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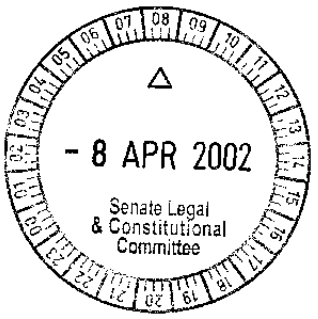
THE
VICTORIAN
BAR



8th April, 2002

Mr. Noel Gregory
Acting Secretary
Australian Senate
Legal and Constitutional Legislation Committee
Parliament House
CANBERRA 2600

Facsimile: (02) 6277 5794

Dear Mr. Gregory,

Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 and of the Migration Legislation Amendment Bill (No 1) 2002

Further to your letter of 25th March, 2002 inviting comments from the Victorian Bar concerning the above-mentioned bills, our comments in the very limited time we have been afforded are as follows.

Migration Legislation Amendment (Procedural Fairness) Bill 2002

Despite the title of the Bill,its effect is to alter the status quo with respect to procedural fairness obligations under the Migration Act 1958 (Cth) (as amended) ("the Act") by reducing the need to comply with basic principles of natural justice..

The Act is primarily concerned with decisions relating to visas. Most visa applicants are non-citizens and most of these are persons who are not familiar with English or the intricacies of the Australian bureaucratic culture. Many do not have representation and are generally in a vulnerable position. Only registered migration agents can advise and represent visa applicants. Registered migration agents do not have to be legally qualified. It is well known that the standard of representation in the migration field is generally very poor.

Decisions made under the Act also impact on Australian citizens and permanent residents who are related to non-citizen visa applicants. The Procedural Fairness Bill was prompted by the High Court's decision in Re Minister for Immigration and

The Victorian Bar Inc. - Reg. No. A0034304S

Please address all correspondence to the Honorary Secretary

Owen Dixon Chambers
205 William Street Melbourne 3000

Telephone: (03) 9225-7111
Facsimile: (03) 9670-2959

Email: vicbar@vicbar.com.au
Website: www.vicbar.com.au

Affiliated with the Australian Bar Association

Multicultural Affairs; ex parte Miah (2001) 179 ALR 238 ("Miah"), in which it was held that the Code of Procedure provided for in the Act in relation to decision-making at the primary and merits review levels did not exclude common law natural justice requirements. The majority held that natural justice was a long established common law right, which could only be ousted by unambiguous statutory language.

Miah concerned a refugee status applicant whose application was refused by the primary decision-maker because he took the view that the change of government in the applicant's home country nullified the applicant's risk of political persecution. The primary decision-maker did not give the visa applicant an opportunity to make submissions as to how the change of government impacted on him. The majority took the view that it was simplistic and unrealistic for the primary decision-maker to assume that all the former government's policies no longer had an impact on persons such as the applicant.

The legislative regime governing migration decisions is highly prescriptive and complex. In addition to the legislation, decision-making is also heavily influenced by governmental policy in the form of the Procedures Advice Manuals ("PAMS"), the Migration Series Instructions ("MSIs") and Ministerial Directions. These materials fill about 25 lever arch files. Lawyers who do not specialise in migration law find this regime difficult to navigate. It is intimidating to most English speaking lay people and incomprehensible to persons with little or no English language ability. These difficulties are exacerbated if the visa applicant is in detention, particularly outside metropolitan areas.

Many of the decisions made under the Act have the ability to drastically affect the lives of visa applicants and any relatives they may have in Australia. For those seeking to invoke the protection of the Refugees Convention, the effect of decisions made by the Department of Immigration, Multicultural and Indigenous Affairs ("DIMIA") or by the Refugee Review Tribunal ("RRT"), have the potential to impact on their lives and liberty in a very literal sense. Protection visa decisions also have the potential to affect Australia's international standing as Australia's refugee determination system has been regarded as one of the best in the world.

The Act imposes strict requirements in relation to the making of visa applications. Many applicants assume that filling in the relevant visa application form will be all that is required when this is seldom the case. The application forms almost always need to be supplemented with supporting documentation and submissions addressing the relevant legal and policy requirements.

The Code of Procedure which presently exists in the legislation is very restrictive and heavily biased towards to the decision-maker. The decision-maker is generally absolved from taking a pro-active role in relation to obtaining further information from applicants. The objective of the Code of Procedure is to maximise administrative expediency rather ensuring a fair and correct decision. The type of administrative expediency achieved is often of a very short-sighted nature. The efficacy of decision-making is judged by the volume of decisions produced rather than the outcomes of the decisions. Hastily made decisions are invariably appealed to the

merits review tribunals thus passing the cost to a different segment of the budget for the immigration portfolio.

Funding for the merits review tribunals is also tied to the volume of decisions produced. Reappointment of members is heavily dependent on whether they have achieved the requisite quota of decisions. The quota for RRT members is 130 decisions per year. This is 2.7 decisions per week (allowing for a working year of 48 weeks). Given the complexities of the decision-making process in the refugee jurisdiction, the pressure of this workload may cause members to cut corners or to fail to cover all necessary issues in their reasons for decision. This was also noted by the Senate Legal and Constitutional Law Committee's Report concerning the refugee determination process Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Process (Parliament of the Commonwealth of Australia, Canberra, June 2000).

If the decision-maker takes the simple step of inviting comments and deals with the applicant's response, the quality of the decision will generally be better and the potential for successful appeal will be reduced. A high rate of appeal tends to occur where there is little trust in the decision-making body. There will be less trust if the people affected believe that they have not been given "a fair go".

The extensive amendments to the Act, which were passed in late September 2001 (in particular the introduction of the privative clause in relation to judicial review), served to reduce the scope for challenging and scrutinising decisions made under the Act. Practitioners in the migration jurisdiction point to the notable difference in quality between decisions which are subject to external review and those which are not, such as, for example, visa decisions by overseas posts. The quality of reasoning and the decision-making process generally is notably inferior and much less fair to applicants than that which applies in relation to visa applications lodged and decided in Australia. Removal of accountability can only have an adverse affect on the quality and integrity of the decision-making process.

There are currently many protection visa applicants in a similar position to that of the applicant in Miah. Afghanistan is a prime example of a country in which there has been a change of government but where the political system is still very unstable. If a protection visa applicant is in detention and unrepresented, they may not be aware of the changes in their home country or have limited information at best. The proposed bill removes any obligation on the decision-maker to inform visa applicants of the changes or to invite comments. The Code of Procedure confers a discretion on decision-makers to invite comments but they do not have to exercise it and are legally entitled to proceed to make their decision on the basis of the information before them. The proposed amendments will also apply to the Migration Review Tribunal and the RRT. The decisions of these tribunals are affected by the privative clause in section 474 of the Act. Given the existence of the privative clause, natural justice in the decision-making process is even more vital.

This initiative to deny the full range of natural justice rights to non-citizens sets a precedent for the removal or restriction of such rights for Australian citizens

generally. The Government's proposed legislation for the Administrative Review Tribunal was heavily criticised because it downgraded existing administrative review rights.

In 1994, the Migration Reform Act 1992, introduced a highly restrictive judicial review regime in part 8 of the Act which eliminated many of the usual grounds for judicial review such as breaches of natural justice, failure to take into account relevant considerations, reasonable apprehension of bias and unreasonableness. It was thought that these restricted grounds would lessen the appeal rate against decisions made by DIMIA or the merits review tribunals. It had the opposite effect as noted in the Immigration Minister's second reading speech for the Migration Legislation Amendment (Judicial Review) Bill 2001, which introduced a new Part 8 into the Act, the main feature of which was the privative clause in section 474.

The Government was aware of the Court's approach to such clauses but decided to introduce it into the Act nevertheless. Practitioners in the migration jurisdiction have noted that there has been no decrease in the number of judicial review applications to the Courts since the introduction of the privative clause. The decisions which have been handed down by the Court thus far still involve a full hearing of the case. The approach taken by the Court is to examine whether the nature of the legal errors alleged would be sustainable under normal administrative review principles and if they are, only then would they deal with the complexities of the privative clause. In other words, all judicial review applications are fully litigated. No doubt this is not the approach anticipated or desired by the Minister for Immigration.

Just as Courts are loath to have their jurisdiction ousted by privative clauses, they are also loath to allow the abrogation of long established common law rights. Under the former part 8, the Federal Court in particular construed the provisions in a way to introduce common law principles of administrative review. The jurisprudence concerning sections 420 (the obligation to accord substantial justice and act in accordance with the merits of the case) and 430 (reasons for decision) are notable examples of judicial interventionism and innovation. The High Court's decisions in cases such as Miah, Re Refugee Review Tribunal; ex parte Aala (2000) ALR 219 and Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1 are also examples of this. At times, the Court's reasoning has been strained or difficult to comprehend. The end result is that the decision-maker's task was often made all the more difficult.

If the Procedural Fairness bill is passed, it is highly likely that the Courts will adopt a similar approach in construing the Code of Procedure in such a way as to expand its scope with the result that the administrator's task will not be any easier. It would be preferable to amend the Code of Procedure to include a provision which obliges the decision-maker to invite a visa applicant to comment where there has been a material change which could affect the outcome of the application. A material change could include governmental change in the applicant's home country or other significant change in the political landscape. If such a provision is enacted and the applicant's response (if any) is considered, the quality of decisions will improve, the persons affected will have more confidence in the process and be more inclined to accept the outcome.

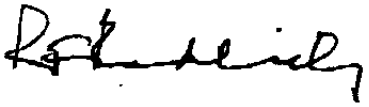
Migration Legislation Amendment Bill (No 1) 2002

The Victorian Bar is concerned about proposed sections 33(5A) and 33(11) of the Act as set out in Schedule 3, Items 1 and 2 of this Bill. These provisions affect special purpose visas. Section 33(9) empowers the Minister to issue a declaration to ban a person or classes of person from entering or remaining in Australia. The effect of such a declaration is to render the persons affected unlawful entrants and thereby liable to detention and removal from Australia. Section 33(11) removes any obligation to afford natural justice to persons affected by such a declaration. The justification for this is that the persons affected cannot be contacted or because the decision is based on adverse intelligence reports which cannot be disclosed.

In a country such as Australia, which espouses the rule of law, governmental decisions should not be made without giving the person affected an opportunity to answer any adverse material used by the decision-maker. Of particular concern is the use of adverse intelligence reports. The source of such reports is highly relevant in determining their reliability. Section 503A of the Act already exempts from disclosure information provided in confidence from gazetted agencies. A gazetted agency is defined in section 503A(9) as a body, agency or organization responsible for law enforcement, criminal intelligence, criminal investigation or security intelligence in Australia or a foreign country which is specified by the Minister in a notice published in the Commonwealth Government Gazette.

The relevant gazette notice (Gazette Notice GN23, 9 June 1999). specifies countries rather than agencies and hence its legality is questionable. Assuming it is legally valid for the purposes of the present submission, an examination of the countries listed in the gazette notice includes countries that are well-known for human rights abuses. Information provided by countries which are governed by undemocratic regimes that regularly commit human rights violations such as Afghanistan, Iran, Iraq, Mozambique, Somalia and Rwanda could hardly be regarded as reliable. It is the Victorian Bar's view that the Australian government should not be basing its decisions on information provided from such sources, especially if the person affected has no right to respond to such information. By removing any natural justice requirement, decision-making is at risk of becoming arbitrary and unsound. Extensive provisions already exist for the cancellation of visas before and after entry to Australia: see sections 33, 109, 116, 128, 134, 137, 140, 500A, 501, 501A and 501B. The proposed amendments to section 33 are unnecessary in the Bar's view.

Yours sincerely,



ROBERT REDLICH
Chairman