Migration Amendment Bill 2013

Portfolio: Immigration and Border Protection
Introduced: House of Representatives, 12 November 2013
Status: Before Senate
PJCHR comments: Second Report of the 44th Parliament, tabled 11 February 2013
Response dated: 28 February 2014

Information sought by the committee

3.163 This bill proposes to amend the *Migration Act 1958* to:

- specify that a review decision by the Refugee Review Tribunal or the Migration Review Tribunal (MRT) is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant (Schedule 1);
- specify the operation of the statutory bar on making a further protection visa application (Schedule 2); and
- make it a criterion for the grant of a protection visa that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (Schedule 3).

3.164 The committee sought a range of further information with regard to the amendments in each of these Schedules to determine whether the bill was compatible with human rights.

3.165 The Minister's response was provided 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.

Committee's response

3.166 The committee thanks the Minister for his response.[1]

3.167 In light of the information provided, the committee makes no further comment on the amendments proposed in Schedule 1 to the bill. The committee notes that it would have been helpful for this information to have been included in the statement of compatibility.

3.168 The committee notes the Minister's explanations in relation to the amendments proposed in Schedule 2 to the bill. The committee retains its concerns about utilising administrative processes to deal with complementary protection claims. The committee's views on this issue are set out in its comments on the

1 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, pp 2-9.

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.[2]

3.169 The committee notes that the Minister's reply has provided only a partial response to the committee's questions with regard to the amendments in Schedule 3 to the bill. The response states that the relevant information 'will be provided at a later date'.[3] The committee notes that these are key matters that go towards the compatibility or otherwise of these provisions. Without the necessary information, the committee is unable to conclude that the amendments in Schedule 3 are compatible with human rights.

3.170 The committee has decided to defer finalising its views on the bill's compatibility with human rights, pending receipt of the Minister's full response to the issues raised by the committee in relation to the amendments in Schedule 3 to the bill.

2 See, Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, 11 February 2014, pp 45-62; and pp 51-74 of this report.

3 Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 28 February 2014, p 7.

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

Senator Dean Smith
Chair
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Dear Senator

Response to questions received from Parliamentary Joint Committee on Human Rights

Thank you for your letters of 11 February 2014 in which further information was requested on the following bills and legislative instruments:

- *Migration Amendment Bill 2013*;
- *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013*;
- *Customs Amendment (Record Keeping Requirements and Other measures) Regulation 2013* [F2013L01968];
- *Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year – IMMI 13/156* [F2013L02038];
- *Migration Amendment (Disclosure of Information) Regulation 2013* [F2013L02101];
- *Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013* [F2013L02102];
- *Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155* [F2013L02105]; and
- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* [F2013L02104].

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

I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
25/3/2014

Migration Amendment Bill 2013 – Schedule 1

Could the measures in Schedule 1 adversely affect the ability of a person to seek judicial review of a decision made by the MRT or the RRT?

Sections 477 and 477A of the Migration Act, which respectively prescribe the time limit on seeking judicial review with the Federal Circuit Court and the Federal Court, provide that the application to the court must be made within 35 days of the date of the migration decision (which includes, inter alia, a decision of the MRT or the RRT).

The 'date of the migration decision', in the case of a written decision of the MRT or the RRT, means the date of the written statement of the decision. In the case of an oral decision, it means the date of the oral statement of decision.

Clarifying that a decision on review (other than an oral decision) is taken to be made by the making of the written statement, and on the day and at the time the written statement is made, does not diminish a person's right or ability to seek judicial review of the decision. Nor does the amendment affect the existing requirement for an application to the court to be made within 35 days of the date of the written statement of the decision.

In addition, both the Federal Circuit Court and the Federal Court have the ability, under sections 477 and 477A of the Act, to extend the 35 day period if the court considers it appropriate and necessary (to grant the extension) in the interest of the administration of justice. This discretion is not in any way affected by the measures contained in Schedule 1.

Are there any consequences for failing to comply with the notification requirements in the Migration Act, including whether any time bar for exercising review rights may be lifted as a result?

Under the Migration Act, a person who is entitled to merits review of a decision must make an application to the MRT or the RRT within a prescribed, non-extendable period. The prescribed period commences from when the person is notified of the decision according to law.

In circumstances where there has been a failure to comply with the notification requirements (such as a failure to send the notification to the correct address), the person is not taken to be notified. This means that the prescribed period, or time limit, for seeking merits of the decision does not commence.

Therefore, if there has been a defective notification due to a failure to comply with the notification requirements, the person cannot be 'out of time' to seek merits review. In other words, there is no need for a mechanism to allow the time limit for seeking merits review to be lifted, because the time limit will not commence due to the defective notification.

In relation to applications for judicial review of a decision of the MRT or the RRT, as stated in the response to Question 1, the time limit for making an application to the Federal Circuit Court or the Federal Court is calculated by reference to the date of the written statement of the review decision; it is not dependent on the effectiveness of the MRT or the RRT's notification of its decision on review. In any event, where a person is out of time to seek judicial review, the court has the ability to extend the time if it considers it appropriate and necessary to do so.

What are the implications of deeming that a decision by the Minister or his delegate to refuse, cancel or revoke a visa is made on the day and time when a record of the decision is made (irrespective of whether that decision is notified to the person), and will the changes in Schedule 1 adversely affect the ability of a person to challenge the decision?

Deeming a decision by the Minister or his delegate to be made on the day and at the time when a record of the decision is made will provide clarity and certainty about when the Minister or his delegate's decision making power is exercised or spent.

This will facilitate greater administrative efficiency by enabling the Minister or his delegate to move on once a decision is made, irrespective of whether the person has been properly notified of the decision. Separating the decision making process from its effective notification will ensure that the Minister or his delegate would not be required to re-open and re-visit a decision because of a defective notification which is discovered later (which may be quite some time after the decision is already made).

Clarifying the precise moment when a decision is taken to be made by the Minister or his delegate will not affect a person's ability to challenge the decision. The person remains able to seek merits review (where it is available) or judicial review on the basis that there is a reviewable decision. The measures in Schedule 1 simply put the timing of the decision beyond doubt.

Migration Amendment Bill 2013 – Schedule 2

How many people are likely to be affected by the proposed bar on further Protection visa applications?

Since the SZGIZ decision was handed down on 3 July 2013, there have been over 760 repeat Protection visa applications to date. If this amendment does not proceed, the number of repeat Protection visa applications could be expected to grow significantly.

In terms of the decision in SZGIZ, there are 4 criteria on which a person could be eligible for the grant of a Protection visa:

1. by engaging Australia's protection obligations under the Refugees Convention.
2. by engaging Australia's protection obligations under complementary protection provisions.
3. by being the family member of another person who meets 1.
4. By being the family member of another person who meets 2.

If this amendment does not proceed, it would have a number of implications.

All applicants who were assessed and refused Protection visas on Refugees Convention grounds before the commencement of the complementary protection provisions on 24 March 2012, will be able to make another application on complementary protection grounds. These persons, in the majority of cases, will already have had their complementary protection claims assessed administratively through consideration of the exercise of the ministerial intervention powers, or as part of the pre-removal clearance processes. It is contrary to the Government's policy intention that they be able to have those claims assessed again through a repeat Protection visa application process.

In addition, current and future refused Protection visa applicants who will have already had their application assessed against both the Refugees Convention and complementary protection grounds, will also be able to make repeat Protection visa applications on the basis of being the family member of another person who claims to engages Australia's protection obligations under either the Refugees Convention or complementary protection grounds.

For this reason, it is not possible to quantify or even approximate the number of people who might be affected by the proposed bar on further Protection visa applications. In theory, the department may be able to estimate the number of applicants refused before 24 March 2012 who may now make further Protection visa applications. But it would not be possible to predict the behaviour of an unknown, but potentially large, group of applicants, who may now lodge further Protection visa applications on a basis that is different from the one relied upon in their previously unsuccessful application (for example, a person who previously applied unsuccessfully in their own right, may now seek to reapply as a member of the family unit of another person, and vice versa).

Have the individuals in this cohort been assessed by the department for any complementary protection claims?

Applicants who made their Protection applications on or after 24 March 2012 will have had any claims for complementary protection automatically assessed under the current criteria for the grant of a Protection visa.

Applicants who made their Protection visa applications before 24 March 2012 (on the basis of Refugees Convention only), and who have raised complementary protection claims, would also have had their complementary protection claims assessed under an administrative process. In the majority of cases this will have been through the Ministerial intervention process, or as part of a pre-removal clearance process, where the applicant was being considered for removal by the department.

Has anyone in this cohort received an alternative visa to remain in Australia as a result of the Minister exercising his discretionary powers under the Migration Act?

Yes. There are some applicants who, following a decision made before 24 March 2012 to refuse to grant them a Protection visa, were referred to the Minister for consideration under section 417 of the Migration Act, because their request for ministerial intervention met the guidelines for referral. Around 100 of these applicants are estimated to have been granted a visa by the Minister, although the department is not able to precisely quantify this cohort of applicants.

The department is continuing to refer cases to the Minister for consideration, including those refused before 24 March 2012 which were not assessed against complementary protection provisions and are therefore potentially affected by the Federal Court's decision in SZGIZ, as well as cases which are decided after 24 March 2012 (and were therefore assessed against both the Refugees Convention as well as complementary protection provisions) but which nonetheless meet the guidelines for referral.

What is the interaction between the measures in Schedule 2 and those proposed by the Migration Amendment (Regaining Control Over Australia's Protection Obligation) Bill 2013, and are these measures a consequence of the proposed repeal of the complementary protection legislation?

Whilst the measures in Schedule 2 will mean that an applicant who was refused a Protection visa before 24 March 2012 will not be able to make a further Protection visa application on the basis of complementary protection claims, the measures proposed are not a consequence of the proposed repeal of the complementary protection legislation by the Migration Amendment (Regaining Control Over Australia's Protection Obligation) Bill 2013.

The measures in that Bill and the measures in Schedule 2 are aimed at achieving different objectives.

The purpose of the Regaining Control Bill is to ensure that all Protection visa applications which are not yet decided on commencement date, and all future Protection visa applications, are decided on the basis of the Refugees Convention criterion only.

The purpose of the measures in Schedule 2 is to prevent unsuccessful Protection visa applicants from making unmeritorious repeat Protection visa applications on an alternative ground each time as a means of delaying their departure from Australia.

Even if the Regaining Control Bill is passed so that the Refugees Convention criterion becomes the only core criterion against which a Protection visa application will be assessed, it does not mean that the measures in Schedule 2 are unnecessary. This is because Schedule 2 is not just about preventing repeat Protection visa applications on complementary protection ground; it is also to prevent repeat Protection visa applications based on being a member of the family unit of another person who claims to engage Australia's protection obligations. Indeed, the latter was the reason why section 48A was introduced in the first place.

Therefore, irrespective of whether the complementary protection legislation is repealed by the Regaining Control Bill, the measures in Schedule 2 are necessary to ensure that section 48A can operate as intended to prevent the making of unmeritorious repeat Protection visa applications by unsuccessful Protection visa applicants.

Migration Amendment Bill 2013 – Schedule 3

Whether the 'arrangements for independent review' mentioned in the statement of compatibility include the following features:

- Meet the 'quality of law' test;
- Permit review of the substantive grounds on which the person is held in order to determine whether the detention is arbitrary within the meaning of the ICCPR and not merely lawful under Australian law;
- Result in binding outcomes, including the power to order release if the detention is not justified;
- Include regular review of the continuing necessity of the detention, including the ability of the person to initiate a review, for example, in light of new information; and
- Provide sufficient opportunity for the person to effectively challenge the basis for the adverse security assessment.

A response to this question from the Committee will be provided at a later date.

Whether the bar on refugees accessing merits review by the AAT for their adverse security assessments is consistent with the right to equality and non-discrimination in article 26 of the ICCPR.

A response to this question from the Committee will be provided at a later date.

Whether and what steps have been put in place to ensure that the circumstances that were the subject of consideration by the HRC [UN Human Rights Committee] will not arise again.

A response to this question from the Committee will be provided at a later date.

Do refugees with adverse security assessments receive an individualised assessment as to whether less restrictive alternatives to closed detention are available and appropriate for their specific circumstances (including, for example, community detention or conditional release with requirements such as to reside at a specified location, curfews, travel restrictions, regular reporting or possibly even electronic monitoring), and, if not, how the absence of such individualised assessment and/or options may be considered to be a proportionate response?

When a refugee is subject to an adverse security assessment, the Australian Security Intelligence Organisation (ASIO) has assessed that it would be inconsistent with Australia's national security for a person to be granted a visa.

It has been the long standing, clear and well publicised position of the Australian Government that refugees who pose an unacceptable security risk to the Australian community and are subject to an adverse security assessment from ASIO will remain in an immigration detention facility.

My department gives careful consideration to the most suitable placement of refugees with an adverse security assessment in immigration detention. Placement decisions for refugees with an adverse security assessment are made on a case-by-case basis, taking into account the person's individual level of security risk and their care needs. Accommodation decisions are subject to regular reviews to ensure that the placement remains appropriate, including through departmental senior officer and Commonwealth Ombudsman reviews.

Accordingly, taking into account the protection of the Australian community, continued immigration detention arrangements, including detention placement options, for refugees who are the subject of an adverse security assessment from ASIO are considered reasonable, necessary and proportionate to the security risk that they are found to pose.

Are the amendments in Schedule 3 to the bill compatible with the prohibition against torture, cruel, inhuman or degrading treatment, given that they may result in the indefinite detention of a refugee who is deemed a security risk by ASIO?

The proposed amendment to section 36 of the Migration Act 1958 contained in Schedule 3 of the bill relates to Australia's obligation not to return a person who has been found to engage Australia's protection obligations back to the country where they would face persecution or significant harm.

The proposed amendment to section 36 reflects the government's position that a person who engages Australia's protection obligations but who has an adverse security assessment should not be granted a protection visa; it does not determine the management of a refugee with an adverse security assessment who engages Australia's protection obligations while their immigration status is resolved. That is a separate policy decision.

The conditions of immigration detention and the services provided to immigration detainees, including medical services, accommodation and food are designed to ensure that detainees are treated with humanity and respect for the inherent dignity of the human person. Any allegations of harm to detainees are promptly investigated and, if necessary, acted upon.

The amendments in Schedule 3 to the bill do not affect existing avenues for judicial review of the adverse security assessment from ASIO. Additionally, the amendments do not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Furthermore, the amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

What steps have been put in place to ensure that the circumstances that were the subject of consideration by the United Nations Human Rights Committee will not arise again?

The Attorney-General is the Minister responsible for responding to adverse views of the United Nations Human Rights Committee (UN HRC). However, I am advised that the Government is currently considering its response to the UN HRC's views in this matter. While the views of the UN HRC are not binding as a matter of law, they are to be considered in good faith by the Government, and taken into account in the interpretation of Australia's obligations under the ICCPR. The Government has notified the UN HRC that it will respond as soon as possible to the UN HRC's views. It is the general practice of the Government not to publicly comment in detail while considering such views.