

Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern

FRLI: F2013L01185

Portfolio: Immigration and Border Protection

Tabled: House of Representatives, 12 November 2013 and Senate, 28 June 2013

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

Response dated: 20 January 2014

Information sought by the committee

3.58 The committee sought clarification as to whether the instrument is compatible with the right to work and the right to equality and non-discrimination.

3.59 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

3.60 The committee thanks the Minister for his response.

3.61 The purpose of this instrument is to specify the chemicals of security concern referred to in the Migration Amendment Regulation 2013 (No. 4). The regulation allows for certain conditions to be imposed on persons to whom a Subclass 070 (Bridging (Removal Pending)) visa is granted by the Minister. Such conditions include requirements that the Minister approve employment involving chemicals of security concern and the acquisition of certain goods relating to chemicals of security concern. The committee has also considered the regulation in this report.

3.62 The Minister's response states that the limitation which results from this instrument (in combination with the regulation) on the right to work is necessary for:

the protection of the Australian community and national security. Persons subject to this limitation will have been assessed to be a risk to security. For this reason, this measure is both lawful and legitimate within the meaning of [the right to work].

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, pp 14-15.

3.63 Similarly, the Minister's response states that the instrument (in combination with the regulation) is compatible with the right to equality and non-discrimination because:

persons subject to the requirement to seek my approval prior to commencing specified occupations have been assessed as a security risk. Further, the protection of the Australian community and Australia's national security is a purpose which is legitimate under the objectives of the Covenant. The requirement is proportionate to the aim of protecting the Australian community and Australia's national security because it allows me to assess each request individually and does not automatically prevent all members of the cohort from taking up employment in the occupations specified.

3.64 The committee notes that this instrument raises the same issues as those raised by the regulation. In relation to the regulation, the committee has set out a range of matters in relation to which it needs further information before being able to assess whether the regulation is compatible with human rights. This includes information on the particular cohort to which the regulation applies and the basis for, and process by which, such persons are assessed as posing a security risk.

3.65 Without this information, the committee is unable to assess whether the limitations on the rights to work and equality and non-discrimination imposed by this instrument (in combination with the regulation) are necessary, reasonable and proportionate to achieving a legitimate objective (that is, the protection of the community and Australia's national security).

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Legislative Instrument IMMI 13/083 Definition of Chemicals of Security Concern (Subclauses 8551(2) and 8560(2)) (the legislative instrument) commenced on 1 July 2013 and specifies the chemicals of security concern referred to in *Migration Amendment Regulation 2013 (no.4)*.

The legislative instrument is an important element of the Government's strategy to manage the immigration status of illegal maritime arrivals and to protect the Australian community and Australia's national security.

Right to work

Article 6.1 of the ICESCR requires that:

1. *The States Parties to the ...Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

However, article 4 of the ICESCR provides that:

...the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.

For the purposes of article 4 of the ICESCR, the requirement that the visa holder seek my approval before commencing a specified occupation is lawful by virtue of the registration of the legislative instrument on the Federal Register of Legislative Instruments. Further, the purpose of the limitation on the recognition of the right to work is the protection of the Australian community and national security. Persons subject to this limitation will have been assessed to be a risk to security. For this reason, this measure is both lawful and legitimate within the meaning of article 4 of ICESCR.

Equality and non-discrimination

Article 2.1 of the ICCPR requires that:

1. *Each State Party to the present Covenant undertakes to respect and ensure 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.*

Article 26 of the ICCPR similarly states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other option, national or social origin, property, birth or other status.

However, not all treatment that differs among individuals or groups on any of the grounds mentioned above will amount to prohibited discrimination. The UN Human Rights Committee has recognised that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

As noted above, persons subject to the requirement to seek my approval prior to commencing specified occupations have been assessed as a security risk. Further, the protection of the Australian community and Australia's national security is a purpose which is legitimate under the objectives of the Covenant. The requirement is proportionate to the aim of protecting the Australian community and Australia's national security because it allows me to assess each request individually and does not automatically prevent all members of the cohort from taking up employment in the occupations specified. As such, the measure does not offend the principles of equality and non-discrimination as articulated in articles 2.1 and 26 of the ICCPR.