Maurice Blackburn Lawyers Since 1919

Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 10
456 Lonsdale Street
Melbourne VIC 3000
PO Box 523
Melbourne VIC 3001
DX 466 Melbourne

31 October 2014

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

Dear Sir/Madam

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 ("the Bill")

1. EXECUTIVE SUMMARY

1.1 We request that the Committee recommend that Schedule 6 to the Bill be deleted.

1.2 While we have various concerns with the Bill as a whole, our request is based on the effect of amendments in Schedule 6 that:

(a) will result in the transfer of a relatively small number of Australian-born children to inhumane conditions on Nauru; and

(b) will interfere with current Federal Court of Australia proceedings, in which we represent a one year old boy named Ferouz, who was born in Brisbane's Mater Hospital, holds a Queensland birth certificate and is eligible to apply for Australian citizenship.

1.3 We refer to these amendments as "the Ferouz amendments".

2. THE LEGAL EFFECT OF THE FEROUZ AMENDMENTS

2.1 The Ferouz amendments, contained in Schedule 6 to the Bill, seek to retrospectively remove a range of rights currently available to babies of asylum seekers, even when those babies were born on Australian shore.

Transitory persons

2.2 The term "transitory person" is defined in section 5(1) of the *Migration Act 1958 (Cth)* (**"the Act"**). The definition includes various types of person, but the common link is that the person must have been taken from Australia to another location (e.g. Nauru or Manus Island).

2.3 As section 5(1) currently stands, this definition does not include a person who has not been taken offshore. Therefore, a baby born on Australian soil, who has remained in Australia since birth, is not a "transitory person". This is so, even if the baby's mother or father is a "transitory person" (e.g. a pregnant woman who is brought from Nauru to the mainland, in order to give birth).

2.4 The consequences of being a "transitory person" are significant. They include the following:

(a) In most circumstances, "transitory persons" are ineligible to apply for a visa (section 46B of the Act); and

(b) "Transitory persons" can be taken to Nauru or Manus, if they have been brought to Australia for a "temporary purpose", such as to seek medical care or to give birth (sections 198AD and 198AH of the Act).

2.5 The Ferouz amendments seek to retrospectively change the law, so that even babies born on Australian soil would be subject to these consequences.

2.6 This is sought to be achieved by:

(a) amending the definition of "transitory person" in section 5(1) of the Act to include a child of a "transitory person", whether that child is born in Australia or in Nauru or Manus (see Schedule 6, clause 1); and

(b) amending section 198AH so that children born in Australia can be taken to Nauru or Manus, if their mother was brought from Nauru to Australia to give birth to them (Schedule 6, clause 9).

2.7 The fact the Ferouz amendments are retrospective means that Ferouz, and other babies like him, would be ineligible to apply for a visa, and could be taken to Nauru or Manus, despite:

(a) Having been born in Brisbane;

(b) Having never left Australia; and

(c) Being eligible to apply for Australian citizenship.

Unauthorised maritime arrivals

2.8 Under section 5AA of the Act, a person is defined to be an "unauthorised maritime arrival" (**"UMA"**) if they satisfy a number of requirements, including that they "entered Australia by sea".

2.9 In Ferouz's current Federal Court proceedings, we argue that this definition does not include a baby born on Australian soil, even if they are born to a person who themselves came to Australia by sea.

2.10 As with "transitory persons", the consequences of being a UMA are significant and include the following:

(a) In most circumstances, UMAs are ineligible to apply for a visa (section 46A of the Act); and

(b) UMAs "must" be taken to Nauru or Manus "as soon as reasonably practicable" (section 198AD of the Act).

2.11 The Ferouz amendments seek to retrospectively change the law, so that children born on Australian soil would be subject to these consequences.

2.12 This is achieved by amending the definition of "unauthorised maritime arrival" to include a child who is born in Australia, Nauru or Manus, if a parent of the child is a UMA (Schedule 6, clause 3).

2.13 The fact the Ferouz amendments are retrospective means that Ferouz, and other babies like him, would be ineligible to apply for a visa, and "must" be taken to Nauru or Manus, despite:

(a) Having been born in Brisbane;

(b) Having never left Australia; and

(c) Being eligible to apply for Australian citizenship.

Retrospectivity

2.14 There has been some confusion over whether the Ferouz amendments are retrospective or prospective in nature. For example, in his Second Reading Speech, the Shadow Immigration Minister said, in reference to Ferouz's legal proceedings, that:

> *"it is clear that this legislation will not specifically apply to the participants within that case. It will be prospective but it deals with the substance of the matters that come from that."*

2.15 However, schedule 6, clause 11(b) makes clear that the Ferouz amendments are retrospective, in relation to a person's status as a UMA or a transitory person "whether the person is born before, on or after" the commencement of the Ferouz amendments.

2.16 Therefore, if passed, the Ferouz amendments would even deem a child born before the amendments commence to be UMA and a transitory person. This is an outrageous departure from the usual convention that legislation should be prospective in its operation.

2.17 Schedule 6, clause 12 acknowledges that the Ferouz amendments do not apply to an application under the Act (e.g. for a Protection Visa) if the application was "finally determined" before the Ferouz amendments commence.

2.18 However, section 5(9) of the Act states that, for an application to be "finally determined", all forms of review (e.g. internal review by the Department of Immigration and Border Protection, RRT review) of any decision relating to the application must be exhausted. That process can take many months, and it is extremely unlikely that all forms of review, regarding a specific Protection Visa application, would be exhausted before the Ferouz amendments commence.

2.19 For this reason, there is no doubt that the Ferouz amendments would directly impact on Ferouz, and other babies born in Australia. They should be deleted from the Bill.

3. THE PRACTICAL EFFECT OF THE FEROUZ AMENDMENTS

3.1 Maurice Blackburn acts for around 100 babies who were born in Australia to parents who are UMAs and/or transitory persons. These families are currently held in detention on Christmas Island and on the Australian mainland.

3.2 If the Ferouz amendments are passed:

(a) All 100 babies would be retrospectively deemed to be UMAs, because their parents entered Australia by sea.

(b) All 100 babies would therefore retrospectively lose their right to apply for a permanent Protection Visa.

(c) All 100 babies "must" be taken to Nauru or Manus "as soon as reasonably practicable". Some may qualify for SHEVs or/TPVs under other amendments proposed in the Bill, but only if the Minister allows the babies and their parents to apply for protection here in Australia.

(d) At least 16 of these 100 babies would be retrospectively deemed to be transitory persons, because their parents have previously been detained on Nauru and/or Manus.

(e) At least these 16 babies would not be eligible for TPVs/SHEVs under other amendments proposed the Bill, as their parents have been brought to the mainland from Nauru or Manus, and the Minister has said that he will not be allowing these babies and their families to apply for protection in Australia. <u>If the amendments are passed, there is no way that these babies and their families could remain in Australia.</u>

(f) Around 31 of these 100 babies, who "must" be taken to Nauru or Manus, are eligible to apply for Australian citizenship. This is explained below. These babies "must" be taken to Nauru or Manus, unless they are granted Australian citizenship. Even if they are granted Australian citizenship, their families "must" be taken to Nauru or Manus as a result of the Ferouz amendments.

3.3 The appalling conditions faced by children and families who are held in detention on Nauru are well documented. Among others, the United Nations High Commissioner for Refugees has described these conditions as inhumane and not fit for children.

3.4 We trust that the Committee shares our concern about the potential for forced transfers, especially of children born in Australia, and who are entitled to apply for Australian citizenship.

4. THE EFFECT OF THE FEROUZ AMENDMENTS ON CURRENT LEGAL ACTION

4.1 The Ferouz amendments are also an interference in current legal proceedings, which have already been before the High Court, and are currently the subject of an appeal to the Full Court of the Federal Court of Australia.

4.2 In those proceedings, we act for Ferouz, a one year old child of Rohingyan asylum seekers from Myanmar (Burma), who was born in Brisbane's Mater Hospital in November 2013.

4.3 Since rejecting Ferouz's application for a Protection Visa ("PV") in January 2014, the Department has consistently maintained that the current wording of the Act means that Ferouz is a UMA, and is therefore not eligible to apply for a PV.

4.4 The Department's argument is that Ferouz entered Australia by sea, when in fact he was born in Brisbane. Indeed, the Queensland Government has issued Ferouz with an official birth certificate, recognising his birth in Brisbane.

4.5 We challenged this decision and only three weeks prior to the hearing, the Government introduced the Bill, to retrospectively remove Ferouz's right to apply for a PV. In our view this legislative provision is specifically designed to facilitate an outcome detrimental to Ferouz.

4.6 The Ferouz amendments are clearly designed to circumvent Ferouz's court case, and represent an admission by the Government that it was wrong to reject Ferouz's PV application in the first place.

4.7 The Federal Circuit Court delivered judgment on 15 October 2014, in which it decided that Ferouz was an unauthorised maritime arrival, and is therefore not eligible to apply for a permanent Protection Visa.

4.8 The Full Court of the Federal Court of Australia will hear our appeal against this judgment on 24 November 2014. If the appeal is successful, Ferouz and the other 100 babies for whom we act would be eligible to apply for a permanent Protection Visa, rather than the TPVs/SHEVs which are proposed in the Bill.

4.9 We note that Nobel Peace Prize winner, Aung San Suu Kyi – herself from Myanmar - spoke out in support of Ferouz and his legal battle, during a visit to Australia in November 2013. Referring to Ferouz's case, Ms Suu Kyi said that the rule of law "must be tempered by mercy".

4.10 If Ferouz's appeal succeeds, the Ferouz amendments (if passed) would most likely override the Court's decision. This is because consideration of his Protection Visa application is not likely to be "finally determined" before the Ferouz amendments commence, meaning his application is likely to be retrospectively invalidated.

4.11 Ferouz's case should be allowed to run its course, free from the Government changing the goalposts at the last minute.

5. THE FEROUZ AMENDMENTS WOULD TRANSFER AUSTRALIAN CITIZENS TO NAURU

5.1 In addition to applying for a Protection Visa, Ferouz has applied for Australian citizenship. His application was made pursuant to section 21(8) of the *Australian Citizenship Act 2007 (Cth)*, which states that a person is eligible to apply for Australian citizenship if they are:

(a) born in Australia; and

(b) are stateless, meaning they are not eligible for citizenship in another country.

5.2 Stateless babies are treated differently to other children born in Australia, who are born to citizens of another country (e.g. UK, New Zealand). Those children are generally entitled to the citizenship of their parents, and must therefore wait several years before being eligible to apply for Australian citizenship. The parents of stateless children do not hold any citizenship that they can pass on to their children.

5.3 Ferouz satisfies the criteria set out in paragraph 5.1 above. He was born in Australia and he is stateless. This is because, as members of the Rohingyan ethnic minority, the government of Myanmar denies their right to citizenship of that country.

Little wonder the United Nations regards the Rohingyan people as one of the most persecuted minorities in the world. In total, Maurice Blackburn acts for around 31 Rohingyan babies who are similarly eligible to apply for Australian citizenship.

5.4 Ferouz submitted his citizenship application in December 2013. Ten months later, and despite several requests for action, the Department has still not advised the outcome. This is well outside the Department's normal service standards.

5.5 Despite being born in Brisbane, and being eligible to apply for Australian citizenship, Schedule 6 to the Bill – if passed – places Ferouz at risk of transfer to Nauru unless he is granted citizenship.

5.6 Even if Ferouz is granted Australian citizenship, his family "must" be taken to Nauru or Manus as a result of the Ferouz amendments.

5.7 It is unthinkable that the Australian Parliament could support the separation of "Aussie kids" from their families in this manner. For this reason, the Ferouz amendments should be opposed.

6. THE RATIONALE FOR THE FEROUZ AMENDMENTS HAS NO BASIS

6.1 Two main arguments have been advanced in support of the Ferouz amendments. Both lack any factual basis.

6.2 The first argument advanced in support of the Ferouz amendments is that, in the absence of them being passed, there will be an incentive to pregnant women to come to Australia by boat, or for asylum seekers already here to conceive.

6.3 All evidence shows that this argument is without foundation:

(a) As the Government often states, only one boat has entered Australian waters in 2014. There is no evidence that pregnant asylum seekers are attempting to come to Australia, to exploit an alleged loophole in the Australian law.

(b) There is no evidence that asylum seekers who are currently in detention are falling pregnant in an attempt to exploit an alleged loophole.

(c) The Department's own statistics show that, as at 30 September 2014, the average length of detention of people currently in immigration detention facilities has increased to 413 days. Given the large numbers of families currently held in immigration detention facilities for long periods of time, it is not surprising that some of those families would conceive.

7. CONCLUSION

7.1 We ask that the Committee recommend the deletion of Schedule 6 to the Bill, on two grounds:

(a) It will result in the transfer of a relatively small number of Australian-born children to inhumane conditions on Nauru; and

(b) It will interfere with a current Federal Court appeal, in which we represent an 11 month old boy named Ferouz, who was born in Brisbane's Mater Hospital, holds a Queensland birth certificate and is eligible for Australian citizenship.

7.2 We would welcome the opportunity to speak with the Committee about these concerns.

Yours faithfully

Jacob Varghese
MAURICE BLACKBURN