

Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102]

Portfolio: Immigration and Border Protection

Authorising legislation: Migration Act 1958

Last day to disallow: 13 May 2014 (Senate)

Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105]

Portfolio: Immigration and Border Protection

Authorising legislation: Migration Regulations 1994

Last day to disallow: Exempt from disallowance

Purpose

2.55 The Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 and the Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 introduced a mandatory code of behaviour as an additional visa condition for certain Bridging E (Class WE) visa (BVE) holders. A person who breaches the code may be returned to immigration detention, transferred to Nauru or Manus Island, or have their income support reduced or terminated.

Background

2.56 The committee initially reported on the instruments in its *Second Report of the 44th Parliament*. The committee made further comments on the instruments in its *Fourth Report of the 44th Parliament*.

2.57 The committee notes that the Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 is currently subject to a notice of motion to disallow which expires on 14 July 2014.¹

1 On 13 May 2014, a notice of motion to disallow the Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 was given. This extended the disallowance period by 15 sitting days to 14 July 2014. See *Journals of the Senate*, 13 May 2014, p. 769.

Committee view on compatibility

Multiple rights

Limitation of human rights

2.58 The committee noted that the introduction of a mandatory code of behaviour for BVE holders risked limiting a range of human rights and sought further information from the Minister for Immigration and Border Protection to ascertain whether the amendments were aimed at achieving a legitimate objective and were reasonable proportionate to that objective.

Legitimate objective

Minister's response

3.120 The committee, however, notes that the government must show that there are objective and reasonable grounds for adopting a specific behaviour regime applicable only to BVE holders and that any asserted factual basis for the differential treatment is supported by evidence.

3.121 While the committee accepts that the measures are primarily aimed at public safety objectives, the committee remains concerned that the necessity for these measures has not been adequately demonstrated.

I note the Committee's views in this regard. I would also reiterate that the introduction of the Code of Behaviour provides the appropriate tools to support the education of BVE holders about community expectations and acceptable behaviour and supports the taking of compliance action, including consideration of visa cancellation, where BVE holders do not behave appropriately or represent a risk to the public. If not for my decision or the decision of previous Ministers to temporarily release these non-citizens from detention on a BVE granted in the public interest, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act.²

Committee response

2.59 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.60 However, the committee notes that minister has not demonstrated objective and reasonable grounds for adopting a specific behaviour regime which is applicable only to BVE holders.

2 See Appendix 2, Letter from Mr Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, pp 5-8.

Visa cancellation powers

Minister's response

3.132 For these measures to be proportionate, the committee considers that the power to cancel a BVE holder's visa for breach of the code should only be possible when the decision-maker is satisfied:

- that the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power; and
- that the exercise of the power is no more restrictive than is required in the circumstances.

3.133 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As stated in my previous response, the decision to cancel a visa based on a breach of the Code of Behaviour is discretionary. Existing legislation requires that the person must be provided with notification and an opportunity to demonstrate that cancellation grounds either do not exist, or that their visa should not be cancelled. The combination of this discretionary cancellation framework and the sanctions framework supporting the Code of Behaviour enable decision makers to make proportionate responses based on the individual merits of each case where the Code of Behaviour is found to have been breached.

Committee response

2.61 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.62 However, the committee reiterates its view that in order for these measure to be considered proportionate, appropriate legislative amendments should be made to the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 in order to mitigate the broad and discretionary nature of the cancellation powers.³

Exclusion of merits review

Minister's response

3.134 The committee notes that merits review of a decision to cancel a BVE for a breach of the code will not be available if the Minister issues a

3 See the committee's consideration of the Migration Amendment (Subclass 050 and Subclass 051) regulation 2013 [F2013L01218] in this report.

conclusive certificate. pursuant to section 399 of the Migration Act, stating that it would be contrary to the national interest to change a decision or for the decision to be reviewed. The committee has already noted its concerns about the exclusion of merits review for BVE cancellation decisions subject to a conclusive certificate in its comments on the Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013.

3.135 The Minister's response says that 'historically, this power has been exercised rarely'. The response does not explain whether and how the exercise of this power would be appropriate in the context of decisions to cancel a BVE for a breach of the code.

3.136 The committee intends to write to the Minister for Immigration and Border Protection to seek clarification as to the types of situations envisaged and possible examples where it would be appropriate to issue a conclusive certificate for visa cancellation decisions relating to a breach of the code of behaviour.

I am not prepared to speculate about the type of situations where it may be appropriate for me to issue a conclusive certificate. I may issue a conclusive certificate if I believe it would be contrary to the national interest for a decision to be reviewed. The courts have accepted that the term 'national interest' is a broad term and that such a decision is one that is entrusted to me as Minister.

Committee response

2.63 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.64 The committee notes that, in circumstances where a cancellation decision results in the re-detention of the person, the relevant issue is whether the availability of judicial review only (and the exclusion of merits review) is consistent with the prohibition against arbitrary detention in article 9 of the International Covenant on Civil and Political Rights (ICCPR).

2.65 The committee reiterates its view that the minister has not provided sufficient reasons to demonstrate that the exclusion of merits review for BVE cancellation decisions, that are subject to a conclusive certificate, is consistent with article 9 of the ICCPR.

Reduction or termination of income support

Minister's response

3.139 The committee notes that:

- Payment for income support under the CAS and ASAS is 89% of the equivalent Centrelink Special Benefit (which is comparable to 89% of Newstart Allowance).
- Decisions to reduce or terminate income support payments are not subject to merits review.
- BVE holders who arrived by boat after 13 August 2012 (that is, the majority of BVE holders) do not have permission to work.

3.140 Our predecessor committee had noted that the absence of work rights combined with the provision of minimal support for asylum seekers on BVEs risks resulting in their destitution, contrary to the right to work and an adequate standard of living in article 6 and 11 of the ICESCR and potentially the prohibition against inhuman and degrading treatment in article 7 of the ICCPR.

3.141 In light of the already minimal support that is provided to BVE holders, the committee is concerned that any further reduction to their income support payments is likely to have a disproportionately severe impact on the person and their family. The committee is hard pressed to see how terminating a BVE holder's income support in these circumstances could ever be a reasonable option given that the person is also barred from working.

3.142 For these measures to be proportionate, the committee considers that:

- the power to sanction a BVE holder for breach of the code by reducing or terminating their income support must only be possible if the decision maker is satisfied that such action will not result in the destitution of the person or their family; and
- decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.

3.143 The committee intends to write to the Minister for Immigration and Border Protection to recommend that appropriate legislative amendments be made to give effect to the requirements set out above.

I note the Committee's recommendation. As explained previously, income support payments and support under the Asylum Seeker Assistance Scheme (ASAS) and Community Assistance Support (CAS) is not a legislative entitlement. The provision of this support is provided administratively, and to prescribe within legislation the circumstances in which a decision to reduce or terminate these types of payments would therefore not be appropriate. The decision making framework that has

been established to support the consideration of using this particular sanction includes natural justice provisions which will enable the circumstances of each case to be assessed on a case by case basis. No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution.

Committee response

2.66 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.67 The committee welcomes the minister's assertion that 'No decision to reduce or terminate a person's income support payments would be made where that decision would result in destitution'.

2.68 However, the committee reiterates its view that, in order for the measure to be considered proportionate, appropriate legislative amendments should be made with the effect that:

- **the decision-maker is required to be satisfied that terminating or reducing income support of a BVE holder will not result in the destitution of the person or their family; and**
- **that decisions to reduce or terminate a person's income support for breach of the code must be subject to independent merits review.**

Oversight and monitoring

Minister's response

3.146 The committee accepts that the Immigration Department has strong relationships with service providers dealing with BVE holders in the community and this provides an important channel for relevant information to be passed to the department.

3.147 The committee, however, notes that these processes appear to be ad hoc rather than a systematic approach to monitoring the impacts of the behaviour code on individuals in the community. The committee considers that there should be express monitoring mechanisms in place to assess the impact of these measures on BVE holders, including regular opportunities to consult with the affected individuals and other interested parties.

I note the Committee's views. My department has well established reporting arrangements and communication channels in place under the Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) programmes, including an incident reporting protocol. The department's engagement with service providers also includes a schedule of monthly meetings and quarterly conferences, as well as meetings on specific issues such as the code of behaviour. These arrangements provide the department with information on specific incidents affecting individual

BVE holders, and opportunities for service providers to raise issues of broader concern. Through these processes there is oversight and monitoring of substantial issues affecting BVE holders.

Committee response

2.69 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of this matter.

2.70 However, the committee reiterates its view that monitoring mechanisms should be systematic in nature.

Conclusion

2.71 The committee thanks the Minister for Immigration and Border Protection for his response and has concluded its examination of these instruments.

2.72 However, noting the minister's advice, the committee reiterates its previous statements that limitations on rights must not only be reasonable, necessary and proportionate to a legitimate objective, but also be prescribed by law. That is, limitations must have a clear legal basis, including being publicly accessible and not open-ended. Finally, the committee reiterates its view that limitations on fundamental rights based solely on administrative discretion are likely to be impermissible under human rights law.

2.73 On the basis of the information provided, the committee is unable to determine that the Migration Amendment (Bridging Visas – Code of Behaviour) Regulation 2013 [F2013L02102] and the Code of Behaviour for Public Interest Criterion 4022 – IMMI 13/155 [F2013L02105] are compatible with human rights.