

Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013

Introduced into the House of Representatives on 11 February 2013

By: Mr Morrison MP

Migration Amendment (Reinstatement of Temporary Protection Visas) Bill 2013 [No.2]

Introduced into the Senate on 28 February 2013

By: Senator Cash

Summary of committee view

1.147 The committee seeks clarification on how the bills are compatible with the right to family life; the right to freedom of movement; the right to health; the right to social security and an adequate standard of living; the rights of children as guaranteed by the Convention on the Rights of the Child; and the guarantee of the non-discriminatory enjoyment of these rights.

Overview

1.148 These two bills (which are in identical terms) seek to amend the *Migration Act 1958* to introduce two new categories of protection visas:

- *Temporary Protection (Offshore Entry Visa)*: this visa may be granted to a person recognised to be a refugee, where Australia is the first country the person could seek protection from. The visa would be valid for no longer than three years, and a permanent visa could not be granted unless the Minister personally considered it to be in the public interest to grant a permanent visa;
- *Temporary Protection (Secondary Movement Offshore Entry Visa)*: this visa may be granted to a person recognised to be a refugee, where the person could have sought protection from another country but did not do so. The visa would be valid for no longer than three years and a person on such a visa would never be entitled to a permanent visa.

1.149 Under both types of visas, family reunion would not be permitted and the visa holder would not be able to leave and re-enter Australia while holding such a visa. The holder of the visa would be entitled to engage in work and access social security benefits, but social security benefits would only be available if the visa holder participated in 'a mutual obligation program', to be prescribed by regulations.

Compatibility with human rights

1.150 The bills are accompanied by self-contained statements of compatibility, which state in general terms that the bills are consistent with human rights as they enhance the human rights of those fleeing persecution by facilitating the provision of temporary safe haven (through a temporary protection visa (TPV)). However, the net effect of the bills would appear to reduce the rights that such persons presently enjoy rather than enhance them. This lesser level of protection is justified in the statements of compatibility on the grounds that this level of protection is nonetheless consistent with Australia's obligations as a party to the 1951 Refugee Convention and 1967 Protocol to that Convention.

1.151 The committee has concerns whether the proposed reintroduction of temporary protection visas as proposed by the bills is fully consistent with Australia's obligations under the Refugees Convention and Protocol. In this report the committee focuses on the issues of compatibility with the human rights explicitly guaranteed by the seven human rights treaties listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*. However, it notes that the provisions of the Refugee Convention and Protocol may be relevant to the interpretation of the guarantees contained in those treaties.

Right to family life

1.152 Under the provisions proposed by the bills, a temporary protection visa would be subject to a number of conditions, including that 'family reunion is not permitted under the visa'.⁵³ This can be contrasted with the right to family reunion provided for under other categories of visas granted to refugees and humanitarian entrants. Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR), article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and articles 8 and 10 of the Convention on the Rights of the Child (among other provisions) guarantee various aspects of the right to family life.

1.153 If limitations on enjoyment of the right to a family life are to be imposed, any such limitation must be shown to be a reasonable and proportionate restriction which is rationally adapted to achieving a legitimate objective. In the context of the Convention on the Rights of the Child, it must also be shown that the best interests of the child are 'a primary consideration'. The right to enjoy such rights must also be guaranteed equally to all without discrimination, under articles 2(1) and 26 of the ICCPR and article 2(2) of the ICESCR. The guarantee of non-discriminatory enjoyment requires the demonstration of an objective and reasonable basis for any differential treatment of similarly situated persons, in this case between different categories of refugees to whom Australia owes protection obligations.

53 See proposed new section 76D(1)(c) and 76H(1)(c).

1.154 A general policy denying the possibility of family reunion raises issues about reasonableness and proportionality and consistency with the obligation to make the best interests of the child a primary consideration.

Liberty of movement and non-discrimination

1.155 The bills provide that a person granted a TPV will not be permitted to leave and re-enter Australia while holding the visa. Article 12(2) and (3) of the ICCPR provides:

2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

1.156 Although the right in article 12(2) may not independently guarantee a person who is not a citizen or permanent resident the right to leave and then return to Australia, a person holding a TPV is entitled to non-discriminatory treatment in the enjoyment of the right to leave Australia. Under article 2(1) of the ICCPR, Australia has undertaken to 'ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The status of being a TPV-holder would fall within the term 'other status' in article 2(1) (and also in article 26) of the ICCPR.⁵⁴

1.157 International human rights law requires that different treatment of people in similar situations be justified by objective and reasonable criteria; it must be a reasonable and proportionate measure that rationally pursues an objective that is legitimate under the ICCPR. Permitting other recognised refugees (for example those who arrived with a visa before seeking asylum) or other visa holders to leave and return to Australia while denying this right to TPV holders raises issues of discrimination on the ground of 'other status'.

Right to social security

1.158 Proposed new sections 76D(2) and 76H(2) provide that the regulations may prescribe that TPV holders must participate in a mutual obligations program in order

54 To the extent that there is different treatment of this category of refugees compared to others similarly situated in relation to economic, social and cultural rights, the corresponding guarantee of non-discrimination in the enjoyment of those rights contained in article 2(2) of the International Covenant on Economic, Social and Cultural Rights would also apply.

to access social security benefits, which would be specified in regulations. No details are given of the nature of the program envisaged, nor are any reasons offered for the restriction on the right of access to social security by these means. In imposing such restrictions, the bill engages the right to social security and the right to an adequate standard of living as guaranteed by articles 9 and 11 of the ICESCR. The bill also engages article 2(2) of the ICESCR, which guarantees the non-discriminatory enjoyment of those rights, and may also engage article 26 of the Convention on the Rights of the Child, which guarantees children the right to social security.

1.159 While article 4 of the ICESCR permits reasonable limitations on the enjoyment of the rights in articles 9 and 11, any limitations must not be discriminatory as between classes of similarly situated asylum-seekers to whom Australia owes protection obligations. In assessing the legitimacy of any restrictions or differential treatment relating to the right to social security, Australia's obligations under article 24 of the Refugee Convention are relevant. Article 24 adopts as its starting point equality of treatment in relation to social security. The statement of compatibility offers no justification for the limitations and differential treatment proposed by the bill.

Right to health

1.160 The bills also engage the right to the highest attainable standard of health guaranteed by article 12 of the ICESCR and article 24 of the Convention on the Rights of the Child. Under the previous TPV regime, commentators and studies indicated that the uncertainty involved in living under a TPV regime, especially when combined with conditions preventing family reunion and the impossibility of visiting family living outside Australia, may have significantly adverse effects on the mental health of TPV holders and their families.

1.161 The bills may also engage article 39 of the Convention on the Rights of the Child, which provides that Australia 'take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.'

1.162 The statements of compatibility make no reference to these issues, and contain no justification for the potential limitations on the enjoyment of the right to health (which includes the right to mental health).

1.163 The committee intends to write to Mr Morrison MP and Senator Cash to ask them to clarify how the bills are compatible with the following rights:

- (a) the right to family life;**
- (b) the right to freedom of movement;**
- (c) the right to health;**

- (d) the right to social security and an adequate standard of living;
- (e) the rights of children as guaranteed by the Convention on the Rights of the Child; and
- (f) the guarantee of the non-discriminatory enjoyment of these rights.

1.164 The committee expects that in relation to each right an explanation will be provided that sets out:

- whether the limitation on the right is aimed at achieving a legitimate objective;
- whether the limitation on the right is rationally connected to achieving that objective; and
- whether the limitation on the right is reasonable and proportionate to achieving the objective, and whether any less restrictive alternatives could achieve that objective.