Duncan Kerr MHR

Federal Member for Denison

188 Collins St, Hobart 7000

Ph (03) 6234 5255 Fax (03) 6223 8560

GPO Box 32 Hobart Tas. 7001

26 April 2004

The Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

Inquiry into the Provisions of the Migration Amendment (Judicial Review) Bill 2004

Thank you for the opportunity to make a submission to this inquiry.

I enclose a copy of the remarks I made in the House of Representatives on this Bill which I would be grateful for you to accept as formal submission to your enquiry.

My remarks address the constitutional issues arising from *Plaintiff S157/2002 v The Commonwealth* in which I appeared as counsel with Professor George Williams.

Yours sincerely,

Duncan Kerr MP

Parliament House Canberra ACT 2600

Telephone (02) 6277 2178

MIGRATION AMENDMENT (JUDICIAL REVIEW) BILL 2004: Second Reading

Mr KERR (Denison) (11.07 a.m.) —I will speak only briefly on the substance of this legislation but will add some short remarks in relation to the legal issues that my friend and colleague the member for Perth outlined as concerning the opposition. In broad terms, no-one would object to a fair time limit being imposed on a period for which a person can bring an appeal claiming that an administrative law decision adverse to them was infected by an error that requires judicial review. The question of what is a fair time limit, however, is obviously a contentious one. The Migration Amendment (Judicial Review) Bill 2004 provides for a period of 35 days from the date of a deemed receipt of the decision and then a further period of some 58 days where a court can permit—on proper grounds being shown for exceptional circumstances—an extension of that original 35 days. Thus there is a period of about three months proposed by the bill, after which no judicial review would be possible—were this bill to be passed and were it to be constitutionally valid—and no determination could be made to overturn a decision made without jurisdiction, unlawfully, in bad faith or even as a result of fraud.

The first question is whether the proposed time limits in general are fair and apt. That is a matter that ought to be considered by the Senate in its review. Thirty-five days from the date of a deemed receipt of a decision is not really 35 days because, for various reasons, the actual receipt of notification of the decision could well be after the time at which the law, as provided in the Migration Act, deems that receipt to have occurred. There will be instances emerging from time to time where a person's actual knowledge of a notification of a decision that they would wish to appeal arises at a time which would give them virtually no opportunity to consult lawyers and to prepare the necessary papers to take their matter before a court. That is recognised, of course, by the provision allowing some extension in exceptional circumstances.

However, whether or not 35 days is a practical period of time to enable a person who receives an adverse decision to take legal advice and to have his or her solicitors or other representatives prepare the necessary papers and file them is a nice point. Many legal firms do not operate so effectively as to permit that. The circumstances of many applicants are that they have no English, they may not be aware of the nature of the correspondence that they receive, they may need translation between them and their solicitors and their solicitors may be dealing with complex issues of law, perhaps for the first time. Although there are some firms which specialise in this area, many do not and would not know where to start. Whether 35 days in those circumstances is an appropriate first date of cut-off I think needs some examination. It may well be too short. Whether three months in general terms is an appropriate period to cut off all applications is similarly a matter which requires some attention.

But let us concede, for the sake of argument in this House, that in general those time lines might be thought to be apt in the large majority of cases. Assuming that, there could be no broad objection to a principle that says that somebody must bring an application within a reasonable period of time for their matter to be the subject of judicial review.

However, the constitutional question arises because, outside the general provisions of statutory entitlements that this parliament is free to create and rescind, the High Court of Australia has a constitutional responsibility given to it by section 75 of the Constitution to hear applications which claim that an officer of the Commonwealth—that is, a bureaucrat acting in the name of the Commonwealth or the minister—has made a decision in a way which would entitle the applicant to have the decision set aside as being infected by jurisdictional error. A shorthand way of explaining that is to say that if a decision is so wrong as to be void or voidable, if a decision is so in error as to go beyond the powers that the parliament has properly conferred on that decision maker, the person about whom the decision is made has a right to bring the matter before the High Court of Australia and have that issue determined. Of course, that right is a fundamental element of what we all uphold in this parliament—there are some exceptions, perhaps, but I think the vast majority of us do—as a fundamental component of the rule of law.

The rule of law is nothing more or less than saying that all administrative decision makers in this country are obliged to follow the law, and any person—citizen or otherwise—who is adversely affected by a wrongful decision is entitled to have that wrongful decision set aside by a court. The High Court has the constitutional responsibility, through a constitutional guarantee underpinned by the rule of law, to ensure that that can occur. Section 75(v) of the Constitution—inserted in the Australian Constitution by its framers in the lead-up to our movement to a federation in 1901—explicitly adopted a framework in the Constitution which remedied a defect in the United States Constitution revealed in the case of Marbury v. Madison, where it was held that the United States Constitution had not given that power to the Supreme Court of the United States. So the framers of our Constitution deliberately conferred on the High Court of Australia that right and that power—a power which has been exercised through the more than 100 years of our federation to protect citizens and noncitizens alike and to ensure that decision makers comply with the law.

So, in those circumstances, how can the High Court deal with a provision that says there is a fixed and inflexible time limit from a deemed date of receipt of a notice if an applicant comes before them in circumstances which ordinarily would merit an entitlement for review and where the High Court can see that those circumstances of delay are no fault of the applicant? In Plaintiff S157, a case that has been referred to by the member for Perth and other speakers in this House, the Commonwealth argued that a 28-day period from the date of the actual receipt of a decision could be enacted by this parliament as an absolute bar to the High Court's hearing of an application for review. Responding to that, the plaintiff in that case argued that such a provision was unconstitutional.

The High Court did not have to address that particular argument, because it read section 474 of the Migration Act as having no effect in relation to what it called purported decisions—that is, decisions which, whilst asserted by the decision maker to be decisions made under the act, were in fact decisions not authorised by law. So the High Court said that, where a person claimed that the decision was not made in accordance with law, the 28-day period simply did not come into effect. The claim was that there was no actual decision according to law, rather a purported decision, and that the 28-day period did not apply to purported decisions.

Now the government has changed the bar on the High Court's hearing of such matters by proposing that the new provisions apply not only to actual decisions made under the act but also to purported decisions. It has not gone so far as to try to prevent review of those purported decisions because the High Court in every instance of the judges hearing the matter indicated that, were it to do so, such a law would be struck down by the court. It made it unambiguously plain that that was the case.

The new provisions say that time limits apply not only to decisions under the act but also to purported decisions. That then means that at some stage in the future it is inevitable that an instance will arise where the court will have to consider the arguments which it did not need to deal with in Plaintiff S157. There are two issues—firstly, whether this parliament has any power to pass a law which places any restriction on the time in which the High Court of Australia can exercise its constitutional guarantee rights under section 75(v). That question was agitated in the High Court.

The Solicitor-General was asked under what head of power the parliament had purported to act. He indicated that it would be under the incidental powers relating to various procedures of the court. That was met with some scepticism in argument by members of the court, but, as I say, an ultimate decision did not need to be made. The unhappy reception of some of the arguments advanced by the Solicitor-General might give rise at least to an apprehension amongst the Commonwealth's advisers that that is a live issue still—that is, whether this parliament can set any period at all when the High Court has an entrenched constitutional right to guarantee judicial review or whether it is indeed for the court to determine for itself the circumstances in which that authority would be exercised.

The second issue is subsidiary to that—that is, if the Commonwealth does have power, it can only

have power under the incidental provisions of the Constitution. One of the constraints on the use of the incidental provisions of Commonwealth powers of legislation is that they can be only proportional to the circumstances in which the power is exercised. This is a proportionality test. This arose in Davis and the Commonwealth where, under the incidental powers, the Commonwealth made certain laws which created offences with respect to the use of Commonwealth logos in order to protect the bicentennial celebrations. Ultimately, the High Court struck down those laws as being disproportionate to the inherent power of nationhood and the proportionality requirements. So, if there is any power that would go to the right of the parliament to set limits, those limits must be proportionate. But proportionate to what? They must be proportionate to the constitutional power of the court to exercise its rule of law functions to supervise the conduct of the executive.

Because of the way in which an absolute cut-off has been expressed, I believe it is most doubtful that the High Court would regard those provisions as constitutionally valid. Why? Firstly, because those provisions relate not to the actual receipt of the notice but to the deemed receipt, so those provisions provide an absolute cut-off to a person who has not in fact been notified of a decision. A deemed receipt may never be received. After the whole period in which a person has been deemed to receive a notice, even if he or she can show that they never actually received the notice, the Commonwealth wishes to pass a law which says even in those circumstances, you cannot be heard to complain that the decision which now affects you was made invalidly. I suspect that the High Court would say that that is an invalid and disproportionate way for the Commonwealth to legislate which offends the responsibility under the Constitution, given to the High Court by section 75(v).

Secondly, you can imagine many examples, even where a person has actual receipt, where it would be manifestly unfair to apply such an absolute deadline. For example, assume that somebody receives a notice but then suffers a car accident and is hospitalised through that period where the cut-off comes into effect. Is it in those circumstances apt that our law prevents that person from agitating subsequently on the legality or otherwise of a decision which adversely affects them? To take another example: let us assume that the decision was actuated by malice and fraud and that is later discovered, a fact that could not have been known to the applicant even if he received notice—for example, if a decision maker takes a bribe or acts in a way which is contrary to law, criminal and adverse to the person—and the circumstances which give rise to that being known emerge only after three months. Is it to be said that the High Court cannot then pursue an entitlement to review that decision which has adversely affected the person? For those kinds of circumstances I think it would be almost inevitable that, unless the Senate includes a provision that enables the High Court to examine such extraordinary and exceptional circumstances and to have a filter—albeit perhaps a tight filter, so that the general provision is not absolute—I think it is almost inevitable that the High Court can say, 'We cannot, consistent with our constitutional duty and our responsibility to uphold the rule of law, allow such laws to stand as they are proposed.'

I thought it worth while to make those general observations because this matter will need further attention. I make one other point before conclusion. This act now is a mess. It is completely incomprehensible to any lay reader. It contains a myriad of provisions now which do not mean what they say. When the government brought in its first attempt to remove judicial review—namely, section 474—I spoke opposing that legislation and, in this House, the opposition opposed it on the basis that the provision was unconstitutional and that this parliament should not pass legislation knowing that it does not say what it means. Now, compounding the problem, we have section 474, which does not mean what it says, and a complex provision which says that, when you read section 474 and apply it to other decisions in relation to the time limits, the provisions apply to purported decisions. Try and read that as a sane citizen coming to the act for the first time and not an expert in migration law. Your average solicitor, lawyer or barrister, let alone your average parliamentarian or refugee claimant with limited English skills, would be completely lost.

This legislation is an abomination in terms of its comprehensibility and accessibility. It defies all the rules that we in this parliament have established for ourselves about trying to express ourselves in plain and simple English. It is a product of repeated efforts which had no prospect of success by a

minister obsessed with an attack on the High Court of Australia in order to deny it its proper function and constrain the lawful entitlement of every citizen and noncitizen to ensure that administrative law is conducted according to law. Whatever the fate of these particular proposals in relation to time limits—and I am certain that they require amendment and that some mechanism is required to address those very exceptional circumstances where an absolute time limit would be held unconstitutional by the High Court—the act itself needs dramatic rewriting. It is simply not appropriate to have such fundamental legislation affecting the rights of persons who seek asylum in our country—and, indeed, section 474 and the other provisions that apply also to other migration decisions—expressed in such a turgid way. *(Time expired)*