

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

FRLI: F2013L02104

Portfolio: Immigration and Border Protection

Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.119 The committee considers that this regulation potentially involves serious limitations of human rights. Regrettably, the explanations provided in the statement of compatibility are deficient and the committee requires further information to determine this instrument's compatibility with human rights.

2.120 The committee seeks the Minister's clarification on the various issues set out below as a matter of urgency so that it may finalise its consideration of this regulation while it is still before the Parliament.

Overview

2.121 The Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013 (UMA Regulation) amends the *Migration Regulations 1994* to reverse the outcomes brought about by the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (TPV Regulation). The TPV Regulation sought to reintroduce temporary protection visas as the only protection visa available to persons who entered Australia without a valid visa. The TPV Regulation commenced on 18 October 2013, but was disallowed in full by the Senate on 2 December 2013. As a result of its disallowance, '[permanent] protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas'.¹

2.122 To implement 'the government's intention to ensure that persons who arrive in Australia without visas are not granted permanent protection visas',² the UMA Regulation amends the Migration Regulations to introduce a new visa criterion for protection visas.

2.123 The core criteria for a protection visa are found in the *Migration Act 1958*. They require the decision maker to be satisfied that the applicant is a non-citizen in Australia and is:

1 Explanatory statement, p 1.

2 Explanatory statement, p 1.

- a person in respect of whom Australia has protection obligations under the 1951 Refugee Convention as amended by the 1967 Protocol (the refugee criterion);³ or
- a person in respect of whom Australia has protection obligations on complementary protection grounds (the complementary protection criterion);⁴ or
- a member of the same family unit as a person in respect of whom Australia has protection obligations and who holds a protection visa.⁵

2.124 In addition to core protection criteria set out in the Migration Act, there are a number of other requirements, relating to health, public interest and national interest, which must be met at the time of decision. These criteria are found in the Migration Regulations.⁶

2.125 The UMA Regulation introduces an additional criterion which must be satisfied at the time of decision, namely that the applicant:

- held a valid visa on their last entry into Australia;
- is not an unauthorised maritime arrival;⁷ and
- was immigration cleared on their last entry into Australia.

2.126 These amendments apply in relation to a protection visa application:

- made on or after the regulation commenced on 14 December 2013; or
- made, but not finally determined, before 14 December 2013.

2.127 The changes apply to unauthorised boat and air arrivals alike. Protection visas remain available to people from outside this cohort, that is, those who enter Australia with a valid visa.

3 *Migration Act 1958*, s 36(2)(a).

4 *Migration Act 1958*, s 36(2)(aa).

5 *Migration Act 1958*, ss 36(2)(b) and (c).

6 *Migration Regulations 1994*, Part 866 of Schedule 2.

7 An 'unauthorised maritime arrival' is defined in section 5AA of the *Migration Act 1958* to be a person who (i) entered Australia by sea at an excised offshore place (such as Christmas Island) at any time after the excision time for that place or at any other place at any time on or after 1 June 2013; and (ii) became an unlawful non-citizen because of that entry; and (iii) is not an excluded maritime arrival.

Compatibility with human rights

Statement of compatibility

2.128 The UMA Regulation is accompanied by a short statement of compatibility that states that the amendments engage the right not to be refouled,⁸ the right to non-discrimination,⁹ and the children's rights.¹⁰

2.129 Having noted these rights, the statement goes on to make several brief assertions regarding:

- The government's intention to abide by its non-refoulement obligations;
- The government's view that any differential treatment accorded to unauthorised arrivals is 'based on reasonable and objective criteria and is aimed at a legitimate purpose, being the need to maintain the integrity of Australia's migration system and protecting the national interest'; and
- The government's position that these objectives, along with the need to discourage minors from undertaking dangerous journeys, outweigh the best interests of the child to be reunited with their family.

2.130 On the basis of these claims, the statement concludes that the amendments are compatible with human rights.

Committee view on compatibility

Deficient statement of compatibility

2.131 Given the human rights implications of these amendments, the committee is troubled by the meagreness of the explanations provided in the statement of compatibility. The committee considers the statement of compatibility to be an important reflection of the manner in which human rights are taken into account in the legislative development process.

2.132 The statement of compatibility is also an important starting point for the committee's scrutiny tasks. This is particularly the case for amendments arising in the migration portfolio. As the committee has previously noted, amendments to migration legislation often involve complex and technical interactions with the Migration Act and a range of secondary legislation. Without clear explanations of their precise impact and scope, it is often difficult to grasp their full effect, particularly in the time available to the committee to undertake its scrutiny tasks.

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

9 Article 26 of the ICCPR.

10 Article 3 of the Convention on the Rights of the Child (CRC).

2.133 The committee expects statements to clearly set out the full range of implications arising from legislative changes and to explain in appropriate and sufficient detail the justification for any limitations of rights. Unfortunately in this instance, the statement of compatibility does not elucidate the relevant human rights implications of the amendments. It simply recycles pro-forma statements about the rights that are engaged (without explaining how or why they are engaged), reiterates the government's intentions to abide by its non-refoulement obligations via administrative processes, and restates assertions that any limitations on rights are reasonable, necessary and proportionate.

2.134 The committee intends to write to the Minister for Immigration and Border Protection to reiterate its expectation that statements of compatibility should clearly set out the nature and operation of amendments and their human rights implications. In particular, given the complexity of migration legislation, the committee expects statements to identify and properly explain how a particular amendment may relate to other relevant aspects of the scheme in question.

2.135 The committee also reiterates its expectation that any limitations on rights should be justified by providing reasoned and evidence-based explanations as to whether the limitation is (i) aimed at a legitimate objective; (ii) rationally connected to that objective; and (iii) proportionate, including why less restrictive options would not be available.

Substantially the same in effect as the TPV Regulation

2.136 The committee notes that the stated purpose of the UMA Regulation is to reinstate the outcome that was sought to be achieved by the now disallowed TPV Regulation: that is, to prevent unauthorised arrivals from accessing the permanent protection visa regime under the Migration Act. In this regard, the committee observes that the *Legislative Instruments Act 2003* imposes a six-month bar on the making of a legislative instrument that produces substantially the same effect as the disallowed instrument.¹¹ The committee notes the potential inconsistency of the UMA Regulation with the requirements of that Act.

Human rights implications

2.137 Given the similarities in outcomes between the UMA and TPV regulations, the committee considers that the amendments give rise to many of the same human rights concerns as did under the TPV scheme, including in relation to the right to health,¹² the right to social security,¹³ the right to an adequate standard of living,¹⁴

11 *Legislative Instruments Act 2003*, section 48.

12 Article 12 of the International Covenant on Economic, Social and Cultural Rights and article 24 of the CRC.

13 Article 9 of the ICESCR.

14 Article 11 of the ICESCR.

the right to education,¹⁵ and the right to work.¹⁶ The committee commented extensively on the human rights implications of the TPV regime in its last report.¹⁷ It is therefore disappointing that the statement of compatibility has not referred to or addressed those concerns in the context of these amendments. The committee does not propose to repeat those comments here, but intends to draw them to the attention of the Minister for Immigration and Border Protection.

2.138 These amendments are also likely to give rise to fresh human rights concerns. The committee considers that in addition to the rights noted in the statement of compatibility, the amendments engage the right to an effective remedy,¹⁸ and may also involve further restrictions, over and above those contained under the TPV regime, on the rights of children and families,¹⁹ the right to health, the right to social security, the right to an adequate standard of living, the right to education, and the right to work.²⁰

2.139 These heightened concerns arise because of the government's intention to deal with all unauthorised arrivals, even where they have been found to be refugees, through the bridging visa regime. According to the statement of compatibility:

[Unauthorised arrivals] who are found to engage Australia's protection obligations but who are affected by these amendments will continue to hold a Bridging visa with the same work rights and travel conditions that they currently hold.²¹

2.140 No further explanation about the bridging visa regime is provided in any of the explanatory materials and it is not apparent how such a scheme, which is intended as a temporary solution for people awaiting an immigration outcome or removal from Australia, is likely to be suitable for those who have been found to be refugees or to be otherwise owed protection.

2.141 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification about the bridging visa scheme that is to be utilised for unauthorised arrivals who engage Australia's protection obligations: In particular, the committee requests information about:

- **The duration of a BVE visa and what criteria need to be met for renewal.**

15 Article 13 of the ICESCR.

16 Article 6 of the ICESCR.

17 See ,PJCHR, First Report of the 44th Parliament, 10 December 2013, pp 109-120.

18 Article 2 of the ICCPR.

19 Article 17 and 23 of the ICCPR; and the CRC.

20 Article 6 of the ICESCR.

21 Statement of compatibility, p 1.

- **Whether the BVE regime places any restrictions on work rights, and if so what these are and how they are consistent with article 6 of the ICESCR, particularly in light of refugees’ right to work under the Refugee Convention.**
- **Whether the BVE regime places any restrictions on travel rights, and if so what these are, and how they are consistent with article 12 of the ICCPR.**
- **A description of available supports and benefits available under the BVE regime, including amounts; and whether the combination of these supports is sufficient to ensure minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the minimum requirements of the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR. The committee also seeks information as to whether BVE holders would be expected to satisfy a ‘mandatory mutual obligation requirement’ in exchange for income support.**
- **Whether BVE holders and their children have access to adequate and accessible education, without discrimination, consistent with article 13 of the ICESCR. In particular, the committee seeks clarification as to which States and/or Territories have yet to finalise arrangements for the provision of education for this group.**
- **Whether the BVE regime provides for any option of family reunion, and if not, whether and how the denial of family reunion without any consideration of individual circumstances is a reasonable and proportionate measure, particularly in light of the obligation to make the best interests of the child a primary consideration.**
- **Whether the BVE regime is consistent with the right to health in article 12 of the ICESCR.**

Interaction with related migration instruments

2.142 The committee notes that the UMA Regulation commenced on the same day as two other related migration instruments, namely the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013,²² and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155. These instruments establish an enforceable code of behaviour for certain BVE holders.²³ A breach of the code could result in the BVE holder being returned to immigration detention, transferred to a regional processing country, or having their income support ceased or reduced. The committee has set out its concerns with regard to these two instruments elsewhere

22 FRLI No: F2013L02102.

23 FRLI No: F2013L02105.

in this report. Notably, the statement of compatibility for the UMA Regulation makes no mention of those changes or their interaction with these amendments.

2.143 Neither does the statement of compatibility mention other relevant changes that have recently been made to the BVE regime, specifically by the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013,²⁴ and the Migration Amendment (Disclosure of Information) Regulation 2013.²⁵ The former introduced broad grounds for cancelling a BVE, while the latter permits information about a BVE holder to be disclosed to the federal and state police authorities.

2.144 The committee intends to write to the Minister for Immigration and Border Protection to seek an explanation as to how the UMA Regulation interacts with these instruments:

- **Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 (F2013L02102);**
- **Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 (F2013L02105);**
- **Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (F2013L01218); and**
- **Migration Amendment (Disclosure of Information) Regulation 2013 (F2013L02101).**

In particular, the committee seeks the following information with reference to the above instruments:

- **Whether unauthorised arrivals who are owed protection obligations but who remain on BVEs will be required to sign a code of behaviour, and if so if they will be subject to the same consequences for breaching the code, including potentially being sent to an regional processing country.**
- **Whether their personal information will be shared with the federal and state police authorities.**
- **Whether their visas may be cancelled on the same grounds that currently apply to other BVE holders who are awaiting resolution of their immigration status.**

24 FRLI No: F2013L01218. The committee's comments on this instrument are contained in its last report; see PJCHR, *First Report of the 44th Parliament*, 10 December 2013, pp 103-108.

25 FRLI No: F2013L02101. The committee's comments on this instrument are contained elsewhere in this report.

Non-refoulement obligations and the right to an effective remedy

2.145 The committee notes that the statement of compatibility mentions the right to non-refoulement and the government's intention to fulfil its obligations in this respect through (unspecified) administrative arrangements:

The amendment does not substantively alter the rights and interests of persons whom this amendment would affect as all of Australia's non-refoulement obligations will be assessed, ensuring that no person who engages non-refoulement obligations will be returned to the country from which they have sought protection. The form of administrative arrangements in place to support Australia meeting its non-refoulement obligations is a matter for the Government.²⁶

2.146 Elsewhere in this report, the committee has detailed its concerns with regard to the proposed repeal of the complementary protection provisions in the Migration Act and the intention to reinstate administrative arrangements to deal with such claims. It is not clear whether a consequence of the UMA Regulation is that all protection claims by unauthorised arrivals, including those arising under the Refugee Convention, will be dealt with administratively.

2.147 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification of the refugee determination processes that would apply to unauthorised arrivals, as a result of these changes, in particular whether they will have access to merits review at the Refugee Review Tribunal.

26 Statement of compatibility, p 2.