Ms Fiona Stuart

4 May, 2004

The Secretariat
Legal and Constitutional (Legislation) Committee
legcon.sen@aph.gov.au
Fax: 02 6277 5794

Senate Committee Enquiry Submission
Migration Amendment (Judicial Review) Bill 2004
Fiona Stuart

The proposed Migration Amendment (Judicial Review) Bill 2004 seeks to offer a solution to the growing number of unmeritorious judicial review applications being made. It is our contention that this Bill has two serious inadequacies: (1) the amended definition of 'privative clause decision' in subsection 5(1) may be constitutionally invalid, and (2) this bill offers no solution to the growing problem of the unmanageable volume of migration cases going to the High Court at first instance, which might have otherwise been brought in the Federal Court or the Federal Magistrates Court.

Constitutionality of Subsection 5(1) (definition of privative clause decision):

The constitutionality of privative clauses was questioned in the recent High Court case of *Plaintiff S157/2002 v. the Commonwealth of Australia 195 ALR 24*. There, the *Migration Act* privative clause, s 474, was unanimously accepted as being constitutionally valid. However, the court's narrow construction of the provision demonstrated an uneasiness towards the interpretation and operation of privative clauses. The decision in *S157* was based on careful statutory interpretation, in which a distinction was made in *S 157* between decisions made under the *Migration Act* and those decisions 'purported' to be made under the Act. It was stressed that only the former class of decisions would have any constitutional validity. It was argued that 'purported' decision (a decision affected by jurisdictional error) could not lawfully be denied the opportunity for judicial review.

The proposed amendment under subsection 5(1)(b) seeks to get around the *S157* High Court decision by saying that these time limits apply not just to decisions made under the *Migration Act* but, also to purported decisions. In essence, the bill intends to limit judicial review of potentially unlawful decisions. The argument put forward in *S157* was that a privative decision involving unauthorized conduct by officers of the Commonwealth would be in direct conflict of s 75(v) of the Constitution, and would therefore be invalid. The present amendment appears to run risk of being found unconstitutional by seeking to exclude the original jurisdiction of the High Court by imposing time limits within which an individual can appeal a decision which was made without lawful authority. Indeed the growing number of appeals to review Refugee

Review Tribunal decisions indicates a dissatisfaction with the merits review process. To impose limitations on the right of such applicants to appeal the lawfulness of the decisions, contradicts any notion of justice.

Burdening the High Court:

Section 75(v) of the Constitution guarantees the High Court jurisdiction in matters in which 'a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.' The fact that this right is entrenched in the Constitution means that applicants denied access to the Federal Court will almost certainly seek review at the High Court. The 2002-2003 Annual Report of the High Court of Australia confirms this, showing a 217 percent increase in the number of matters filed and under the Court's original jurisdiction there has been an increase in the number of constitutional writs filed from 300 to 2 131 compared with the previous year. Of these, 99 percent involved migration issues, which in total made up 82 percent of all matters filed in the High Court in 2003.

The proposed amendment offers no solution to this trend, and may in fact exacerbate the situation by further limiting the opportunity for judicial review of its decisions, therein leaving those dissatisfied with RRT decisions, appeal to the High Court as the only remaining option.

Time limitations on appeals may be reasonable and perhaps even necessary to cope with the growing number of applicants under the *Migration Act*. However, as pointed out by Justice Callinan in *S 157*, it would be necessary that such time limitations be simply regulatory and not in substance a prohibition.[1] Given the reality that many applicants live and are detained in remote places with limited access to lawyers and may not speak English, 28 days may be an unrealistic time period for such an applicant to successfully submit an appeal. If it were the case that such a time limit scheme could have the effect of making judicial review unfeasible for such applicants, then the time limitation clause would likely be considered unconstitutional as well.

[1] *Plaintiff S 157/2002 v Commonwealth* (2003) 195 ALR 24 at 174