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Migration Litigation Reform Bill 2005

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Migration Litigation Reform Bill 2005

Date Introduced: 10 March 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedule 1 commences on a day to be fixed by Proclamation or, if this does not occur within six months of Royal Assent, on the first day after that period. Schedule 2 commences on Royal Assent

Purpose

To amend the *Migration Act 1958*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999* and the *Judiciary Act 1903* to assist courts in managing their migration litigation workload.

Background

Given the short time between introduction of this Bill and scheduled debate in the House of Representatives, this digest is a draft covering key points only. It will be revised to include a more comprehensive discussion in time for further consideration of the Bill by the Parliament.

Readers are directed to Bills Digest No. 118 of 2003-04[1] on the Migration Amendment (Judicial Review) Bill 2004 (the '2004 Bill'). The 2004 Bill contained similar (although not identical) reforms to the 2005 Bill. The digest on the 2004 Bill includes extensive background and a detailed reading list. The 2004 Bill was also the subject of an inquiry[2] by the Senate Legal and Constitutional Legislation Committee. The 2004 Bill lapsed when Parliament was prorogued for the October 2004 federal election.

Main Provisions

The main proposals in the Bill are to:

- **Direct migration cases to the Federal Magistrates Court (FMC)**
  - The Federal Court will have limited jurisdiction in migration matters, restricted to complex cases referred by the FMC and review of decisions to cancel the visas of, or deport, people on 'character' grounds
  - Nearly all migration cases remitted from the High Court will be channelled directly to the FMC

  (Item 17)

- **Ensure identical grounds of review in migration cases**
  - The grounds of review in migration matters in the FMC will be the same as those in the High Court under s75(v) of the Constitution. Section 75 of the Constitution states that the High Court has 'original jurisdiction' (i.e. the authority to hear cases) in all matters:

    > *(v) in which a writ of Mandamus* [directing that an officer do a certain action] *or prohibition* [preventing an officer from doing a certain action] *or an injunction* [halting a current or future action for a period of time] *is sought against an officer of the Commonwealth.*

  (Item 17)

- **Impose uniform time limits in migration cases**
  - Applications to the FMC, Federal Court and the High Court must be made within 28 days of actual (rather than deemed) notification of a decision. The 28 day time limit can be extended by a further 56 days if a request for further time is made within 84 days of actual notification of the decision

  (Item 18 and Items 30-33)

- **Facilitate quicker handling of migration cases**
  - Require applicants to disclose previous applications for judicial review of the same migration decision
  - Expressly provide for the High Court to remit migration and other cases 'on the papers' (i.e. without a hearing)

  (Items 10 and 37)

- **Deter unmeritorious applications**
  - Allow the High Court, Federal Court and FMC to dispose of a matter summarily on their own initiative if satisfied that there are no reasonable prospects of success
  - Prohibit lawyers, migration agents and others from encouraging unmeritorious migration litigation, with the risk of a personal costs order for contravening this prohibition.

General Comments

Migration Litigation Workload

The Explanatory Memorandum notes that:

> The Government is very concerned about the large increases in the number of migration cases in the federal courts in recent years and the very low success rate of

> this litigation. Migration litigation constitutes a substantial proportion of the workload of the High Court, Federal Court and Federal Magistrates Court (FMC). In recent years, the Government has won over 90 per cent of all migration cases decided at hearing. Unsuccessful cases are not necessarily unmeritorious. However, the very high failure rate reflects concerns raised, including by the courts, about high levels of unmeritorious migration litigation.
>
> The large volume of judicial review proceedings, unmeritorious litigation and delays are very costly and are placing strains on the courts and the migration system more generally. Extended waiting times in courts have been taken advantage of by some applicants using the court process simply to delay their removal from Australia and prolong their stay in the community. These delays impact on applicants with genuine claims who are waiting to have their cases considered.[3]

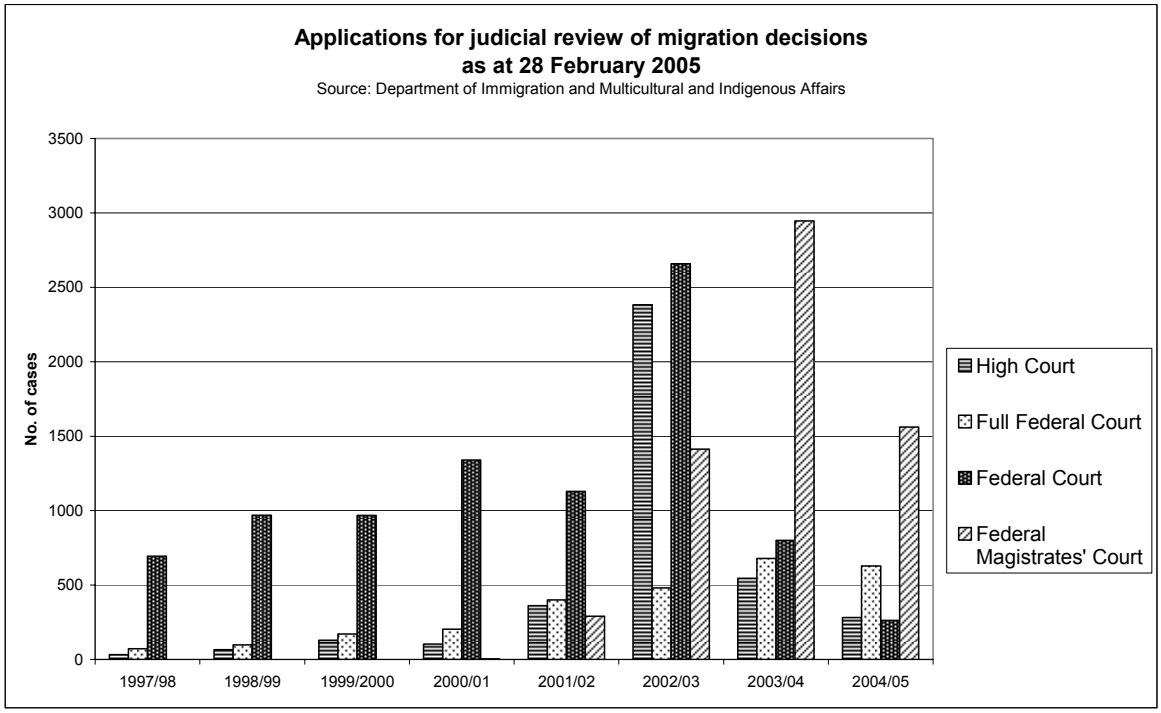
In October 2003 the Government commissioned the Migration Litigation Review conducted by Hilary Penfold QC to inquire into more efficient management of migration cases. According to the Second Reading Speech, the measures in the 2005 Bill have been drawn from recommendations by the Review. Bills Digest no 118 noted in relation to the 2004 Bill that:

> The Government has asked Parliament to approve the current Bill without releasing the Migration Litigation Review. There has been no public indication of what its conclusions and recommendations were. This prevents any assessment either of the adequacy of the Review in addressing the issue of migration caseload or the adequacy of the Bill as a response to the Review.[4]

The findings of the Review have yet to be released. In other words, the Government has still not revealed publicly the detailed analysis from the Review on which the proposals in the 2005 Bill are based.

The table below shows figures for judicial review applications in migration matters in various courts from 1997 to 2005. As Bills Digest no.118 noted, there was a large increase in applications in 2002/03 after the government prohibited 'representative' actions in migration matters, causing the single *Muin* case to be split into an additional 1350 matters, which were filed in the High Court in that financial year.[5] After the distorting effect of the Muin case on migration matters passed, numbers of migration applications have declined dramatically. The extent to which the reforms proposed in the Bill are now necessary is unclear.

The FMC, which commenced hearings in 2000, received jurisdiction in migration matters in 2001. As the Second Reading Speech notes, 8 additional magistrates have been appointed to the FMC. The graph below indicates that the FMC is playing the role intended for it, taking on a substantial part of the burden in migration matters from the Federal Court and the High Court.



Specific Comments

Time limits and 'Purported decisions'

- As explained in Bills Digest no 118, in *Plaintiff S157* the High Court said that a decision under the Migration Act affected by 'jurisdictional error' (i.e. a significant mistake') was not a valid decision under the Act. So appeals from such a decision could not be caught by the time limits in the Act. The High Court called migration decisions with such mistakes 'purported' decisions.
  - The 2005 Bill amends the Migration Act so that it specifically includes 'purported decisions'. Any time limits on appealing in the Act will now apply to 'purported' decisions
  - Logically, however, it is difficult to see how this can be effective. The High Court has said that 'purported' decisions are outside the scope of the Migration Act. So amending the Migration Act itself cannot bring them within its scope.
- A 'purported' decision is defined by the Bill to include anything listed in s474(3) of the Migration Act. So, for example, purported 'conduct preparatory to making a decision', a purported 'failure or refusal to make a decision' or a purported 'refusal to do any other act or thing would all be subject to the time limits and other restrictions on judicial review in the Migration Act

- the wide definition of 'purported' decision may make it difficult for people to recognise that some decision or action, or inaction, has occurred which has started time limits running for lodging an appeal
- the consequence may be that people may seek to lodge 'precautionary' appeals in case they have been the subject of a 'purported' decision without this being obvious to them. This will be all the more difficult, however, because of the proposal in the Bill to 'penalise' unmeritorious applications. In practice, therefore, applicants may be caught between, on the one hand, a vague definition of 'migration decision' linked to strict time limits for appealing and, on the other hand, a prohibition on appealing if there are 'no reasonable prospects' for success, linked to personal costs orders.

The Constitution and time limits

See the discussion at pp13-14 of Bills Digest No 118.

Remitting migration matters to the FMC from the High Court

Pursuant to section 44 of the *Judiciary Act 1903*, the High Court could remit any matter, on its own motion or on application of the parties, in full or in part, and whether or not the matter originated in the High Court. Importantly however, the *Migration Legislation Amendment (Judicial Review) Act 2001*, which commenced in September 2001, removed the power of the High Court to remit matters that relate to immigration decisions where those decisions a) have a merits review process attached,[6] and b) are subject to the Minister's discretion to substitute a more favourable decision.[7] It follows that these constitutionally entrenched matters must now be reviewed by the High Court itself.

- The Bill does not change this position, but simply directs the High Court to remit other migration matters directly to the FMC.

Prohibition on unmeritorious applications

- This proposal may raise constitutional issues, especially the possible intrusion of the legislature into the 'judicial power' of the Commonwealth, in contravention of Chapter III of the Constitution
  - The Bill gives discretion to courts to decide whether an unmeritorious application has been brought and whether a personal costs order should be made against the applicant, his or her lawyer or migration agent. However it directs courts to consider whether a personal costs order should be made. This could potentially amount to an unconstitutional intrusion into federal judicial power.
- Parliament may also wish to consider a number of policy issues raised by this proposal
  - Whether this would discourage lawyers and/or migration agents offering advice to potential applicants, leading to more unrepresented (and potentially less meritorious) applications. A practical issue may be whether applicants with no

ability to pay in any case if a decision goes against them would be discouraged by the threat of a personal costs order

  - Whether this may provoke a significant number of cases about whether an unmeritorious application has been made.

- The provisions in the Bill allowing summary judgments at the initiative of the High Court, Federal Court or FMC apply not just to migration matters but to all matters. It is suggested that Parliament should seek specific advice on the full implications of this proposal.

Further reading

- HREOC submission to the Penfold Migration Litigation Review at http://www.humanrights.gov.au/legal/submissions/migration.html.
- B. O'Shea, submission from the Law Institute Victoria to the Penfold inquiry, 4 December 2003, at http://www.liv.asn.au/news/pro_issues/livsubs/2003/20031205migrationlitigation.pdf.
- Amnesty International submission to the Penfold inquiry at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/submissions/sub08att.pdf.

Endnotes

1 http://www.aph.gov.au/library/pubs/bd/2003-04/04bd118.pdf.

2 http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/mig_judicial_04/index.htm.

3 Explanatory Memorandum, p. 1.

4 Bills Digest no 118 2003-04, p. 9.

5 Ibid, p. 2.

6 Subsections 476(4) and (1) of the Migration Act.

7 Subsections 476(4) and (2) of the Migration Act.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2404.