Chapter 1

Introduction

The referral

1.1 On 12 December 2013, the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the Migration Amendment Bill 2013 (the Bill) to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 12 February 2014.[1]

1.2 The Bill was introduced in the House of Representatives on 12 December 2013, by the Hon Scott Morrison MP, Minister for Immigration and Border Protection.[2] The Bill seeks to amend the *Migration Act 1958* (the Act) to address a number of recent court and administrative tribunal decisions which have affected the interpretation of key provisions of the Act. These decisions have impacted on the Department of Immigration and Border Protection's (the department) operations including the processing of visa applications made by asylum seekers.[3]

Rationale for the Bill

1.3 The Bill has three schedules that address distinct issues. Accordingly, the context of, and rationale for, each schedule is considered in this chapter separately.

Schedule 1 – When decisions are made and finally determined

1.4 Part 7 of the Act provides a process of merits review of particular visa decisions (including protection visas) made by the department in the Refugee Review Tribunal (RRT).

1.5 In accordance with section 430 of the Act, when the RRT makes its decision on review, it must prepare a written statement. In accordance with section 430A, the RRT must notify both the applicant and the secretary of the department of its decision on review by providing a copy of the written statement prepared under section 430.

1.6 Subsection 5(9) of the Act provides that an application under the Act is finally determined when either:

- a decision on an application is not (or no longer) subject to a form of review; or
- a decision that has been made on an application was subject to some form of review but the period within which a review may be instituted has ended.

1.7 Recent decisions by the Full Federal Court of Australia in *Minister for Immigration and Citizenship v SZQOY*[4] and *Minister for Immigration and Citizenship*

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[1] *Journals of the Senate* No. 11—12 December 2013, p. 361.

[2] *Votes and Proceedings* No 15—12 December 2013, p. 248.

[3] *Explanatory Memorandum* (EM), p.1-2.

[4] [2012] FCAFC 131.

v SZRNY[5] have interpreted when a decision on review by the RRT is finally determined. In *SZRNY*, the Full Federal Court found that an application within the meaning of subsection 5(9) of the Act, is not 'finally determined' unless the RRT has notified its decision to both the applicant and the department in accordance with section 430A.

1.8 These decisions of the court depart from the interpretation that has been applied by the department, that once a review decision was made, the application was finally determined. The department had taken the view that whether or not the RRT had correctly notified the review applicant and the secretary of the department did not affect when a decision was finally determined.

1.9 The department argued that the judgement in *SZRNY* is 'highly problematic' for the RRT and also has implications for decisions on review by the Migration Review Tribunal (MRT).[6] The department argued that as a result of the court's decision in *SZRNY*, if the MRT or the RRT makes an error in notifying either the review applicant or the secretary of the department of its decision, the application is not finally determined and continues to be subject to merits review. Understanding when a decision is finally determined is critical for administrative certainty. For example, ascertaining when an application is finally determined is crucial for the department to correctly remove individuals from Australia under section 198 of the Act.

1.10 The Bill seeks to provide administrative certainty by clarifying:

- that a visa refusal, cancellation or revocation decision by the minister or his delegate is taken to be made on the date on which the order is made and not when the decision is communicated to the applicant or former visa holder;
- the MRT and RRT's powers of review are exercised when a decision on review has been made, and once made it cannot be re-opened or varied; and
- that where review of a decision on an application has been sought, it will be considered to be finally determined when the MRT or the RRT has made its decision[7], and not when the decision is communicated to the applicant or the department.

Schedule 2 – Bar on further applications for protection visas

1.11 In March 2012, amendments to the Act introduced a statutory framework for considering complimentary protection claims for a protection visa. Complimentary protection refers to Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (the ICCPR), the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, and the Convention on the Rights of the Child (the CRC). The 2012

[5] [2013] FCAFC 104.

[6] EM, Attachment A, p. 3.

[7] An exception is provided where the MRT or RRT makes a decision to remit the application to the department for reconsideration.

amendments provided for a combined protection visa assessment process of both Australia's obligations under the Refugees Convention and Australia's complimentary protection obligations.

1.12 As amended in March 2012, section 36(2) of the Act sets out the key criterion for the grant of a protection visa. The section provides that an applicant must be a person who:

- engages Australia's protection obligations under the Refugees Convention; or
- engages Australia's protection obligations on the basis that as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm ('complimentary protection'); or
- is a member of the family unit of a person who meets either of the above two criteria.

1.13 Section 48A of the Act prohibits repeat protection visa applications by persons in the migration zone. In *SZGIZ v Minister for Immigration and Citizenship*[8] the Full Federal Court found that these three separate criterion for a protection visa under section 36(2) could be used to initiate separate visa applications. Consequently, the court found that section 48A of the Act does not prohibit the making of further protection visa applications that rely on different criterion. Section 48A only prohibits repeated applications under the same criterion.

1.14 The EM states that as a result of this decision, a non-citizen who first applied for a protection visa prior to March 2012, and who has no meritorious protection claims, will potentially be able to make four alternative protection visa claims before being barred under section 48A.[9]

1.15 According to the EM:

> [t]he original policy intention in relation to section 48A was to prohibit the making of further visa applications by persons who have already applied for protection and had their application assessed and refused.[10]

1.16 The Bill seeks to amend the Act so that a person who was refused a protection visa under the Refugee Convention criterion would be unable to make a further protection visa application on the grounds of complimentary protection. This amendment would only affect applicants who applied for a protection visa prior to the 2012 amendments. Applicants since 24 March 2012 have had their complimentary protection claims assessed by the department at the same time as protection claims under the Refugee Convention.

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[8] [2013] FCAFC 71.

[9] EM, Attachment A, p.6.

[10] EM, Attachment A, p.6.

Schedule 3 – Security assessments

1.17 The third schedule to the Bill seeks to address a recent High Court decision in *Plaintiff M47/2012 v Director-General of Security & Ors.*[11] In this case, the court found that the use of the Public Interest Criterion 4002 (PIC 4002) in the *Migration Regulations 1994* were invalid for the purposes of assessing a protection visa application.

1.18 PIC 4002 states that an applicant for a protection visa must not be subject to an adverse security assessment from the Australian Security Intelligence Organisation (ASIO).[12] Following the decision of the court in M47, the department has been unable to rely on PIC 4002 and as a result has been required to individually assess whether each applicant does or does not pass the character test in section 501 of the Act. This has caused delays in processing protection visa applications.

1.19 The Bill would address this issue by amending section 36 of the Act to insert a specific criterion for a protection visa that the applicant does not have an adverse security assessment from ASIO. The Bill would also confirm that the MRT, RRT and AAT do not have the power to review a decision to refuse to grant (or to cancel) a protection visa on the basis of an adverse security assessment by ASIO. The Bill would also clarify that the RRT does not have the power to review a decision into a refusal to grant (or to cancel) a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention.

Conduct of the inquiry

1.20 In accordance with the usual practice, the committee advertised the inquiry on its website. The committee also wrote to relevant organisations inviting submissions by 13 January 2014. The committee received 12 submissions. A full list of submissions is provided at Appendix 1.

1.21 The committee held a public hearing in Melbourne on 4 February 2014.

1.22 A list of stakeholders who have evidence to the committee at the public hearing is provided at Appendix 2.

Structure of the report

1.23 This report considers the Bill as follows:

- chapter 2 provides a brief overview of the provisions contained in the bill;
- chapter 3 discusses the key issues raised in submissions and evidence in respect of Schedule 1;
- chapter 4 discusses the key issues raised in submissions and evidence in respect of Schedule 2; and

[11] [2012] HCA 46.

[12] ASIO undertakes an assessment of whether an application is directly or indirectly a risk to security within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*

- chapter 5 discusses the key issues raised in submissions and evidence in respect of Schedule 3.

Acknowledgement

1.24 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.25 References in this report to the committee Hansard are to the proof. Hansard and page numbers may vary between the proof and the official Hansard transcript.