Migration Amendment Regulation 2013 (No. 4) [F2013L01014]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Act 1958
Last day to disallow: 11 December 2013 (Senate)

Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern [F2013L01185]

Portfolio: Immigration and Border Protection
Authorising legislation: Migration Regulations 1994
Last day to disallow: Exempt from disallowance

Purpose

2.102 A bridging visa subclass 070 is ordinarily issued to individuals who are in immigration detention and whose removal from Australia is not practicable at the time. A bridging visa subclass 070 is normally granted using the minister's non-delegable, non-compellable public interest power under section 195A of the *Migration Act 1958* (Migration Act) to grant a visa to a person in immigration detention.

2.103 The Migration Amendment Regulation 2013 (No. 4) amends the *Migration Regulations 1994* to prescribe a new class of persons to whom the minister may grant a bridging visa subclass 070 under the Migration Act. The explanatory statement describes this new class of persons as comprising individuals:

- who do not currently hold a visa;
- who are not in immigration detention (and therefore outside the power of the minister to grant a visa under section 195A of the Migration Act); and
- whose removal from Australia is not practicable at the time.[1]

2.104 The amendments insert a range of new visa conditions into the *Migration Regulations 1994*, which the minister must impose on a bridging visa granted to a person in the new class of eligible non-citizens, and may impose on a bridging visa granted to a detainee under section 195A of the Migration Act. Such conditions include, for example, requiring approval by the minister for employment in certain industries or for changes in employment (such as those involving chemicals of security concern), refraining from engaging in certain activities, and not communicating or associating with certain entities.

1 Explanatory statement, Attachment C, p. 2.

2.105 The purpose of the Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern is to specify the chemicals of security concern referred to in the Migration Amendment Regulation 2013 (No. 4).

Background

2.106 The committee reported on both instruments in its *First Report of the 44th Parliament* and *Third Report of the 44th Parliament*.

Committee view on compatibility

Multiple rights

2.107 The committee raised concerns in relation to the right to work, the right to equality and non-discrimination and the right to freedom of association.

Compatibility of amendments with human rights

2.108 The committee sought further advice from the minister in relation to the Migration Amendment Regulation 2013 (No. 4) as to:

- whether the amendments apply to persons who are currently in immigration detention; and
- whether that particular cohort was considered to pose a security risk (including whether the entire cohort was considered to pose such a risk).

2.109 The committee also noted that, without the above information, it could not assess whether the proposed limitations (on the rights engaged) imposed by the Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern (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).

Minister's response

> 'It remains unclear to whom the amendments will apply.'
>
> The amendments can be used to facilitate the grant of a visa to detainees who are currently in immigration detention and in the event that a detainee's current immigration detention is found to be unlawful by a court.
>
> It is government policy that the amendments will only apply to enable the grant of a visa, without the requirement of an application being made, to persons in immigration detention who have been assessed to be a security risk in the event that their current immigration detention is found to be unlawful by a court.
>
> 'In particular, it is unclear:
>
> - 'On what basis the detention of this cohort has been (or will be) found to be unlawful by a court.'

While it is not appropriate to speculate on possible future court cases, the question of whether or not indefinite immigration detention is lawful has been raised as an issue in cases where the Plaintiff has been the subject of an adverse security assessment.

The current immigration detention of persons who have been assessed to be a security risk has not been found to be unlawful by a court.

- 'If, as the response states, the amendments apply to persons currently in immigration detention and to persons whose current immigration detention has been found to be unlawful, why section 195A of the Migration Act is not available to the Minister.'

While a person is in immigration detention under section 189 of the *Migration Act 1958* (the Act), the power in section 195A of the Act is available to me. If a court finds a person's detention unlawful, they must be released from detention. The power in section 195A is only available in relation to persons in detention. Where a court has found detention to be unlawful the power in section 195A is not available.

Without this Regulation, there is no visa that could be granted without an application being made, meaning that a person ordered to be released by a court would need to be released from detention without a visa. Release without a visa is contrary to the legislation and government policy. The Regulation allows for a person to be quickly granted a Subclass 070 (Bridging (Removal Pending)) visa (RPBV) with appropriate conditions if the court orders their release from immigration detention, allowing for them to be lawfully in the community.

The conditions that must be imposed on the person reflect the necessity to manage, in the most effective way, the risk to security and the Australian community posed by detainees who are the subject of adverse security assessments.

- 'If, as the response states, it is government policy that the amendments will only be applied to persons whose current immigration detention has been found to be unlawful by a court, why the amendments also apply to persons who are currently in immigration detention (and whose detention has presumably not been found to be unlawful).'

Under the Regulation, I have the discretion to impose one or more of the conditions introduced by the amendments on a RPBV if, exercising my non compellable power under section 195A of the Act, I decide to grant this visa to a person currently in immigration detention, whose detention has not been found unlawful by a court.

I consider that the discretion to impose on a RPBV one or more of the conditions introduced by the amendments is a necessary part of the Government's strategy to manage the risk to the safety of the Australian community if detainees who pose a risk to the Australian community are released from immigration detention.

- 'On what basis and by what process a person will be 'assessed to be a security risk' and made subject to the conditions imposed by the amendments.'

The assessment that an individual is a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* - ASIO Act) is made by the Australian Security Intelligence Organisation (ASIO). Security assessments fall within the portfolio responsibilities of the Attorney-General.

In the event that a court finds that the current immigration detention of a person who has been assessed to be a security risk is unlawful under section 189 of the Act, and orders their release from immigration detention, my delegate must impose these conditions on the RPBV. If a person assessed to be a risk to security by ASIO is lawfully detained the imposition of conditions on an RPBV granted pursuant to s195A will be at my discretion.

- 'Why persons who fall within the new class of persons must have such conditions imposed and why other detainees may have such conditions imposed.'

It is Government policy that the amendments will apply only to persons who have been assessed by ASIO to be a risk to security within the meaning of section 4 of the ASIO Act.

In the event that the RPBV is granted by a departmental delegate, the mandatory imposition of the conditions introduced by the amendments will enable the government to manage risks to security and to the Australian community posed by the release from immigration detention of a person who has been assessed to be a risk to security.

Under section 195A, I can grant any visa to a person who is in immigration detention. In the exercise of this power, I am not bound by the Regulations, and can choose to exercise the power if I consider it to be in the public interest. If I grant the RPBV under section 195A, the discretionary imposition of the conditions introduced by the amendments will allow me to manage risks to the Australian community, in line with my consideration of what is in the public interest.[2]

Committee response

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

2.111 However, while the committee acknowledges that security assessments are an important part of ensuring the safety of Australians, and that ASIO advice that an individual is a risk to security should be afforded appropriate weight, the

2 See Appendix 2, Letter from the Hon Scott Morrison MP, Minister for Immigration and Border Protection to Senator Dean Smith, 15 April 2014.

committee remains concerned that ASIO assessments of non-citizens are not subject to any form of merits review. The imposition of conditions on RPBV holders in relation to employment and association, as required by these regulations, may be reasonable in and of itself; however, as the decision by ASIO leading to their imposition is not reviewable the committee considers that there is a risk that such conditions may not be necessary or proportionate.

2.112 The committee is therefore unable, on the basis of the information provided, to determine that the Migration Amendment Regulation 2013 (No. 4) [F2013L01014] and Migration Regulations 1994 – Specification under subclauses 8551(2) and 8560(2) – Definition of Chemicals of Security Concern [F2013L01185] are compatible with the right to work and right to equality.