Refugee Advocacy Service of South Australia Inc

A Community Legal Service for Refugees and Asylum Seekers

Who we are

This submission is written on behalf of Refugee Advocacy Service of South Australia (RASSA). RASSA is a community legal service set up with the specific objective of advocating on behalf of asylum seekers detained or residing in Australia. The service is based in Adelaide, South Australia. Membership of RASSA comprises a broad cross-section of legal practitioners including private and public solicitors, barristers and academics, as well as persons from other professional disciplines and students.

Introduction

RASSA welcomes the call for submissions made by the Senate Legal and Constitutional Committee as a part of its inquiry into the provisions of the *Migration Amendment (Judicial Review) Bill* 2004. It is against this background that RASSA makes its submissions in this matter. Whilst on its face this Bill does not appear to propose many substantive amendments to the *Migration Act 1958* in its present form, RASSA is of the opinion that indeed the amendments which are proposed which may on their face appear quite simple actually have quite strong and negative effects both on the applicants for judicial review of migration decisions, but also for the Courts dealing with those decisions.

Migration Litigation Review report written by Hilary Penfold

Attorney-General Philip Ruddock and Minister for Immigration, Multicultural and Indigenous Affairs Senator Amanda Vanstone announced the introduction of the Bill on 25 March 2004. It was said to be the "first stage of the Australian Government's response to the recommendations of the Migration Litigation Review".[1] RASSA notes that the report which came as a result of this review has not been made public at the time at which the call for submissions was made by the Senate Legal and Constitutional Committee and therefore RASSA is unable to comment on the recommendations made by the Migration Litigation

[1] Attorney-General Philip Ruddock, "Reforms to the Migration act to reintroduce time limits in Federal Courts" Joint Media Release 41/2004, dated 25 March 2004. Available at: http://www.ag.gov.au/www/MinisterRuddockHome.nsf/0/0912C26AE3F8F6B2CA256E620013DED3?OpenDocument

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Review, only on the Bill itself and the supporting documentation which has been made public. RASSA shares the view expressed by both Stephen Smith, Shadow Minister for Immigration[2] and Glenn Ferguson, an executive member of the International Law Section of the Law Council of Australia[3], insofar as they have expressed concerns about the fact that this report has not been made public and that it would be preferable for the Government to make the report public.

Proposed new measures may be counter-productive

RASSA submits that the new measures proposed by the Bill may indeed be counter-productive. In this regard, RASSA refers the Committee to the submissions made by the Law Council of Australia and also by Parish Patience Immigration. Mr Gotterson of the Law Council of Australia in its press release of 29 March 2004 indicated that the measures "may encourage more litigants to pursue review of the Government's migration decisions in the High Court, utilising its original jurisdiction to hear such matters, rather that the lower federal courts".[4] Parish Patience Immigration Lawyers have expressed their view that "all this Bill will achieve will be to again clog up the High Court with applications to overturn decisions infected with jurisdictional error, which might have otherwise been brought in the Federal Court or the Federal Magistrates Court".[5] RASSA agrees with this position.

Constitutional issues as concerns restricting judicial review

Putting the effects on the workload of the court aside, the Bill as it currently stands does appear to be in conflict with the Constitution. The Bill attempts to exclude the capacity of the High Court to hear appeals after the 28 day and then when extended 56 day period. This can be seen in the proposed amendments to s 486. Clause 11 of the Bill decreases the time limit from "35 days of the actual (as opposed to deemed) notification of the decision" to "28 days of the notification of the decision" for applications for appeals or reviews to the High Court. Additionally, the bill seeks to insert a new subsection following s 486A being (1A) which permits the court to extend this limit from 28 days to 56 days based on conditions specified in

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[2] Migration Amendment (Judicial Review) Bill 2004: Second reading debate Stephen Smith- Shadow Minister for Immigration, Acting Shadow Minister for Ageing & Senior, Speech, *Transcript Parliament House*, Canberra 2 April 2004

[3] Gibbs, Kate "Careful with time limits for migration cases: LCA", *Lawyers Weekly*, 5 April 2004 at: http://www.lawyersweekly.com.au/articles/7a/0c01ee7a.asp

[4] Law Council of Australia, "Migration Law Reform Proposals Need Further Scrutiny", 29 March 2004, available at: http://www.lawcouncil.asn.au/read/2004/2393400233

[5] Parish Patience Immigration Lawyers, "Migration Amendment (Judicial Review) Bill 2004", available at: http://www.parishpatience.com.au/immigration/JudRev04.htm

that section. However, the Bill seeks to constrain the court to only extending this limit to 56 days in certain cases, being those outlined as mentioned. Changes are proposed to s486(2) so that the High Court will only be permitted to make an extension in this time limit for reasons given in the Act. The Bill states in quite clear language that:

> "except as provided by subsection (1A), the High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 28 day period".

In this regard, not only is it reducing the ability of applicants to have an appeal or seek judicial review, but it is also constricting the Court's ability to hear such appeals or conduct such reviews and in this light it is clear that it may be threatening the constitutional position as regards the High Court in s 75 of the Constitution. RASSA agrees in this regard with the statements made by Stephen Smith, Shadow Minister for Immigration, that "the court must be obedient to its constitutional function. In the end, pursuant to s75 of the Constitution, this limits the powers of the parliament or of the executive to avoid, or confine, judicial review".[6] RASSA submits that essentially this Bill is an attempt by the Parliament to avoid or confine judicial review.

One of the major reasons why many sought that this Bill be sent to the Senate Legal and Constitutional Committee was because of fears that the Bill may, in its present form, be unconstitutional. These concerns have been expressed not only by Stephen Smith, Shadow Minister for Immigration, but also by Parish Patience Immigration. RASSA shares the same concerns as the above mentioned on that matter. Whilst the Law Council of Australia did not express any views about the constitutionality of the view *per se,* it did indicate that it is a bill which Parliament should not rush to adopt.

Bill to be considered in light of the High Court decision of *Plaintiff S157 v Commonwealth of Australia*

RASSA further submits that the Bill needs to be considered in the context of the decision of the High Court in February 2003 in the case of *Plaintiff S157 v Commonwealth of Australia*. In that decision the High Court "confirmed that the government's legislation could not deny the High Court's jurisdiction to review visa-related decisions where a decision maker misapplied the law, failed to take into account relevant evidence, where they exceeded their

[6] Migration Amendment (Judicial Review) Bill 2004: Second reading debate Stephen Smith- Shadow Minister for Immigration, Acting Shadow Minister for Ageing & Senior, Speech, *Transcript Parliament House*, Canberra 2 April 2004

powers or otherwise committed "jurisdictional error" in making their decision".[7] The Court did not say that privative clauses were unconstitutional, it indicated that such clauses, as Stephen Smith has put it, "could of course be constitutional but that a privative clause could not operate in respect of decisions that were made without jurisdiction".[8] Stephen Smith has indicated that "the bill 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 this regard, Mr Smith is referring to the proposed amendment to the privative clause definition within s 5(1) the definitions section of the *Migration Act*, so that it also includes decisions made both where the decision-maker has jurisdiction, but also purported decisions, that is decisions made where the decision-maker did not have the power or jurisdiction to make the decision.

Against the public interest

Earlier in this submission, there was discussion concerning the proposed change to the definition of privative clause decisions to include purported decisions. This move to again seek to exclude the possibility of review of decisions is both unfair and also against the public interest. In this regard, RASSA agrees with Parish Patience Immigration's statement that "the Bill is a stark illustration of a disturbing general trend regarding the introduction of privative clauses in legislation denying people access to an independent judiciary where potentially incorrect administrative decisions have a profoundly negative impact on people's lives".[9] RASSA submits that this Bill is entirely against the public interest in all respects. In respect of narrowing the scope for the Courts to grant extensions to the time-limits set down in the Act, and furthermore in ensuring that all decisions, including "purported decisions" are covered by these amendments so that effectively applicants are left with very limited and restricted possibilities for review and appeal of decisions. Further to this, RASSA again agrees with Parish Patience Immigration who said that "the whole notion of denying people access to an independent judge to call into question unlawful decisions of Officers of the Commonwealth is repugnant to Australia's core values of accountability, transparency and the prevention of abuse of power".[10]

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[7] Parish Patience Immigration Lawyers, "Migration Amendment (Judicial Review) Bill 2004", available at: http://www.parishpatience.com.au/immigration/JudRev04.htm

[8] Migration Amendment (Judicial Review) Bill 2004: Second reading debate Stephen Smith- Shadow Minister for Immigration, Acting Shadow Minister for Ageing & Senior, Speech, *Transcript Parliament House*, Canberra 2 April 2004

[9] Parish Patience Immigration Lawyers, "Migration Amendment (Judicial Review) Bill 2004", available at: http://www.parishpatience.com.au/immigration/JudRev04.htm

[10] Parish Patience Immigration Lawyers, "Migration Amendment (Judicial Review) Bill 2004", available at:

Conclusion

Refugee Advocacy Service of South Australia has great concerns not only about the constitutionality of this Bill but also of the effects which it will have on applicants for judicial review of decisions made under the Migration Act by the delegates and the Minister herself of the Department of Immigration, Multicultural and Indigenous Affairs. RASSA is concerned that this Bill will not decrease the workload of the Courts in migration matters as the Government hopes, but will rather increase the workload of the High Court. Additionally, RASSA supports the views expressed by Parish Patience Immigration Lawyers that the Government cannot be above the law as this Bill seeks to place them and further agrees that it is every person's right to have review of a decision made by a decision-maker where there is jurisdictional error. Furthermore, RASSA submits that the Government needs to look to the root cause of the problem -i.e. the reason why there are such a large number of applications for judicial review being made to the courts- and that the Government should address the cause and not the effects. In this regard, RASSA submits that the Government should look at the quality of the original decisions being made by the decision-makers and look at the reasons why so many review applications are being made from these decisions. Perhaps if the Government would ensure a better quality of decision-making then it would be able to decrease the Court's workload as concerns review of migration decisions. In this regard, RASSA supports the comments made by Stephen Smith about the lack of confidence in both the initial decision-making process and also in the Refugee Review Tribunal's review of these initial decisions.[11]

For further information, please do not hesitate to contact us:

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http://www.parishpatience.com.au/immigration/JudRev04.htm

[11] Migration Amendment (Judicial Review) Bill 2004: Second reading debate Stephen Smith- Shadow Minister for Immigration, Acting Shadow Minister for Ageing & Senior, Speech, *Transcript Parliament House*, Canberra 2 April 2004