

Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013

FRLI: F2013L01218

Portfolio: Immigration and Border Protection

Tabled: House of Representatives and Senate, 12 November 2013

Summary of committee concerns

2.45 The committee considers that this instrument authorises serious limitations on the rights of individuals and that there are inadequate substantive and procedural safeguards provided to ensure that the exercise of the powers conferred would be consistent with human rights. The committee recommends that the instrument should be amended to ensure that the powers conferred are appropriately circumscribed.

2.46 The committee seeks further information, including with regard to the removal of external merits review for certain cancellation decisions and how this is consistent with the right to a fair hearing and the prohibition against arbitrary detention.

Overview

2.47 This regulation amends the *Migration Regulations 1994* to strengthen cancellation powers and create a new condition in relation to Bridging E (Class WE) visas (BVEs). In particular, the regulation amends the Migration Regulations to create:

- a discretionary power to cancel a BVE held by a person who is convicted of, or charged with, an offence in Australia or another country, or who is the subject of an Interpol notice relating to criminal conduct or to threat to public safety; and
- a new discretionary visa condition to, when imposed, prohibit a person who has been granted a BVE from engaging in criminal conduct.

2.48 The explanatory material accompanying the regulation describes the consequences of BVE cancellation on any of the above grounds as follows:

- The person may, depending on the circumstances of the case, be liable for removal as an unlawful non-citizen.
- It may expose the person to being 'taken' to a regional processing country for processing of those claims in accordance with government policy.
- The re-detention of an unauthorised arrival whose BVE has been cancelled will have the effect of restoring that person to the situation prior to their release from detention where they were subject to mandatory detention under the *Migration Act 1958*. If the Minister

does not intervene to grant a further BVE, an unauthorised arrival is liable to remain in detention until their claims for protection are assessed and a substantive visa is granted, they chose to depart, or they are removed following finalisation of assessment processes and refusal of their claims. Cancellation of the BVE restores the former BVE holder to that situation.

- The cancellation of BVEs held by persons who are not unauthorised arrivals places such persons in the same situation as other unlawful non-citizens, that is, they may be liable for removal.

Compatibility with human rights

Statement of compatibility

2.49 The statement of compatibility accompanying the instrument notes that the amendments engage the right not to be arbitrarily detained;²⁷ the obligation of non-refoulement;²⁸ children's rights²⁹ and the protection of the family unit.³⁰ The statement concludes that the amendments are consistent with these rights.

2.50 In coming to this conclusion, the statement argues that the amendments seek to achieve a legitimate objective, namely, the safety of the Australian community; and claims that '[a]ny questions of proportionality will be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a BVE, including consideration of family relationships and the effect of separation on children'.³¹

Committee view on compatibility

2.51 The committee agrees that the key rights engaged by these amendments are as set out in the statement of compatibility. The committee considers that the measures permitted by this instrument potentially involve serious limitations on human rights and that the statement of compatibility has not sufficiently demonstrated their consistency with the identified rights. The committee's concerns are set out below.

Right to non-refoulement

2.52 Australia has obligations under a number of the UN human rights treaties not to send a person to a country where there is a real or substantial risk that the person may be subject to particular forms of human rights violations. There is a clear

27 Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

28 Article 3(1) of the Convention against Torture (CAT) and articles 6 and 7 of the ICCPR.

29 Article 37(b) of the Convention on the Rights of the Child (CRC).

30 Article 17(1) and article 23(1) of the ICCPR and article 16(1) of the CRC.

31 Statement of compatibility, p 6.

obligation under article 7 of the ICCPR and article 3 of the CAT, not to return or send a person to a country where there is a real risk that they will be subjected to torture or cruel, inhuman or degrading treatment. Obligations also arise under article 6 of the ICCPR to not return or send a person to a country where they are at real risk of the death penalty or arbitrary deprivation of life.

2.53 The statement of compatibility states that if a BVE is cancelled, the person may 'depending on the circumstances' be liable for removal from Australia or be exposed to be taken to a regional processing country for processing. The statement says that detention of the individual will not expose the person to removal action where there are unassessed claims for protection or where removal would be in breach of a court order. It also says that the detention will not enliven any removal process where there are other visa applications on foot. The statement notes that there are provisions in the migration legislation to ensure that a court can order removal to be suspended but does not provide further clarification.

2.54 The committee seeks clarification from the Minister for Immigration and Border Protection as to whether:

- **the fact of cancelling of a BVE under these provisions, would in any circumstance be in and of itself a grounds for the removal of the person as an unlawful non-citizen or for transferring the person offshore; and**
- **the circumstances when a court can suspend the removal of a person, including whether such powers extend to a decision to transfer a person to a regional processing country.**

Prohibition against arbitrary detention

2.55 Article 9 of the ICCPR provides that no one may be subjected to arbitrary arrest or detention, and no one may be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Article 9 of the ICCPR applies to all deprivations of liberty and is not limited to criminal cases. Detention must not only be lawful but reasonable and necessary in all the circumstances. The principle of arbitrariness includes elements of inappropriateness, injustice and lack of predictability. In other words, the detention must be aimed at a legitimate objective and must be reasonable, necessary and proportionate to that objective.

2.56 In order for detention not to be arbitrary, it must be necessary in the individual case (rather than the result of a mandatory, blanket policy); subject to initial and periodic review by an independent authority with the power to release detainees if detention cannot be objectively justified; be proportionate to the reason

for the restriction; and be for the shortest time possible.³² Where the detention involves children, the CRC requires that children are detained only as a measure of last resort, and for the shortest appropriate period of time.³³ The CRC also requires that, 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'³⁴

2.57 A direct consequence of cancelling a BVE is that the person will be detained. The power to cancel a BVE is triggered where the person:³⁵

- has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country; or
- has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or
- is the subject of notice (however described) issued by Interpol for the purposes of locating the holder or arresting the holder; or
- is the subject of a notice (however described) issued by Interpol for the purpose of providing either or both of a warning or intelligence that the holder:
 - has committed an offence against a law of another country; and
 - is likely to commit a similar offence; or
- is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning that the holder is a serious and immediate threat to public safety.

2.58 A person who has their BVE cancelled under these provisions may seek merits review of the cancellation decision at the Migration Review Tribunal. However, a person will not be able to seek merits review if the Minister issues a conclusive certificate in accordance with section 339 of the Migration Act. Under section 339 of the Migration Act, the Minister may issue a conclusive certificate in relation to the cancellation decision if the Minister believes that:

- it would be contrary to the national interest to change the decision; or

32 See, for example, *van Alphen v. Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988, (23 July 1990), para 5.8; *Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, CCPR/C/83/D/1134/2002, (17 March 2005), para 5.1; *F.K.A.G. et al. v Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011 (20 August 2013), paras 9.3, 9.6-9.7; and *M.M.M. et al. v Australia*, Communication No. 2136/2012, CCPR/C/108/D/2136/2012 (20 August 2013), paras 10.3-10.4, 10.6.

33 Article 37(b) of the CRC.

34 Article 3(1) of the CRC.

35 Item 1, new section 2.43(1)(p).

- it would be contrary to the national interest for the decision to be reviewed.

2.59 The committee notes that the amendments will enable a BVE to be cancelled under an extremely broad range of circumstances. Of particular concern to the committee is the low threshold which is set for triggering the exercise of these powers. Notably, a BVE may be cancelled on the basis that a person has been charged with or convicted of *any* offence, whether committed in Australia or elsewhere, irrespective of its seriousness and whether the person poses a threat to public safety.

2.60 The committee agrees that the protection of public safety is a legitimate objective for limiting a person's right to liberty. However, it is also necessary to show that the measures authorising a person's detention are reasonable, necessary and proportionate to that objective. Limitations on rights must also be prescribed by law, that is, they must have a clear legal basis, including being publicly accessible and not open-ended. The committee notes that the UN Human Rights Committee has stated that:

The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.³⁶

2.61 The committee notes the assertion in the statement of compatibility that 'comprehensive policy guidance will be provided to decision-makers to assist decision makers to exercise their discretion [to cancel a BVE]'.³⁷ The committee, however, emphasises that in undertaking its task it must necessarily determine if legislation is sufficiently confined to ensure that human rights will be adequately respected in practice. In this instance, regardless of the guidance that may be provided in policy documents, the committee is not convinced that the amendments as drafted are suitably circumscribed to provide sufficient protection against a person being arbitrarily detained. At minimum, the conditions for exercising these cancellation powers should include the requirement for the relevant decision-maker to be satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

2.62 The committee considers that the provision of independent merits review for cancellation decisions is an important safeguard that goes towards ensuring the

36 UN Human Rights Committee, *General Comment No. 27: Freedom of movement*, (1999), para 13.

37 Statement of compatibility, p 4.

necessity and proportionality of detaining the person. The committee, however, is concerned about the exclusion of merits review for cancellation decisions that are subject to a conclusive certificate by the Minister. The statement of compatibility does not provide any justification for this aspect of the amendments. The committee notes that judicial review remains available for such decisions but considers that such review will only be adequate in accordance with the requirements of article 9 of the ICCPR if it includes the power to release a person from detention if the detention cannot be objectively justified, that, is it must be possible for the independent judicial review body to assess whether the detention is substantively arbitrary, not merely whether it is in accordance with law.

2.63 The committee intends to write to the Minister for Immigration and Border Protection to:

- **recommend that the amendments are redrafted to provide a requirement that a BVE cancellation decision is predicated on a threat to public safety that is sufficiently serious; and**
- **seek further information on whether the absence of merits review for cancellation decisions which are subject to a conclusive certificate is compatible with the right to a fair hearing in article 14(1) of the ICCPR and the right to substantive review under article 9 of the ICCPR.**