Migration Amendment (Judicial Review) Bill 2004
Joint submission of the Public Interest Law Clearing House (Vic) Inc and the Victorian Bar
30 April 2004

INTRODUCTION

1. This submission to the Senate Legal and Constitutional Legislation Committee is made jointly by the Public Interest Law Clearing House (Vic) Inc (**'PILCH'**) and the Victorian Bar, and is based on the collective experience of PILCH and the Victorian Bar. This experience is drawn from membership of the Refugee Review Tribunal (**'RRT'**), appearances before the RRT and the Migration Review Tribunal (**'MRT'**), reading and listening to large numbers of transcripts and tapes of hearings before these Tribunals, and scrutiny of a large number of the Tribunal decisions and the material on which they are based. It also derives from providing representation for, and acting, in migration cases at the judicial review stage in the Federal Magistrates Court, Federal Court of Australia and High Court of Australia.

What is PILCH?

2. PILCH is a not-for-profit, independent legal service based in Melbourne. PILCH coordinates the provision of pro bono legal assistance through four pro bono legal assistance schemes:

   (a) Public Interest Law Clearing House Scheme (**'PILCH Scheme'**);

   (b) Victorian Bar Legal Assistance Scheme (**'VB LAS'**);

   (c) Law Institute of Victoria Legal Assistance Scheme (**'LIV LAS'**); and

   (d) Homeless Persons' Legal Clinic (**'HPLC'**).

   HPLC does not assist in migration matters and therefore will not be discussed further in this submission.

3. The PILCH Scheme, VB LAS and LIV LAS (**'the Schemes'**) receive, assess and refer requests for pro bono legal assistance to law firms and barristers. The Schemes only refer matters for assistance where clients meet a means test, where their matter has legal merit and where community assistance is not available from another source (*e.g.* legal aid or a community legal centre).

4. The PILCH Scheme has an additional criterion. It only refers *public interest* matters for assistance. Public interest matters are:

   (a) legal matters for not-for-profit organisations with public interest objectives; or

   (b) individuals' matters which raise an issue which requires addressing for the public good and which:

      (i) affects a significant number of people, not just the individual;

      (ii) is of broad public concern; or

      (iii) impacts on disadvantaged or marginalised groups.

PILCH and the Victorian Bar

5. The Victorian Bar is a member of PILCH. It has also sub-contracted the administration of VB LAS to PILCH. The administration of VB LAS by PILCH is also subject to the supervision of the Victorian Bar Council. Barristers who are members of the Victorian Bar volunteer and provide pro bono legal assistance through the PILCH Scheme and VB LAS.

PILCH and migration

6. At PILCH, the majority of migration matters are dealt with by VB LAS. In the year to 30 June 2003, migration matters constituted the largest body of pro bono referrals made by VB LAS. In that year, 42% of referrals made by VB LAS were migration matters. In 2002-2003, 7% of referrals made by the PILCH Scheme

were migration matters. In 2002-2003, 3% of referrals made by LIV LAS were migration matters.

7. The majority of inquiries to the Schemes for legal assistance in migration matters are from asylum seekers before the courts in existing judicial review proceedings that have been commenced prior to making a request for legal assistance. In these cases, arrangements are made for a barrister to assess the merits of the client's application for judicial review and, if it is determined that the application has legal merit (*i.e.* an arguable case with reasonable prospects of success), to represent the client in the proceeding, by preparing for and appearing at the hearing.

8. The Schemes receive inquiries in asylum seeker matters from a number of sources, including from:

- asylum seekers directly;
- community legal centres, including specialist migration centres;
- welfare agencies that assist asylum seekers;
- Victoria Legal Aid; and
- members of the community who are friends or supporters of asylum seekers.

9. Generally, the PILCH Scheme and VB LAS do not assist with referrals to lawyers for clients at the merits review stage before the RRT or MRT or with applications under ss 48B, 351 or 417 of the *Migration Act 1958* (Cth) (**'the *Migration Act*'**).

SUBMISSIONS

Time Limits on Judicial Review Applications

10. The Migration Amendment (Judicial Review) Bill 2004 ('**the Bill**') seeks to place a 28-day time limit upon applications for judicial review with a discretion to extend this time limit by a further 56 days.

11. PILCH and the Victorian Bar oppose the amendments contained in the Bill, in so far as they impose absolute time limits on applications for judicial review of migration decisions on grounds of jurisdictional error. We submit that the time limits on judicial review applications should include a further discretion to extend time in 'special circumstances.'

12. Placing a definitive time limit of up to a maximum of 84 days may deny some applicants the ability to challenge decisions that are beyond jurisdiction. Conferral of an absolute time limit, without a residual discretion to extend time, will operate to prevent both meritorious and unmeritorious applications, and will not serve the purpose of "reducing the large numbers of unmeritorious migration related judicial review applications"[1] without limiting the right of appeal for meritorious applicants.

13. In so far as it restricts judicial review of protection visa decisions, the Bill may result in an increased risk of refoulement (expulsion from Australia and return to the state from which the claimant seeks asylum) of genuine asylum seekers, and consequently the violation of Australia's international obligations under the Refugee Convention. Errors by the RRT can lead to the rejection of genuine refugees who may face serious persecution and even death upon removal to their country of origin. High standards of decision-making and access to judicial review reduce the risk of wrongful refoulement. Conversely, blunt legislative measures such as the imposition of an absolute time limit on judicial review applications are likely to increase the risk of wrongful refoulement.

[1] Second Reading Speech of the Migration Amendment (Judicial Review) Bill 2004.

14. Asylum seekers in immigration detention centres often face obstacles in filing applications for judicial review of adverse RRT decisions in a proper and timely manner. These obstacles are caused by, among other things, a lack of access to information, including information about their rights and about the requirements for applications for review such as time limits; language barriers; administrative inefficiencies as a result of immigration detention; and the frequent inability of asylum seekers in detention to access legal and migration advice. The failure of an applicant to submit an application in a timely manner is not an indication that the application is unmeritorious. Nor does it indicate that the applicant is pursuing litigation "as an end in itself – to delay their departure from Australia."[2] Often it is purely symptomatic of the difficulties faced by asylum seekers in accessing the legal system as a result of their situation and especially their detention.

15. Many cases can be cited to exemplify the injustices resulting from legislative absolute time limits.[3] Three of these cases are:

(a) *Al Achrafi v Minister for Immigration and Multicultural Affairs* (1997) 46 ALD 550, in which the application for review was sent by the applicant's family to the Tribunal, rather than to the Court;

(b) *Guendouz v Minister for Immigration and Multicultural Affairs* [2000] FCA 766, in which the applicant did not speak English and was not informed that he had the right to judicial review of the Tribunal's decision; and

(c) *Kucuk v Minister for Immigration and Multicultural Affairs* [2001] FCA 535, in which the officer at the detention centre, after being given the

[2] Ibid.
[3] For example, see *Al Adwan v Minister for Immigration and Multicultural Affairs* [2001] FCA 706; *Gamage v Minister for Immigration and Multicultural Affairs* [2000] FCA 1223; *Takli v Minister for Immigration and Multicultural Affairs* [2000] FCA 1186; *Radhi v Minister for Immigration and Multicultural Affairs* [2000] FCA 777; *Duwai v Minister for Immigration and Multicultural Affairs* [1999] FCA 1309; *Kumar v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 680 and *Susiatin v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 574.

application by the applicant well within the time limit, (twice) faxed the application to the wrong telephone number.

In each of these cases, the court rejected the applications for an extension of time, finding that the Parliament had "left no room for any conclusion other than that it intends that the provision which it…enacted should override any common law considerations and be given effect to precisely in terms of the words chosen."[4] In *Kucuk*, Hely J found that "[t]he terms of the statute and a line of authority establish that [there is] no power to grant an extension of time irrespective of the justice of doing so in the circumstances of the particular case."[5] The asylum seekers were therefore barred from accessing the courts to seek judicial review of the Tribunal's decision that they were not entitled to protection. Given the grave consequences to asylum seekers, it is entirely inappropriate that such errors should result in their inability to access judicial review.

16. In *Salehi v Minister for Immigration & Multicultural* Affairs [2001] FCA 995, Mansfield J considered s478(1)(b) of the *Migration Act*, which specified that a 28-day time limit applied to applications for judicial review, and s479(2) which precluded the Federal Court from making an order allowing for an extension of time. His Honour found that he was bound by the legislature to dismiss the applications of seventeen applicants for an extension of time despite their difficult circumstances, "and sit idly by while injustice is done."[6] His Honour stated:

> *One may struggle to perceive any rationale underlying that legislative intent. Section 478(1)(b) may generally operate fairly once notification of the Tribunal decision is given to a person who is not in immigration detention. In the case of persons in immigration detention under s 189… such persons are frequently unable to read or speak English, and sometimes are illiterate in their own language. At least with the seventeen persons to whom I have referred, they were dependent upon those maintaining the particular detention centre for the provision of forms to enable them to seek review to the Federal Court, as their requests for legal assistance*

[4] *Guendouz v Minister for Immigration and Multicultural Affairs* [2000] FCA 766, per RD Nicholson J at [9].
[5] *Kucuk v Minister for Immigration and Multicultural Affairs* [2001] FCA 535, per Hely J at [17].
[6] *Salehi v Minister for Immigration & Multicultural* Affairs [2001] FCA 995 (1 August 2001), per Mansfield J at [55].

> *were not met. They did not all receive those forms when requested, or experienced delays in being able to convey their requests for the necessary forms or then in receiving the forms. None of those delays were their fault. They could have done no more to get the forms. As I have found, some residents of Woomera Detention Centre went on a hunger strike to draw attention to their requests for the forms. They were then, in all instances, physically unable by themselves to complete those forms in English, and in some instances in their own language. They sought help from the interpreters available, on a very limited basis, at the Woomera Detention Centre. They did not receive that help in a timely manner, through no fault of their own but due to the limited time the interpreters had available. The other duties of interpreters were very substantial. They had to prioritise their time allocations, and had little time available to assist the applicants as requested. The unfortunate result is that these applications are all outside the twenty-eight day time limit prescribed by s 478(1)(b).*[7]

17. Mansfield J noted in his decision that the applicants "might apply in the High Court's original jurisdiction under s 75(v) of the Constitution for constitutional writs…"[8] The Act did not at that time attempt to place time limits upon applications to the original jurisdiction of the High Court.

18. We are aware of at least one applicant who was denied an extension of time by Mansfield J, as a result of the inflexible legislative limits, and who subsequently successfully sought judicial review by the High Court in its original jurisdiction. On remittal to the Tribunal, it was determined that the applicant fell within the definition of a refugee and as such was entitled to protection by Australia. Under the proposed amendments to the Act, this applicant would have been denied judicial review once the time limits had passed, despite the difficulties faced by the applicant in lodging the application within time. A genuine refugee would have been refouled in these circumstances, that is, sent back to his or her country of origin to face persecution or even death.

19. The limited discretion to extend the 28-day time limit for applications for judicial review for a further 56 days does not satisfactorily counteract the potential injustices. The result of the proposed amendment is to create an absolute

[7] *Id* at [51]
[8] *Id* at [55].

maximum time limit of 84 days within which an application for judicial review must be lodged. A further discretion to extend time is required.

20. Based on the experiences of representing applicants in these circumstances, it is submitted that, rather than introducing absolute time limits on applications, a better response would be to allow the courts to retain a discretion to grant an extension of time in 'special circumstances'. This alternative will serve the purpose of filtering out unmeritorious applicants and discouraging those who are merely attempting to delay their departure from Australia. However, it will do so in a just and reasonable manner, allowing for each case to be decided on its particular circumstances, and allowing for an extension of time where otherwise injustice would be done.

Deemed notification

21. The injustices likely to flow from the imposition of absolute time limits for the lodgment of applications for judicial review are further exacerbated by the removal of the requirement for actual notification of the adverse decision in relation to applications to the High Court.

22. The proposed amendments to s 486(1) of the Act would mean that "the issue of whether or not a person was actually notified of a decision would no longer be relevant in deciding whether or not the High Court could hear the application for judicial review."[9] The 28-day time limit will apply from the date on which notification of the decision was deemed to be received by the applicant, as opposed to the date upon which actual notification was received.

23. It is submitted that requiring deemed notification of the decision rather than actual notification, in addition to conferring absolute time limits on applications to the High Court, places unconstitutional limits upon the original jurisdiction of the High Court pursuant to s 75(v) of the Constitution.

[9] Explanatory Memorandum Item 10, paragraph 28.

24. In the case of *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, Gleeson CJ discussed the ability of Parliament to oust the jurisdiction conferred upon the High Court by s 75(v), in that case, in the context of a privative clause. Gleeson CJ found that the Parliament has no power to do so.[10] In finding that "[t]he Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution,"[11] His Honour stated:

> *Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament... Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted*.[12]

25. It is submitted that by imposing absolute time limits, in circumstances where time commences to run upon *deemed* notification of the relevant decision, Parliament is attempting to curtail the original jurisdiction of the High Court. To the extent that the proposed amendments do so, they are likely to face constitutional challenge.

<u>The availability of judicial review of primary decisions</u>

26. This submission further opposes the proposed amendments which, by extending the meaning of 'privative clause decision,' attempt to bar judicial review of a primary decision where merits review of the decision was, but is no longer available.

27. There is no absolute bar upon judicial review of primary decisions at common law, nor under other statutory schemes such as the *Administrative Decision (Judicial Review) Act 1977 (Cth)*. Rather, there is a general discretion to decline

[10] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, per Gleeson C J at [3].
[11] Ibid at [6].

to review a primary decision in circumstances where an alternative avenue of review is available.

28. The courts have dealt with several cases in which merits review is no longer available and judicial review of the primary decision is sought. In *NAUV v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1319, Hely J stated:

> *Under the Act, merits review of the delegate's decision is available by a specialist tribunal (the RRT). Ordinarily, where de novo review on the merits is available which will resolve fully and directly any complaint which would be dealt with in judicial review, it should first be exhausted. Save in exceptional circumstances, prerogative relief will be withheld on discretionary grounds where other suitable remedies are available and have not been used*: Boral Gas (NSW) Pty Ltd v Magill *(1993) 32 NSWLR 501 at 508-512;* NAJT v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCA 487 at [28]*. ***The discretion to grant prerogative relief may nevertheless be exercised where there is an error going to jurisdiction that is patent, and not based on any contested or contestable facts****:* New South Wales Bar Association v Stevens *[2003] NSWCA 95 at [13]*.[13]

29. Hely J referred to the decision of Gaudron and Gummow JJ in *Re Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [56], in which a passage from the judgment of the Court in *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at [400] was quoted:

> *... the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.*[14]

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[12] Ibid at [5].
[13] *NAUV v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1319, per Hely J at [49] (emphasis added).
[14] Ibid at [52].

30. In *NAUV*, Hely J applied this common law criterion in ordering that, in the circumstances of the case in issue, the application for judicial review was dismissed.[15] The common law criterion that has developed is sufficient to prevent judicial review of cases where there is no satisfactory explanation for the applicant not pursuing merits review. The judicial discretion allows each case to be assessed on its particular circumstances but does not require the substance of the matter to be reviewed.

31. In contrast, the amendments would place an absolute bar on judicial review of primary decisions even where merits review is no longer available due to, for example, the failure to lodge an application within the prescribed period of time, even where the applicant was not to blame. This translates into circumstances where, as with the conferral of legislative absolute time limits, injustices may result with grave consequences for the applicant.

32. It is submitted that the common law criterion that has developed for the exercise of judicial discretion are sufficient. The proposed amendments which confer a statutory bar on judicial review of primary decisions under any circumstances is unnecessary and unjust.

RECOMMENDATIONS

33. PILCH and the Victorian Bar make the following recommendations to the Committee:

a) Any legislative time limits on applications for judicial review should ensure the Court retains a discretion to grant an extension of time in 'special circumstances'.

b) The proposed amendment in relation to judicial review by the High Court, which imposes an absolute time limit where time commences upon deemed (as opposed to actual) notification of the decision, should be rejected. The

[15] Ibid at [55].

legislation should require actual notification of decisions in such circumstances.

c) The proposed amendment which places a statutory bar on judicial review of a primary decision in all circumstances should be rejected. The common law criterion which provides for judicial discretion to be exercised to allow judicial review in appropriate cases is sufficient.

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