

The committee has sought further comment in relation to the following instruments

Migration Act 1958 - Determination of Granting of Protection Class XA Visas in 2013/2014 Financial Year - IMMI 14/026

FRLI: F2014L00224

Portfolio: Immigration and Border Protection

Tabled: House of Representatives and Senate, 6 March 2014

Summary of committee concerns

2.1 The committee seeks further information to determine the compatibility of this instrument with human rights.

Overview

2.2 This instrument operates to set the cap for the Protection (Class XA) visa (protection visa). It determines that the maximum number of protection visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is 2773.¹ The instrument applies to all applicants who have applied for a protection visa, including applicants who have applied before the implementation of this cap.

2.3 The explanatory statement states that:

The purpose of this Legislative Instrument is to support the Government's determination that no more than 2750 permanent Protection visas be granted to applicants who lawfully applied onshore under the onshore component of the 2013/2014 Humanitarian Programme. The figure of 2773 takes into account the temporary protection visas that were granted in 2013/2014.²

1 Section 85 of the *Migration Act 1958* provides that the Minister may determine by instrument in writing the maximum number of the visas of a specified class that may be granted in a specified financial year.

2 Explanatory statement, p 1.

Compatibility with human rights

Statement of compatibility

2.4 The instrument is not accompanied by a statement of compatibility as it is not defined as a disallowable legislative instrument within the strict meaning of section 42 of the *Legislative Instruments Act 2003*.³

Committee view on compatibility

2.5 The committee notes that it had commented on a similar instrument in its Second Report of the 44th Parliament.⁴ That instrument was subsequently revoked by the Minister but the committee took the opportunity to outline some of the human rights issues that the instrument gave rise to, as it was legislation that had come before the Parliament.

2.6 The committee notes that a human rights compatibility assessment, addressing the committee's previously identified concerns, has not been provided for this instrument. The committee reiterates its view that legislative instruments which have the potential to limit human rights should be accompanied by a statement of compatibility, even if one is not technically required under the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁵

2.7 The committee understands that there are approximately 5,800 persons in immigration detention, 3,300 people in community detention, and 22,900 people in the community on bridging visas.⁶ The committee considers that to the extent that the instrument results in a freeze on processing, it may give rise to issues of compatibility with a number of human rights.

2.8 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification on the following issues:

- **whether the cap of 2773 determined for this financial year has already been reached; and if so,**

3 Section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires statements of compatibility only for legislative instruments within the meaning of section 42 of the *Legislative Instruments Act 2003*. The committee's scrutiny mandate, however, is not limited by the section 42 definition and extends to all legislative instruments: see section 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4 Parliamentary Joint Committee on Human Rights (PJCHR), *Second Report of the 44th Parliament*, 11 February 2014, pp 101-102.

5 See, PJCHR, *Second Report of the 44th Parliament*, 11 February 2014, p 101, para 2.32. See also, PJCHR, *Fourth Report of the 44th Parliament*, 18 March 2014, pp 83-84, paras 3.107-3.109.

6 Mr Martin Bowles PSM, Secretary, Department of Immigration and Border Protection, Supplementary Budget Estimates Hansard, 19 November 2013, p 37.

- **whether the capping on the issuing of protection visas to those held in immigration detention is compatible with the prohibition on arbitrary detention,⁷ the right to humane treatment,⁸ the right to health,⁹ and children's rights;¹⁰**
- **whether the capping on the issuing of protection visas to those who are in the community on bridging visas is compatible with the right to work,¹¹ the right to social security,¹² and the right to an adequate standard of living;¹³ and**
- **whether the capping on the issuing of protection visas is compatible with rights relating to the protection of the family.¹⁴**

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

8 Article 10 of the ICCPR.

9 Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

10 Articles 3(1), and 37(b) of the Convention on the Rights of the Child (CRC).

11 Article 6 of the ICESCR.

12 Article 9 of the ICESCR.

13 Article 11 of the ICESCR.

14 Articles 17 and 23 of the ICCPR; articles 3(1), 10, 20 and 22 of the CRC.

