Network, *Final Report,* March 2012, para 6.152.

Independent Reviewer has no binding powers to amend an ASA, or indeed any mandate over deciding whether refugees who are subject to an ASA must reside.

1.29 While the Greens accept that Recommendation 2 of the majority report is a step in the right direction it is important that there are legislative changes to ensure that the powers of the Independent Reviewer are binding and enforceable.

1.30 To address the recommendations the Australian Greens introduced the *Migration and Security Legislation Amendment (Review of Security Assessments) Bill* in 2012 to put in place a fair legal process for the 50 refugees and their children who are currently stranded in indefinite immigration detention due to an ASA.

1.31 An inquiry into the Bill exposed wide support from witnesses including Civil Liberties Australia, the Australian Human Rights Commission, Victoria Legal Aid and the Asylum Seeker Resource Centre. A number of expert bodies supported the passage of the Bill as a starting point but remarked that the Bill could be amended to go even further in giving rights and fair process to refugees in this predicament, including Professor Ben Saul, the Law Council of Australia, the Refugee Council of Australia and Humanitarian Research Partners. These groups attested that the Bill was imperative as a first step to reform.

1.32 Despite overwhelming support for the Bill it has yet to be supported in the Parliament.

The amendments breach international obligations

1.33 In August last year, the UN Human Rights Committee found that Australia was in breach of its international obligations and had committed 143 human rights violations, including articles 7 and 9(1) of the ICCPR, by indefinitely detaining 46 refugees, including children, due to ASAs.[15]

1.34 The Human Rights Law Centre further highlights that the:

> ….detention of a refugee following an adverse assessment risks violating article 9 of the ICCPR as there are insufficient effective judicial oversight and review mechanisms.[16]

1.35 Amnesty International Australia also highlights possible breaches of articles 3 and 37B of the Convention on the Rights of the Child as a result of 5 children currently being indefinitely detained due to their parents receiving ASAs.[17]

Conclusion

1.36 The Migration Amendment (Provisions) Bill 2013 seeks to amend Australia's rigorous refugee determination process by overturning a number of High and Full Federal Court decisions.

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[15] United Nations Office of the High Commissioner for Human Rights, '*Australia's detention of 46 refugees 'cruel and degrading', UN rights experts find*'. 22 August 2013,

[16] *Submission 5, p. 7.*

[17] Submission 1, p. 2.

1.37 It is clear that this Bill will further distance Australia from our obligations to provide protection to those in desperate need. The amendments proposed are inconsistent with Australia's international obligations, do not afford procedural fairness and further entrench the current practice of indefinitely detaining men, women and children who have been found to be genuine refugees.

1.38 The Australian Greens depart from the recommendation of the majority report and conclude that the Bill should not proceed on basis of the arguments outlined above.

Recommendation 1:

The Australian Greens recommend that this Bill not proceed.

Recommendation 2:

The Australian Greens recommend that the government put in place a legislative framework to underpin the power, authority and role of the Independent Reviewer of Adverse Security Assessments.

Recommendation 3:

The Australian Greens recommend that the government urgently adopted the recommendations made by the Joint Select Committee on Australia's Immigration Detention Network, in particular;

> ***Recommendation 27***
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> **That the Australian Government and the Australian Security Intelligence Organisation establish and implement periodic, internal reviews of adverse Australian Security Intelligence Organisation refugee security assessments commencing as soon as possible.**
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> ***Recommendation 28***
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> **That the Australian Security Intelligence Organisation Act be amended to allow the Security Appeals Division of the Administrative Appeals Tribunal to review the Australian Security Intelligence Organisation security assessments of refugees and asylum seekers.**

Senator Sarah Hanson-Young

Australian Greens, SA