

22 April 2005

Mr Owen Walsh
Secretary
Legal and Constitutional Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Sir

Re: Inquiry into the Migration Litigation Reform Bill 2005

At the hearing held 13 April 2005, the Commission took two questions on notice. I am advised that the answers to the Honourable Senators' questions are as set out below.

1. Examples of Cases Filed Out-of-Time

The Commission, in giving its oral evidence to the Committee, offered to provide further details of cases in which applicants had missed strict deadlines. The following cases demonstrate, in the Commission's view, the range of circumstances in which people can miss a deadline (however long that deadline may be) and, in the absence of judicial discretion, suffer potential injustice.

***Kucuk v Minister for Immigration & Multicultural Affairs* [2001] FCA 535**

In *Kucuk*, a facsimile of the applicant's application was sent by detention centre staff to the wrong number. When the applicant had received no confirmation of the lodging of her appeal, she attempted to transmit the document again, but the fax machine was not working. The applicant then attempted for a third time, still within the appeal period, to transmit her application to the Federal Court and it was again sent to the wrong number by detention centre staff. The applicant was not informed that her application had not been transmitted until a further month passed. The application was dismissed as incompetent.

***Barzideh v Minister for Immigration and Ethnic Affairs* (1997) 72 FCR 337**

In *Barzideh v Minister for Immigration and Ethnic Affairs*, the applicant lodged an application for judicial review within the relevant time limit. The application, however, named the wrong respondent. This error was brought to the attention of the applicant during the court process and the Court purported to make orders substituting the proper respondent more than 5 months after the time limit had expired. Hill J found that the Court was not authorised to do so by reason of the strict time limit and dismissed the application as incompetent.

W281 v Minister for Immigration & Multicultural Affairs [2002] FCA 419

In *W281*, the filing of the applicant's application was initially delayed in the administrative workings of the detention centre and then apparently overlooked by staff for over 2 months – a matter beyond the control of the applicant. French J found as follows (at [33]):

I find that the applicant did complete an application to this Court for an order of review of the decision of the Tribunal on 20 April. He placed that application in the appropriate receptacle at the Curtin Detention Centre on that day. The application was collected by an officer of DIMA on Monday, 23 April and then passed to ACM for transmission to the Court. The ACM Trust Officer declined to transmit the application to the Court because there were insufficient funds in the applicant's account at the Centre to meet the cost of the fax. On 24 April, the application was returned to the DIMA officer and the applicant was told that it had not been sent to the Court for want of the necessary funds. This was the last day of the twenty eight day period which had elapsed since the applicant was notified of the Tribunal decision. The applicant arranged to obtain funds from another detainee to enable the fax to be transmitted. Although relodged by the applicant on that day, the fax request was not processed until 26 April and, in the event, the fax was not sent until 5 July when Ms Boylan was approached by the applicant who complained he had received no notification of a directions hearing date.

His Honour dismissed the application on the basis that the Court lacked jurisdiction to entertain it.

Salehi v Minister for Immigration & Multicultural Affairs [2001] FCA 995

In *Salehi*, Mansfield J considered 17 applications that were filed out-of-time by persons in immigration detention. He found as follows in relation to their failure to commence proceedings in time (at [51], emphasis added):

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 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).

The application was dismissed as incompetent.

Al Achrafi v Minister for Immigration and Multicultural Affairs [1997] 721 FCA

The applicant in this matter, who needed an interpreter to give evidence and was initially unrepresented in his application, made two initial attempts at filing an application for review before finally filing out-of-time with the Federal Court. On the first occasion, within a week of receiving the decision from the RRT, he lodged a form with the RRT in the form of an application for review of the decision. The RRT contacted a member of his family and indicated that a different form was needed. The correct form for an application to the Federal Court was obtained from an office of the Department of Immigration and Multicultural Affairs, but was again lodged by a member of the applicant's family with the RRT. The application was finally lodged with the Federal Court out-of-time and was dismissed as incompetent.

2. Consultation with the Commission in Relation to this Bill

Senator Ludwig inquired as to whether or not the Commission was consulted in relation to this Bill. We have made inquiries on this issue and can advise that the Commission was not consulted in relation to this Bill.

Yours faithfully

Craig Lenehan
Deputy Director Legal Services