
Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 [F2013L01218]

Portfolio: Immigration and Border Protection

Authorising legislation: Migration Act 1958

Last day to disallow: 4 March 2014 (Senate)

Purpose

2.82 The Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 amends the *Migration Regulations 1994* to strengthen cancellation powers and create a new condition in relation to Bridging E (Class WE) visas (BVEs). In particular, the regulation amends the Migration Regulations to create:

- a discretionary power to cancel a BVE held by a person who is convicted of, or charged with, an offence in Australia or another country, or who is the subject of an Interpol notice relating to criminal conduct or to threat to public safety; and
- a new discretionary visa condition to, when imposed, prohibit a person who has been granted a BVE from engaging in criminal conduct.

Background

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

Committee view on compatibility

Right to fair hearing

Restriction on due process

2.84 The committee sought clarification from the Minister for Immigration and Border Protection regarding the circumstances in which a court may issue an injunction to prevent a person's removal or their transfer to a regional processing country, and in particular, how and when a person may seek an injunction before the courts and the ground on which the courts may grant an injunction.

2.85 The committee also requested clarification from the Minister with regard to the following statement contained in his response to the committee: 'As a general rule, a visa should not be cancelled where the breach [of a visa] condition occurred in circumstances beyond the visa holder's control'.¹ The committee noted that this appears to give the decision-maker the discretion to cancel the BVE irrespective of

1 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, 20 January 2014, p. 6.

how the breach occurred and that the committee considers that it should be a requirement for the decision-maker not to cancel a BVE where the person is not at fault for the breach.

Minister's response

Under what circumstances may a court issue an injunction to prevent removal or transfer to a regional processing centre

The Federal Circuit Court, the Federal Court and the High Court all have power to issue an injunction to prevent the removal of a person from Australia or the transfer of a person to a regional processing country in certain circumstances. If they were to do so, the Department would be obliged to comply with the terms of that injunction.

The grounds on which a court may grant an injunction are many and varied. The circumstances in which a court may issue an injunction will vary from case to case. However, the legal principles behind the courts' power to issue injunctions are well established. Usually, a court will have to be satisfied that the person has raised a substantive issue to be determined (that is, that the person has raised an arguable case about his or her circumstances that should be resolved by the court). The court will also weigh this issue against the 'balance of convenience'. Occasionally, the courts do not have time to resolve these issues and may simply issue a short injunction to preserve the status quo, while it considers these issues.

A person may seek an injunction by making an application to the court and if necessary the court can convene an urgent hearing.

Clarification of the cancellation of a Bridging Visa E (BYE) where the breach occurred in circumstances beyond the visa holder's control

The Committee requested clarification regarding the following statement: 'As a general rule, a visa should not be cancelled where the breach of [a visa] condition occurred in circumstances beyond the visa holder's control'. The Committee expressed concern that BVEs should not be cancelled where the person is not at fault for the breach.

Decisions to cancel under section 116(1)g of the Act and regulation 2.43(1)(p) of the *Migration Regulations 1994* (the Regulations) or to cancel under section 116(1)(b) of the Act for a breach of visa condition 8564 (the holder must not engage in criminal conduct) are discretionary decisions. That is, decisions under these provisions allow the decision maker to weigh the grounds for cancellation against reasons not to cancel. Under policy, the decision maker may consider a wide range of matters when deciding whether or not to cancel a visa. These matters include, but are not limited to, the circumstances in which the grounds for cancellation arose. The policy advice available for decision makers is as follows:

Cancellation under section 116(1)(g) and regulation 2.43(1)(p)

Where a BVE holder has been charged with, or convicted of, a crime in Australia or overseas, then their visa may be considered for cancellation

using the new grounds at section 116(1)(g) and regulation 2.43(l)(p). These grounds are objective, that is, the visa holder has either been charged or convicted, or they have not. However, even where grounds objectively exist, the discretionary cancellation framework still allows the decision maker to consider 'reasons not to cancel', and the decision maker may consider the circumstances in which the grounds for cancellation arose. This consideration includes whether or not there are extenuating circumstances that outweigh the grounds for cancellation.

Cancellation under section JJ 6(l)(b) for breach of condition 8564

Cancellation is also discretionary where a person's visa is being considered for cancellation in relation to a breach of condition 8564 (the holder must not engage in criminal conduct). In this situation, the decision maker may not only consider the circumstances in which the ground for cancellation arose, but also the reason for, and the extent of the breach. Under policy, the visa should generally not be cancelled where the breach of visa condition occurred in circumstances beyond the person's control.

On the basis of the above policy guidance, a decision-maker considering the cancellation of a BVE pursuant to the above provisions should consider all matters relevant to the cancellation, including the liability of the visa holder for the breach of the relevant visa condition.²

Committee response

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

2.87 However, the committee notes its previous recommendation that the cancellation powers be amended to provide a requirement for the relevant decision-maker to be satisfied that:

- **the circumstances involve a threat to public safety which is sufficiently serious to justify the exercise of the power;**
- **the exercise of the power is no more restrictive than is required in the circumstances; and**
- **the breach did not occur in circumstances beyond the person's control.**

2.88 The committee notes that the Minister for Immigration and Border Protection does not accept the committee's recommendation, and considers that

2 See Appendix 2, Letter from Mr Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014, pp 4-5.

the powers will be administered in compliance with Australia's international obligations.³

2.89 Noting the minister's advice, the committee remains concerned that a BVE may be cancelled under such broad circumstances. The committee notes 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.

3 See Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection, to Senator Dean Smith, Chair PJCHR, 20 January 2014, p 5.