Standing Committee on Legal and Constitutional Affairs
The Senate
The Parliament of the Commonwealth of Australia

INQUIRY INTO THE MIGRATION AMENDMENT (REVIEW PROVISIONS) BILL 2006

Written submissions by Michaela Byers, Solicitor
8 January 2007

CURRENT LEGAL AUTHORITY

I respectfully submit that the Migration Amendment (Review Provisions) Bill 2006 is an attempt to circumvent the Court authorities, in particular *SAAP v MIMIA* [2005] HCA 24 (2005) 215 ALR 162 (2005) 79 ALJR 1009 83 ALD 545.

In the matter of *SAAP* the facts were that the Tribunal invited the first appellant to appear to give evidence and present arguments under section 425. Evidence was later taken from the first appellant's daughter in absence of the first appellant. The Tribunal affirmed the decision under review by relying on information obtained form the first appellant's daughter. The Tribunal failed to give the first appellant particulars in writing of information – it failed to invite the first appellant in writing to comment on information. The question was whether the Tribunal breached section 424A. The majority of the High Court of Australia held there was a failure of the RRT to comply with section 424A and the decision of the RRT was invalid.

REVIEW PROCESS

The Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) conduct hearings on an inquisitorial basis. The Member asks the review applicant and witnesses questions and they answer. Lawyers and migration agents (advisors) have no right of audience. Usually, the review applicant's advisor attends the hearing in the capacity as a "note taker" and is maybe allowed to comment at the end of the hearing and/or provide post-hearing written submissions. Some review applicants are unrepresented or do not want their advisors to attend the hearing for one reason or another.

It is important to understand that the review applicant is invited to the hearing by the Presiding Member as he/she is unable to make a favourable decision on the papers alone. Therefore, the oral evidence at the hearing is crucial in order to change the Member's view of the review applicant's case. The review applicant and witnesses usually do not speak English and must respond to the Member's questions through an interpreter. The competency of the interpreter is paramount in such circumstances. Most hearings take between two to three hours.

I often remark to clients and Members alike, if Michael Jackson had to defend himself in an inquisitorial process it is highly likely that the verdict would have been different. However, unlike the position that Michael Jackson was defending, the RRT in particular, is often presented with making a decision on a review application where the review applicant's life maybe endangered.

Sections 359AA and _424AA_ Information and invitation given orally by Tribunal while applicant appearing

I respectfully submit that the review system already places a great burden on review applicants to present their own cases. The proposed sections 359AA and 424AA places a further burden on review applicants to make a legal decision on the spot during a hearing whether to comment or to ask for an adjournment. I further submit that most review applicants will not understand the gravity of this legal decision. Also, most review applicants seek a quick decision from the Tribunal and will attempt to comment regardless of whether it is in their best interests to do so, or not.

Furthermore, sections 359AA and 424AA will increase the importance of the role of the interpreter to competently interpret the gravity of the *"clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review"* and any comments in reply as the Tribunal only has to *"ensure as far as is reasonably practicable, that the applicant understands"*. I respectfully submit that there are too many variables in the proposed amendments to ensure justice is done.

A phrase such as *"The Tribunal must ensure as far as is reasonably practicable, that the applicant understands"* will only create a whole new area of case law that may produce a result that is even less flexible in how the MRT and RRT accords procedural fairness to review applicants. In addition, there may even be challenges made against the competency of the interpreters involved in the hearings as advisors are almostly excluded from the review process.

I respectfully submit that the status quo should be maintained. The Tribunal should continue to put its clear particulars of any information that the Tribunal considers would be the reason, or a part of the reasons, for affirming the decision that is under review in accordance with the current

sections 359A and 424A in writing to review applicants in order for them to seek independent (legal) advice before responding in writing to the Tribunals.

Section 359AA* and *424AA

The Department of Immigration (DIMA) tapes interviews with visa applicants but does not give a copy of the tape to visa applicants. In addition, the tape is not released under a Freedom of Information application. Some review applicants to the MRT wait up to 18 months for a hearing, in which time he/she would not recollect the DIMA interview well and he/she has no tape of the DIMA interview to listen to, to refresh his/her memory before or after the hearing. Therefore, I would oppose the implementation of sections 359A subsection 4(ba) and 424A subsection 3(ba) as it is unfair.

Conclusion

The proposed amendments may allow the MRT and RRT flexibility in how they accord procedural fairness to review applicants, however, the proposed amendments place further burdens on review applicants to present their evidence effectively. This burden disadvantages many review applicants who do not have the knowledge, level of education and understanding to deal with an inquisitorial interview and the legal framework of refugee determination. Many have never given evidence through an interpreter before and find the experience very confusing.

I also submit that the proposed amendments further limit the role of the advisor in review applications. Advisors should be allowed to have some input into the hearing and answer legal questions such as what sections 359AA and 424AA propose, on behalf of the review applicant.[1] This is best served by the Tribunal putting its reasons in writing for the review applicant to comment on in writing within the time limits.

[1] Tribunal officers often advise review applicants that they do not need an advisor and this is one of the reasons why review applicants do not ask their advisors to attend the hearing with them.

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