Legislative brief

Migration Amendment (Protection and Other Measures) Bill 2014

This legislative brief sets out the key features of the Migration Amendment (Protection and Other Measures) Bill 2014. For a detailed commentary, see the Kaldor Centre's submission to the Senate Legal and Constitutional Affairs Committee.

Overview

The Migration Amendment (Protection and Other Measures) Bill 2014 proposes a number of significant changes to the current system of determining refugee status in Australia, including:

- changing the standard of proof required to obtain protection from the risk of torture; cruel, inhuman or degrading treatment or punishment; the death penalty; or arbitrary deprivation of life (known as 'complementary protection');
- denying protection to asylum seekers who have, or are thought to have, provided false identity, citizenship or nationality documents;
- imposing a legal burden of proof on asylum seekers to establish their need for protection;
- enabling the Temporary Safe Haven visa to be used as a bridge to temporary protection visas;
- preventing an asylum seeker in Australia from being granted refugee status on the basis that they are a family member of a person who has already been granted protection; and
- empowering the Refugee Review Tribunal (RRT) to dismiss a claim if the asylum seeker fails to appear; make adverse inferences (ie draw conclusions adverse to the asylum seeker) if new evidence is submitted; and issue 'guidance decisions' and practice directions.

In general, the Bill is also retrospective in effect, in that the Bill is intended to apply to all applications that have not been 'finalised', including applications that are already being processed.

On 22 September 2014, the Senate Legal and Constitutional Affairs Committee reported on this Bill. The Committee (with the Greens dissenting) recommended passing the Bill, subject to three recommendations:

- that the amendments only apply to applications made on or after the commencement of the bill or the date on which the bill was first introduced to parliament
- the government consider increasing the 7 day limit on reinstatement of an application where an applicant fails to appear to 14 days, and
- the government amend the explanatory memorandum to the bill to clarify how the 'more likely than not' threshold will be applied by decision makers.

The Bill was also considered by the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills.

The Bill was due to be debated in Parliament in 2014 together with the Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Bill (which was passed), but the Bill was not debated before Parliament closed. It is expected that the Bill will be passed when Parliament resumes in February 2015.

Complementary Protection

What the Bill will change

In 2011, the *Migration Amendment (Complementary Protection) Act 2011* (Cth) ('Complementary Protection Act') was passed. This provided that a non-citizen, who does not satisfy the refugee definition, can still be granted a protection visa where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

This provision was intended as a means to implement Australia's specific *non-refoulement* obligations under the Convention Against Torture (CAT, Art 3) and the International Covenant for Civil and Political Rights (ICCPR, Art 7) in domestic law. It is generally known as 'complementary protection' (see our Complementary Protection factsheet).

The relevant test for complementary protection in international human rights law is broadly consistent with that applied in Australian refugee law, namely whether there is a 'real chance' of persecution. The High Court of Australia has said that this means there is a 'substantial, as distinct from a remote' chance of persecution occurring, 'regardless of whether it is less or more than fifty per cent'. It may be satisfied even 'though there is only a 10 per chance'.[1]

The current Bill proposes amending this threshold so that a person is entitled to complementary protection only if 'it is *more likely than not* that the non-citizen will suffer significant harm if they are to be removed from Australia to a receiving country'.

This proposed amendment will only take effect if the existing Bill before Parliament, which seeks to remove complementary protection from the statutory framework, altogether is not passed.

Comment

The proposed *'more likely than not'* threshold sets a higher threshold for obtaining complementary protection than required under international law. This creates the risk that people who meet the test under international human rights law, but do not meet the

[1] *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, [12], [19], [34].

higher test under domestic law, will be returned in violation of Australia's international legal obligations.

The Senate Legal and Constitutional Affairs Committee noted that there was confusion regarding the application of the test. The Department of Immigration and Border Protection submitted that it was not true that there would need to be a more than 50% chance that a person would suffer significant harm if returned, despite contrary statements in the Explanatory Memorandum and by the Minister for Immigration. The Department has committed to redrafting the Explanatory Memorandum. This does not, however, address the concern that the 'balance of probabilities' test is inconsistent with international law.

Fraudulent Documents

What the Bill will change

Currently, under section 91W of the *Migration Act*, a decision-maker can ask an asylum seeker to provide them with documents relating to their identity, nationality or citizenship. If the asylum seeker 'refuses or fails to comply' with this request without a reasonable explanation, the decision-maker can rely on this as undermining the applicant's evidence of his or her identity, nationality or citizenship ('draw an adverse inference'), as long as the asylum seeker was warned that this was possible at the time the decision-maker made the request.

The proposed Bill would change this by requiring decision-makers to deny asylum seekers protection visas if:

- the decision-maker considered that they had provided, or caused to be provided, 'bogus' identity, nationality or citizenship documents;
- they destroyed or disposed of their identity, nationality or citizenship documents, or caused them to be destroyed or disposed of; or
- they refused or failed to comply with a request to provide such documents without reasonable explanation.

There are two main effects of this change. The first, and most important, is that decision-makers are automatically required to deny protection visas in these circumstances, rather than being able to consider the relevance of the missing or fraudulent documents as part of the overall evidence. Secondly, the circumstances in which the decision-maker can rely on the issue of missing or fraudulent documents have been expanded.

Comment

These provisions are fundamentally flawed because they do not recognise that the use of false documents does not necessarily mean an applicant's claims are untrue. The reality of forced migration means that asylum seekers will often have false or no documents. This reality is recognised in Article 33 of the Refugee Convention.

The provisions create a significant risk of breaching Australia's international legal obligations, because genuine refugees with fraudulent or no documents will be denied

protection. The provisions are also too broadly drawn, so that refugees with genuine documents may also be denied protection visas, simply because the decision-maker considers that the documents are fraudulent.

Legal burden of proof

What the Bill will change

Currently, an asylum seeker does not have to meet a 'legal burden of proof' (that is, be responsible for providing sufficient evidence to establish the refugee claim).[2] Under Australia's inquisitorial process, the asylum seeker must advance his or her evidence or argument and it is for the decision-maker to determine whether this is established.[3]

Proposed section 5AAA of the Bill would change this by making it the sole responsibility of an asylum seeker to 'specify all particulars of his or her claim … and to provide sufficient evidence to establish the claim'. The decision-maker has no responsibility or obligation in this respect. This applies to both refugee and complementary protection claims, and to claims raised in respect of regulations, instruments, and administrative processes under the Act.

Comment

This proposed change is inconsistent with UNCHR's guidance that a decision-maker 'shares the duty' to ascertain and evaluate facts and with international best practice. It also fails to recognise the unique context of refugee status determination, including the special vulnerability of asylum seekers and their limited access to legal advice and representation.

These provisions are likely to disproportionately affect especially vulnerable groups. For example, many victims of sexual violence, torture or homophobia find it difficult to talk about their persecution in detail with strangers in a foreign country.

Temporary protection

What the Bill will change

In early 2014, after the Senate disallowed temporary protection visas (see our factsheet on Temporary Protection Visas), the Immigration Department began offering Temporary Safe Haven visas and Temporary Humanitarian Concern visas to asylum seekers. Accepting these visas had the legal effect of preventing the asylum seeker from applying for any other kind of visa, including a permanent protection visa.

Schedule 3 of the Bill proposes changes that would enable the Immigration Department to transfer people on temporary safe haven visas on to other forms of temporary

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[2] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1.

[3] Ibid [135].

protection visas, and to increase Ministerial powers in respect of whether asylum seekers are allowed to apply for visas. The combined effect would enable the Minister to effectively require those on Temporary Safe Haven and Humanitarian Concern visas to be transferred on to temporary protection visas, which may offer lesser benefits.

Comment

The operation of this Schedule is now unclear, because the High Court has ruled that the grant of Temporary Safe Haven and Humanitarian Concern visas to those already in the process of being considered for protection visas is unlawful (see our factsheet on Temporary Protection Visas). The Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014 has since re-introduced temporary protection visas.

Family reunion

What the Bill will change

Currently, a protection visa can be granted to a person because that person is a family member of a recognised refugee. Proposed section 91WB of the Bill would prevent a family member from joining a recognised refugee in Australia unless the family member can independently establish a refugee or complementary protection claim.

Comment

This provision contravenes the principle of family reunification in international refugee and human rights law, which reflects the importance of family life, especially for children. It will cause considerable hardship to refugees in Australia, and make their adjustment into the community more difficult.

Changes to powers of tribunals

What the Bill will change

The Bill also would make a number of changes to the procedures adopted by the Migration and Refugee Review Tribunals. One of these changes is that, if an asylum seeker fails to appear at a hearing, their claim can be dismissed without considering any evidence. The claim can be reinstated by the Tribunal, but the asylum seeker must apply within seven days of the hearing.

The Bill also requires the Tribunal to consider that the evidence is undermined ('draw an adverse inference') if a person makes a claim or presents evidence that was not in the original application to the Immigration Department, and there is no reasonable explanation for not having provided this earlier.

Finally, the Bill also gives the Tribunal the power to issue 'guidance decisions', which decision-makers will be required to follow unless the facts or circumstances can clearly be distinguished. The Bill does not provide any safeguards as to the use of this power.

Comment

These changes create procedural hurdles that could result in people being returned in violation of Australia's international legal obligations. For example, if a refugee fails to make it to their hearing because of (for example) ill health and misses the short deadline for reinstating their claim, that person could be denied protection. A victim of sexual violence may take a long time to disclose that information, because of the sensitivity of that claim, but may be denied protection because the decision-maker considers that this delay was not reasonable. Finally, without adequate safeguards, an inaccurate guidance decision may have the effect of wrongly denying protection to a group of people.