QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES - 25 FEBRUARY 2014

IMMIGRATION AND BORDER PROTECTION PORTFOLIO

(AE14/001) PROGRAMME – 1.1: Visa and Migration

Senator Macdonald (L&CA 5) asked:

CHAIR: I accept that, Ms Ransome—excuse me interrupting—but it would take five minutes to deliver a judgement, even if it is a handwritten judgement handed down, at the time and the place made clear at the time of the hearing so there can never be any doubt, never be any argument, never be any appeal to the High Court on whether the applicant actually received advice. Apparently it has happened only occasionally.
Ms Ransome: Yes.
CHAIR: It just seems to me that there was an easier way of doing it. I will leave that there. I do not want you to write me an essay, but perhaps you could take on notice why that did not happen. In other circumstances I would say: don't tell me why it can't be done; tell me how it can be done.

Answer:

Removal of the handing down process

The process of inviting an applicant to be present when a tribunal decision is 'handed down' was removed from the Migration Act 1958 in 2008 by the Migration Legislation Amendment Act (No.1) 2008 (No.85, 2008).

The removal was intended to streamline procedures for notifying parties, making the notification and merits review process simpler and reducing the risk of administrative error. It was noted at the time of removal that the handing down and associated notification procedures were of doubtful practical value and had been the source of considerable litigation over the years, often with far reaching effects, including on occasion, the potentially unlawful detention of non-citizens [Second Reading Speech, Senator Carr, Hansard, 25 June 2008].

The 'handing down' process applied to all decisions except those delivered orally at the end of a hearing, and those relating to applications by persons in immigration detention. It required the tribunals, once the decision had been made, to invite the applicant and the Secretary to be present when the decision was handed down (Migration Act 1958, sections 368A, 430A). The handing down consisted of the outcome of the decision being read, whether or not the parties were present. The parties were to be given at least the prescribed period of notice of the time and place the decision was handed down (sections 368B, 430B). If the applicant, or a

representative was not present at the handing down, the decision, and statement of reasons was required to be sent to the applicant within 14 days of the handing down (sections 368B, 430B). The invitation to attend the hearing, the handing down, and the decision record were sent to the same address. If the applicant did not receive the decision record, s/he would have been unlikely to have received notice of the handing down, or of the hearing.

Regardless of whether any notification was received (of the decision or handing down) the applicant was nevertheless deemed to have received the notice. This continues to be the case under the current legislative framework.

In 2008/09, only 21% of RRT applicants and 29% of MRT applicants invited to a handing down attended.

Receipt or otherwise of the decision record does not govern the time limits for judicial review. Since 2009, sections 477, 477A and 486A of the Migration Act 1958 have specified that an application for judicial review must be made to the Court within 35 days of date of the decision, although this period may be extended if the Court considers it is in the interests of the administration of justice to do so.

Delivering a decision at the time/place made clear at end of hearing

There are few cases where the tribunal is in a position at the end of the hearing to be able to determine when a decision will be made. This is because, except in the cases where the tribunal is able to deliver an oral decision at the end of the hearing, the tribunal will typically need to give further consideration to the evidence and argument presented at hearing, and depending upon the assessment of that information, may be required to seek further information from the applicant or another source, and /or be required to invite the applicant formally under the requirements of the statutory scheme, to comment on information that is adverse to his or her case.

In addition, not all cases proceed to a hearing, nor do all applicants attend a hearing. This financial year, the applicant attended a hearing before the MRT-RRT in 57% of cases.

Handing down a decision at a time and date nominated at the end of the hearing would require significant administrative effort through advice to attend, booking of a hearing room and interpreter, attendance of a member and the time of a hearing officer. These resources are scarce and would take away from them being used for hearings of substantive cases. In 2013-14 we expect to decide 24 000 cases. It would be a substantial effort to hand down even half of these decisions and are a less convenient alternative to applicants than receiving a copy of the decision at their nominated address for service.