

Migration Amendment Regulation 2013 (No. 4)

FRLI: F2013L01014

Portfolio: Immigration and Border Protection

Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013

PJCHR comments: First Report of 44th Parliament, tabled 10 December 2013

Response dated: 20 January 2014

Information sought by the committee

3.45 The committee sought further information on this instrument, including whether the amendments apply to persons currently in immigration detention and why the cohort to which the instrument applies is considered to pose a security risk, to determine whether the instrument is compatible with human rights.

3.46 The Minister's response is included as part of an overall response to the concerns raised by the committee in relation to a range of migration legislation. The relevant extract from the Minister's response is attached.¹

Committee's response

3.47 The committee thanks the Minister for his response but notes that the response has not addressed the matters regarding which the committee sought clarification.

3.48 The instrument prescribes a new class of persons to whom a Subclass 070 Bridging (Removal Pending) visa may be granted by the Minister. The new class of persons include a person who, being a non-citizen:

- is an unlawful non-citizen;
- section 195A of the *Migration Act 1958* is not available to the Minister in relation to the grant of a visa to the non-citizen;² and
- the Minister is satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time.

3.49 The instrument inserts a range of new visa conditions into the *Migration Regulations 1994*, which the Minister must impose on a bridging visa granted to a person in the new class of eligible non-citizens and may impose on a bridging visa

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 13.

2 Section 195A of the *Migration Act 1959* provides the Minister the power to grant a person who is in detention under section 189 of the Act a visa where he thinks that it is in the public interest to do so.

granted to a detainee under section 195A of the Act. Such conditions include, for example, requiring approval by the Minister for employment in certain industries or for changes in employment, refraining from engaging in certain activities, and not communicating or associating with certain entities.

3.50 The Minister's response simply states that the conditions will apply to 'individuals who have been assessed to be a security risk', without explaining the basis for such an assessment. For example, it is not clear who will conduct the assessment or if such assessments will be subject to appeal or review.

3.51 The Minister's response further states that:

The amendments apply to detainees who are currently in immigration detention and to persons whose current immigration detention has been found to be unlawful. It is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court.³

3.52 In its initial examination of this instrument, the committee noted that the instrument imposes limitations on a range of rights, including the right to privacy, the right to freedom of movement, the right to freedom of association and the right to work. However, the committee was unable to assess the compatibility of this instrument due to an absence of information about the cohort of persons to whom the amendments are intended to apply and the basis for the conclusion that this class of persons poses a security risk.⁴

3.53 The Minister's response has not provided any further elucidation on these issues. It remains unclear to whom the amendments will apply and why it is necessary to impose such conditions on this cohort. In particular, it is unclear:

- On what basis the detention of this cohort has been (or will be) found to be unlawful by a court;
- If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister;
- If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful);

3 Minister's response, p 13.

4 PJCHR, *First Report of the 44th Parliament*, 10 December 2013, p 123.

- On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments; and
- Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.

3.54 The committee acknowledges that the amendments may promote the right not to be arbitrarily detained in so far as they result in the release of persons from immigration detention.

3.55 However, as a result of the conditions subsequently imposed on such persons, the instrument also limits a range of rights. Such limitations must be justified as reasonable, necessary and proportionate to a legitimate objective.

3.56 As the committee stated previously in relation to this instrument, without understanding the above matters, the committee is unable to assess why the amendments are necessary on security grounds and accordingly whether they are reasonable and proportionate to achieving the objective sought. The committee therefore remains unable to assess whether the instrument is compatible with human rights.

3.57 The committee intends to write to the Minister for Immigration and Border Protection to again seek further clarification on the effect of these provisions, in particular clarification as to the matters set out above. If the Minister is unable to provide such information, the committee requests that the Minister provide the committee with details of why he is unable to provide the information.



The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
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Parliament House
CANBERRA ACT 2600

Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letter of 10 December 2013 in which further information was requested on the following legislative instruments:

- *Migration Act 1958 – Determination under subsection 262(2) – Daily Maintenance Amounts for Persons in Detention – October 2013* [F2013L01785];
- *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* [F2013L01218];
- *Migration Amendment (Temporary Protection Visas) Regulation 2013* [F2013L01811];
- *Migration Amendment Regulation 2013 (No. 4)* [F2013L01014]; and
- *Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern* [F2013L01185].

My responses in respect of the above-named legislative instruments are attached.

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

20 / 1 / 2014

Migration Amendment Regulation 2013 (No. 4) [F2013L01014]

Migration Amendment Regulation 2013 (No.4) (the amendment regulation) was made on 13 June 2013 to prescribe a new class of persons as eligible non-citizens for the purpose of the grant without application of a Subclass 070 (Bridging (Removal Pending)) visa, being a non-citizen who:

- is an unlawful non-citizen; and
- section 195A of the Act is not available to me in relation to the grant of a visa to the non-citizen; and
- I am satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time.

The amendment regulation also inserts new visa conditions into the *Migration Regulations 1994* that I must impose on a Subclass 070 (Bridging (Removal Pending)) visa granted to a person in the new class of eligible non-citizens and that I may impose on a Subclass 070 (Bridging (Removal Pending)) visa if I have granted the visa to a detainee under section 195A of the Act.

Application of amendment to persons who are currently in immigration detention

The amendments apply to detainees who are currently in immigration detention and to persons whose current immigration detention has been found to be unlawful. It is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court.

Security risk of cohort

The conditions will apply to individuals who have been assessed to be a security risk.

