



28 April 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Due date for submissions: 28 April 2014

To the Committee

Migration Legislation Amendment Bill (No. 1) 2014

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS would like to make comments in relation to a number of proposals contained in the *Migration Legislation Amendment Bill (No.1) 2014* (the **Bill**) that are relevant to our service, and particularly as they affect asylum seekers in Australia. In summary we oppose the changes proposed in Schedules 1, 2, 4 and 6 of the Bill.

A summary of our comments and position is also attached.

Schedule 1: Applications for visas

The Bill proposes to alter the law to require that the bars on a person making a further visa application after they have been refused a visa (s48 of the *Migration Act 1958 (Cth)* (the **Migration Act**)), refused a protection visa (s48A of the *Migration Act*) or had a visa

cancelled (s501E of the Migration Act) will become more strict, to the point that any examination of whether the applicant did not know or did not understand the nature of the previous application or cancellation matter will be prevented by legislation. This alteration represents a significant change to the current common law position, which is stated best in the Federal Circuit Court decision of *Kim v Minister for Immigration* [2013] FCCA1526¹ ("*Kim*").

The case concerned a girl whose father had previously lodged an Other Family (Residence) Visa (Class BU) application on her behalf when she was 14, which then prevented her from being able to apply for a Student (Temporary) Class TU subclass 573 visa at age 19. At the time her father made the application on her behalf, she was not aware of the application, or that she had been included in it. The signature on the form was not her own.

The court examined whether the applicant had in fact applied for a visa previously. In doing so the Court considered the case of *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 ("*Woolley*") which remains authority for the principle that parents have the power to make decisions on behalf of a child, provided the child does not have competence themselves to make those decisions.

The Court also considered the case of *Secretary, Department of Health & Community Services v JWB & SMB ("Marion's case")* [1992] HCA 15 where the High Court held (in the context of medical procedures) that a minor is capable of giving informed consent when they have achieved an understanding and intelligence sufficient to enable them to understand fully what is proposed.

The Federal Circuit Court in *Kim* held that if the applicant was of sufficient maturity at age 14 to make an informed decision about whether to apply for a visa, her parents had no power to do so for her. They found that an implication of the decisions in *Marion's case* and *Woolley* is that if a parent acts for a child in a matter on which the child can make an informed decision, the parent will only have acted on the child's behalf if the child authorised that action.

Kim found that in cases where a child is plainly too young to make decisions the issue needs no lengthy consideration by the Department, but the more competent the child becomes in making an informed decision, the more relevant consideration becomes when assessing the validity of any future visa applications.

This remains the common law position in Australia.

¹ *Kim v Minister for Immigration* [2013] FCCA 1526 (3 October 2013), accessible at: <http://www.austlii.edu.au/au/cases/cth/FCCA/2013/1526.html> (accessed 23.4.14).

Conversely, the Bill proposes to narrow the terms of sections 48, 48A and 501 to make it irrelevant that the visa applicant may not have known of the application, or that they had a mental impairment at the time the visa application was made.

Altering the law to this extent raises a number of problems. The most significant problem being the potential for instances of injustice to arise, these are best set out by way of case studies:

Case studies

A 17 year old young man lives independently of his parents in a relationship not approved of by his parents. He is included on a non-meritorious protection visa application by his parents without his knowledge. This application is refused. He only learns of this visa application history when he makes his own visa application in the future, which is deemed invalid.

A 16 year old girl remains in conflict with her father due to family violence and remains living in a refuge with her mother. She is included in a non-meritorious visa application without her knowledge by her father which is refused. When her mother includes her on a subsequent meritorious visa application as her dependent, she is informed that the application by the daughter is invalid due to the father's previous application.

Instances of unfairness can arise where people become statutorily barred from making further visa applications based on something they had no control over and of which they had no knowledge.

As the Court in *Kim* makes clear, this is unlikely to be relevant for children of younger years. However for young people under 18 years of age with capacity, including capacity to providing consent and capacity to form an intention, it is unwise to legislate that such matters can never be considered in relation to future visa applications.

Visa applicants under 18 years of age are not a uniform group, and it seems prudent to allow for some consideration of factors such as level of understanding, intelligence, competence, knowledge, family conflict and mental incapacity.

RACS supports the general proposition that a person's claims to be a refugee should be processed efficiently and fairly, and that merits assessment of their case at Departmental and Tribunal level ought to, ordinarily take place only once rather than repeatedly.

However the changes proposed to the law by the Bill are not required to achieve these ends within the numbers of repeat applications by former child visa applicants, and go too far in

legislating to exclude all considerations of mental incapacity or competence in every case. To legislate that these considerations can never be considered could easily create unintended consequences.

In the last year, RACS has been involved in drafting Guidelines for Migration Agents Working with Children and Young People Seeking Asylum. In relation to the ethos behind this project, the Guidelines note that the issue of assisting children in the asylum claim process presents challenges for migration agents, and is something that many migration agents feel ill-equipped to deal with:

Children and young people are amongst the most vulnerable people who come into contact with Australia's migration system and their interaction with this system is known to cause them high levels of stress and anxiety.

Children have the same legal rights as adults to apply for asylum in Australia, and they are generally subject to the same policies and procedures as adults. Elements of Australia's sometimes-harsh migration laws and policies have been altered in recent years in an attempt to recognise the particular needs of children. Yet Australian law still fails to fully recognise and accommodate the special rights of children. As a result, children and young people remain highly vulnerable to breaches of their human rights.

Working with children and young people seeking asylum can sometimes present challenges for migration practitioners. In 2011 the Migration Institute of Australia² (MIA) conducted a survey of registered migration agents who represent children and young people applying for protection in Australia. The results showed that migration agents perceive a need for further training on working with children. Approximately ninety per cent of respondents said they had never received special training in interviewing children. One hundred per cent of respondents said that they think it is necessary to have special training to assist children in the asylum claim process.

The UN Committee on the Rights of the Child has recommended that States provide training for officials, legal representatives, guardians, interpreters and others who deal with separated and unaccompanied children who are outside their country of origin.³ The Committee recommends that training include information about: the

² The MIA is the peak professional body for Registered Migration Agents.

³ United Nations Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005) [95]-[96].

principles and provisions of the Convention on the Rights of the Child, the country of origin of separated and unaccompanied children, appropriate interview techniques, child development and psychology, and cultural sensitivity and intercultural communication.⁴

These Guidelines are a first step in responding to the interest in and need for training and resources for practitioners. The Guidelines are designed to provide practical assistance to help practitioners to address some of the challenges that arise when working with children and young people seeking asylum.

Given the results of the survey of registered migration agents, it is possible that applications may be lodged on behalf of children and young people that have not appropriately taken into account their views and their capacity. Restricting the law to mean that these issues can never be considered on any future visa application that those young people may make, in our submission, creates the potential for unintended legislative consequences.

We note that legislating to exclude such consideration raises doubts about our compliance with our international obligations as a signatory to the *Convention on the Rights of the Child* (CRC). Article 12 of the CRC concerns the right to participation and provides:

States parties must 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child' and specifies that 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child'.

This right recognises that children should be given the opportunity to participate in all decisions that affect them. The changes proposed to the law by the Bill rule out consideration of a child's views in relation to matters significantly affecting them – namely their rights to bring future visa applications in Australia.

Lastly, RACS would like to express concern that the changes proposed by the Bill all apply retrospectively. It is a fundamental principal of the rule of law that the government in all its actions is bound by rules fixed and announced beforehand. RACS supports the general principle that migration laws should be prospective, open and clear.

Schedule 2: Removal of unlawful non-citizens

Schedule 2 of the Bill includes a proposal to alter the current law in relation to removal of unlawful non-citizens. Currently a person is not able to be removed where they have a visa

⁴ Ibid.

application on foot. The Bill proposes to alter this restriction such that having a bridging visa application on foot will be no impediment to removal.

On the face of it, the proposed legislative change appears to be required in order to prevent a person from making repeat applications for bridging visas in order to delay their removal, given there is no limit to how many times a person can make an application for a Bridging Visa.

However in our submission, this is not required given the existing legislative safeguard provided by section 74 of the Act, which provides as follows:

Section 74. Further applications for Bridging Visas

74. (1) Subject to subsection (2), if:

- (a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa; and
- (b) the Minister refuses to grant the visa; the eligible non-citizen may make a further application for a bridging visa.

(2) https://legend.immi.gov.au/Migration/2014/19-04-2014/legend_current_ma/Pages/document00000/level100005/level200002/level200004/legend_current_mapop00345.aspx Unless the further application for a bridging visa is made in prescribed circumstances, the further application may be made not earlier than 30 days after:

- (a) if the eligible non-citizen did not make an application for review of the decision to refuse to grant the visa — the refusal; or
- (b) if the eligible non-citizen made an application for such review — the application is finally determined.

As such, there is already a legislative safeguard in place that ensures that a person is prevented from making an application for a bridging visa within 30 days of a decision to refuse an earlier application.

To legislate that no bridging visa application can ever be considered before removal, again creates the high potential for unintended consequences of this legislation, which could include:

- a person wanting to apply for a bridging visa for the purpose of leaving Australia voluntarily;

- a person who has never previously applied for a bridging visa who has good grounds for seeking such a visa (for example, while their Judicial Review application is heard).

RACS supports the idea that Australia's migration program must operate justly and efficiently. We do not support the idea that a person should be allowed to make repeat non-meritorious applications at significant expense in order to indefinitely remain in Australia. However, the changes to the law proposed in the Bill are not required to achieve this goal, and further create the potential for instances of injustice and unfairness.

Schedule 3: Recovery of costs from certain persons

These aspects of the Bill are not relevant to our area of practice and as such we will not comment.

Schedule 4: Authorised recipients

Schedule 4 proposes to alter the role of authorised recipients to make clear that they are now only authorised to receive documents and not to act as the agent of the visa applicant. The proposed legislation is in reaction to the case of *MZZDJ v Minister for Immigration and Border Protection* [2013] FCAFC 156.

This case involved a migration agent who had submitted a Form 956 by which their client confirmed that the agent was authorised to act on behalf of the applicant. In the Form 956 that had been submitted, the agent had advised that the contact details by which they could be contacted included a postal address, and email or facsimile details. Subsequently the agent advised the delegate by phone that they would be going overseas and requested that any communication not be sent to their office, but be instead sent by email. The delegate forgot and unfortunately the refusal decision was posted to the agent, resulting in the visa applicant missing the statutory time limit to lodge with the Refugee Review Tribunal. When the agent contacted the delegate, the delegate apologised and issued a re-notification. When the visa applicant then attempted to lodge with the RRT, the application was assessed as invalid, as the law required the delegate to send the decision to the authorised recipient in accordance with the methods specified in the 956. Given the delegate had complied, the initial notice was assessed by the Tribunal as valid.

The Full Federal Court examined closely s494D of the Act. They found that s494D(3) of the Act allows for appointment of an authorised recipient with no prescribed form. Section 494D(1) says if a person gives the Minister written notice that a person should do things on their behalf (including giving documents), the Minister has to give them that document.

Section 494D(3) allows the person to vary or withdraw the notice. The Court found that the conversation between the agent and the delegate amounted to a variation of the notice.

In our submission, there are significant reasons for allowing the law to remain as it stands in relation to authorised recipients. Changing the law essentially reduces the role of the recipient to be no more than a person who may receive documents. The proposed amendment removes the current, rational, position that a client applicant is free to instruct an agent and tell that agent what the agent is empowered to do. It reduces the agent to an address. Migration agents are professionals. Agents are bound by a Code of Conduct, and subject to regulation by the Migration Agents Registration Authority (MARA). Agents have a codified role as representatives and advocates of their clients. It is inappropriate to provide, by law, that they are prevented from acting in this role including acting as agents for their clients. It was never the intention of section 494 that migration agents be excluded from their role as their client's representatives.

We note that RACS, IARC, Legal Aid and many other government and not-for-profit migration advice providers are staffed largely by solicitors, who are familiar with established legal principles of non-communication with another solicitor's client⁵.

Currently, where the Department contacts one of RACS' clients directly in relation to an application for which we are appointed as the client's representative, RACS is able to contact the Department and point out that it is required to communicate with us under the terms of s494D and as set out in the Form 956 previously provided to the Department. If the proposed legislative changes are accepted it may mean that increasingly migration assistance providers such as our office are merely notified that the Department will be contacting our clients directly, reducing our ability to be fully apprised of our client's cases and to help them properly present their claims. The explanatory memorandum to the Bill states that the amendments do not prevent a person from acting as agent of the applicant due to some other authorisation. However the Bill significantly dilutes the scope of agents' ability to act on behalf of their clients in the course of visa applications. The Bill and the explanatory memorandum are silent as to how any more wide-reaching authorisation from a client to agent would be notified to or observed by the Department. RACS' clients represent an incredibly vulnerable client base. It is vital that they retain access to agents who can speak and act on their behalf and ensure their claims are expressed clearly to decision makers considering their cases.

⁵ Solicitors Rules – Rule 33 – A solicitor must not deal directly with the client or clients of another practitioner without the consent of the other practitioner, or where the circumstances are urgent and the dealing would not be unfair to the opponent's client.

Further, under the changes contained in the Bill, the authorised recipient cannot unilaterally withdraw their authorisation to receive documents on behalf of the applicant for review, and the applicant can only make such changes personally. This is likely to create uncertainty and confusion. One of the effects of the changes will be that the arrangements established by Form 956 can only be brought to an end by the client applicant. Our clients form a highly vulnerable client base, and in our experience, many have difficulty with simple forms. Requiring clients directly to be responsible for advising the Department of any variation to the 956 notice is unreasonable and likely to create significant administrative difficulties. These difficulties are most relevant to situations where an agent withdraws from acting for a client (for example, cannot contact their client, or due to a conflict of interest developing between two concurrent clients). In these cases we say it is appropriate to allow an agent to cease the role as authorised recipient other than with the consent of the client.

Schedule 6: Procedural fairness

The crux of this amendment is to reconcile the procedural fairness for onshore and offshore applications. Section 57 defines the rule for onshore applications: information must be given to the visa applicant, if the information:

- would be the reason, or a part of the reason, for refusing to grant the visa; and
- is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and
- was not given by the applicant for the purpose of the application.

Common law procedural fairness, which continues to apply to offshore applications, is far broader, and requires information to be put to the applicant if it is “relevant, credible and significant”.

The amendment reconciles the two positions by extending s 57 to cover offshore applications.

While we appreciate that offshore applications are not entitled to a higher standard, the stated purpose of the amendment according to the explanatory memorandum of achieving the legislative goal of reducing the risk of jurisdictional error as a result of failing to apply the correct test fails to take into account significant differences between the ways in which onshore and offshore applications may be subject to review. We note that offshore applications have significant restrictions on their ability to have decisions about their

RACS

28 April 2014

applications reviewed, including no access to the Refugee Review Tribunal and very limited access to the Australian courts.

RACS supports a refugee status determination process which is procedurally fair for all applicants. The best way to achieve this end would be to allow for all information which is relevant, credible and significant to be required to put to all applicants.

Thank you for considering this submission. We would be happy to expand on these submissions in person should the committee be minded to invite us to an oral hearing.

Yours sincerely,

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:

Tanya Jackson-Vaughan
Executive Director

Katie Wrigley
Principal Solicitor