Australian Human Rights Commission

Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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Table of Contents

Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs legislation Committee..... 1

1 Introduction..... 3

2 Recommendations..... 3

3 Background..... 3

4 Summary..... 4

5 Non-refoulement obligations..... 4

6 'Real Risk' of Harm..... 5

7 Practical problems with considering complementary protection claims through an administrative process/only after claims for refugee status have been rejected..... 7

1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013.

2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

2 Recommendations

Recommendation 1: The Commission recommends that the Bill not be passed.

3 Background

3. This submission draws on the work the Commission has undertaken regarding complementary protection. The work has included:

    - Section 5 of the Commission's submission to the Senate Select Committee on Ministerial Discretion in Migration Matters (2003)[1]
    - The Commission's submission to the Inquiry into Immigration Detention in Australia (paras 69-75) (2008)[2]
    - The Commission's submission to the Inquiry into the Migration Amendment (Complementary Protection) Bill 2009.[3]

4. The government first sought to introduce complementary protection provisions into the *Migration Act 1958* (Cth) (Migration Act) in 2009, with the introduction of the Migration Amendment (Complementary Protection) Bill 2009.

5. The Commission made a submission to the Committee in its Inquiry held in relation to that Bill. Subject to the passage of certain amendments, the Commission supported the passage of that Bill.[4]

6. The 2009 Complementary Protection Bill lapsed. The government again introduced a Bill seeking to insert complementary protection provisions into the Migration Act in 2011, with the introduction of the Migration Amendment (Complementary Protection) Bill 2011. While that Bill did not include all of the amendments proposed by the Commission in relation to the 2009 Bill, the Commission broadly supported the passage of the 2011 Bill as better implementing Australia's complementary protection obligations.

7. The 2011 Complementary Protection Bill was passed, and entered into force on 24 March 2012.

8. The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (the Bill) proposes to amend the Migration Act to remove complementary protection as a basis for the grant of a protection visa.

4 Summary

9. The Commission's key concerns include that:

    a. The repeal of the statutory complementary protection framework may lead to non-compliance with Australia's non-refoulement obligations

    b. If the complementary protection provisions are repealed, the Minister may apply a test in assessing applications for complementary protection that is inconsistent with Australia's non-refoulement obligations

    c. Reliance on the Minister's non-compellable discretionary powers is likely to lead to delays, inefficient processing of claims, and inconsistent decision making.

5 Non-refoulement obligations

10. Australia has binding international obligations to protect people who do not fall within the definition of a refugee under the *Convention Relating to the Status of Refugees* and *Protocol Relating to the Status of Refugees* (Refugee Convention), but who nonetheless must be protected from refoulement (return) under the *Convention Against Torture* (CAT), the *International Covenant on Civil and Political Rights* (ICCPR) and *the Convention on the Rights of the Child* (CRC).

11. These obligations have been discussed by the Commission in detail in previous publications, including those referred to in paragraph 3 (above).

12. The Statement of Compatibility for the Bill states that the government intends to comply with Australia's international complementary protection obligations.[5] The government intends to introduce administrative arrangements to assess claims for complementary protection in place of s 36(2)(aa).[6] Similar remarks have been made by the Minister for Immigration and Border Protection in his second reading speech.[7]

13. The Commission welcomes these statements acknowledging Australia's complementary protection obligations, and the statement that '[a]nyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations'.[8]

14. However, for the reasons below, the Commission is concerned that the repeal of s 36(2)(aa) and reliance on administrative mechanisms may lead to breaches of Australia's non-refoulement obligations.

15. The Commission notes that:

    a. Prior to the introduction of the complementary protection provisions in the Migration Act, Australia fulfilled its complementary protection obligations by the Minister for Immigration and Citizenship exercising his personal, non-compellable discretionary powers under the Migration Act.[9] It appears that the primary power relied on was that in s 417 of the Migration Act.[10]

    b. The current Minister for Immigration and Border Protection has indicated that following the repeal of s 36(2)(aa), the government will consider 'a range of options… including the consideration of the exercise of the [Minister's] personal and non-compellable public interest powers under the act' to meet Australia's complementary protection obligations.[11] The government has not announced any actual framework for the consideration of applications for complementary protection, and it is not clear from the Minister's remarks what consideration has to date been given to the options mentioned in his second reading speech.

    c. Any administrative machinery put in place by the government will not be binding. Any person seeking complementary protection will be forced to rely on the Minister deciding to consider exercising a non-compellable discretionary power under, for instance, s 417 of the Migration Act.

    d. Although the Minister may consider Australia's international human rights obligations, his decisions in these cases are non-compellable and non-reviewable. The Minister is also not obliged to give reasons for his or her decisions, which means that the decisions lack transparency, accountability and consistency.

    e. There is no right of merits review to the Refugee Review Tribunal or any other court or Tribunal of a decision of the Minister made under s 417.

    f. It appears that the Minister is not obliged to accord procedural fairness when considering the exercise of his power under s 417.[12] Therefore, it is unlikely that there will be grounds for an applicant to obtain judicial review of a decision made under s 417 in relation to an application for complementary protection.

6 'Real Risk' of Harm

16. One way in which the repeal of s 36(2)(aa) may result in breaches of Australia's non-refoulement obligations is in changing the threshold of the risk of suffering serious harm on return that an applicant for complementary protection must meet.

17. The Minister for Immigration and Border Protection in his second reading speech said that, in interpreting s 36(2)(aa) of the Migration Act, 'the courts have … broadened the scope of the interpretation of these obligations beyond that which is required under international law.'[13] The Minister went on to say:

> the risk threshold test for assessing whether a person engages Australia's complementary protection obligations has this year been lowered to the same 'real chance' threshold as under the refugees convention…. The 'real chance' test is a very low bar and lower than required under the CAT and the ICCPR.[14]

18. In the Commission's view the Minister's remarks do not accurately reflect the international jurisprudence under the CAT and the ICCPR. The interpretation of the risk threshold that must be met for a person to qualify for a protection visa under s 36(2)(aa) as interpreted by the Full Federal Court is essentially the same as the risk threshold that must be met for that person to qualify for complementary protection in international law.

19. In *Minister for Immigration and Citizenship v SZQRB*[15], the Full Court of the Federal Court held that the risk threshold an applicant must meet to enliven s 36(2)(aa) is that there must be 'a real chance that [a person would] suffer significant harm (as that is defined in s36(2A)) were he to be returned to [his country of origin].[16]

20. This was in contrast to the departmental policy then in place, which was that a person did not qualify for complementary protection under s 36(2)(aa) unless that person showed that it was 'more likely than not' that they would suffer significant harm if returned. The Court held that this 'was not the appropriate standard'.[17]

21. It is true that some earlier decisions of the UN Human Rights Committee (UNHRC) used language suggesting that to demonstrate a 'real risk' of persecution, persecution must be a 'necessary and foreseeable' consequence of return. However the Committee has long made clear that the required threshold is that return would present a 'real risk' of persecution. In *Pillai v Canada*,[18] the UNHRC stated:

> the Committee notes the argument invoked by the State party regarding the harm being the necessary and foreseeable consequence of the deportation. In that respect the Committee recalls its General Comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm.[19]

22. In a concurring opinion, Ms Helen Keller, Ms Iulia Antoanella Motoc, M Gerald L. Neuman, Mr Michael O'Flaherty and Sir Nigel Rodley referred to the submission of the State party referred to above, and stated:

> that is not the proper inquiry. The question should be whether the necessary and foreseeable consequence of the deportation would be a real risk of the killing or torture of the authors.[20]

23. This accords with the statement of the UNHRC in its General Comment 31, wherein it stated that under the ICCPR, States Parties have:

> an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a **real risk** of irreparable harm, such as that contemplated by articles 6 and 67 of the Covenant….[21]

24. This also accords with the position of the United Nations High Commissioner for Refugees, who has said:

> UNHCR is of the view that there is no basis for adopting a stricter approach to assessing the risk of ill treatment in cases of complementary protection than there is for refugee protection because of the similar difficulties facing claimants in obtaining evidence, recounting their experiences, and the seriousness of the threats they face.[22]

25. The statements by the UN Human Rights Committee relate to States non-refoulement obligations under the ICCPR. The risk threshold relating to Australia's obligations under the the CAT is the same – that is, a person must not be expelled from the country if there is there a 'real risk' expulsion will lead to the person being tortured.[23]

26. The threshold for the risk of persecution under s 36(2)(aa) as interpreted by the Courts is therefore essentially the same as the threshold in international law.[24]

27. As the Minister considers that the courts have been applying too low a threshold, it therefore appears that if s 36(2)(aa) were repealed, the Minister might, in considering whether to exercise his non-compellable powers to grant complementary protection, apply a test that is inconsistent with Australia's international obligations.

28. Further, the Minister's claim that the courts' interpretation of s 36(2)(aa) 'has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties'[25] is not supported by his statement that since the introduction of s 36(2)(aa) in March 2012, 'only 57 applications have satisfied the requirements for the grant of a Protection visa on complementary protection grounds.'[26]

7 Practical problems with considering complementary protection claims through an administrative process/only after claims for refugee status have been rejected

29. Prior to the insertion of s 36(2)(aa) into the Migration Act, the government met its complementary protection obligations by the Minister exercising his personal, non-compellable powers under the Migration Act.[27] This had a number of practical disadvantages, including:

    a. It required applicants for complementary protection to apply for protection visas on Refugee Convention grounds, even if they were not entitled to protection on those grounds, causing extensive and unnecessary delays[28]

    b. Because of the mandatory detention provisions in the Migration Act, these delays may have the effect of unnecessarily prolonging detention of applicants for complementary protection in immigration detention, potentially leading to violations of article 9 of the ICCPR

c. The reliance on the Minister's discretion inevitably led to inconsistent decision making

d. The reliance on the Minister's discretion, which can only be exercised personally, was an inefficient use of the Minister's time

e. The Minister's exercise of his power under s 417 is in practice unreviewable, leading to the possibility of errors going uncorrected, and potentially to breaches of article 2(3) of the ICCPR.

30. The Commission refers to its discussion of these issues in the materials described in paragraph 3 above in relation to these matters. It is likely that the repeal of s 36(2)(aa) will lead to the reemergence of these practical problems.

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[1] Available at http://www.humanrights.gov.au/migration-matters.
[2] Available at http://www.humanrights.gov.au/hreoc-submission-inquiry-immigration-detention-australia#fnB40
[3] Available at http://www.humanrights.gov.au/inquiry-migration-amendment-complementary-protection-bill-2009
[4] Ibid.
[5] Statement of Compatibility with Human Rights, Attachment A to Explanatory Memorandum, Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 (Cth) p 2.
[6] Ibid.
[7] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, pp 10-12 (The Hon Scott Morrison MP, Minister for Immigration and Border Protection.)
[8] Statement of Compatibility, footnote 2 above, p2.
[9] Second Reading Speech for the Migration Amendment (Complementary Protection) Bill 2011, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, p 1356 (The Hon Chris Bowen MP, Minister for Immigration and Citizenship).
[10] Prior to the *Migration Amendment (Complementary Protection) Act 2011* coming into force on 24 March 2012, Complementary Protection was dealt with under the 'Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)' issued on 4 September 2011.
[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, p 11. (The Hon Scott Morrison MP, Minister for Immigration and Border Protection.)
[12] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.
[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2013, p 11. (The Hon Scott Morrison MP, Minister for Immigration and Border Protection.)
[14] Ibid.
[15] [2013] FCAC 33
[16] Ibid, [246]-[247] (Lander and Gordon JJ), [297] (Besanko and Jagot JJ), [342] (Flick J).
[17] Ibid.
[18] Communication No. 1763 of 2008, UN Doc CCPR/C/101/D/1763/2008
[19] Ibid, [11.4].
[20] Ibid, concurring view of Ms Helen Keller, Ms Iulia Antoanella Motoc, M Gerald L. Neuman, Mr Michael O'Flaherty and Sir Nigel Rodley.
[21] United Nations Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13, [12] (emphasis added).
[22] United Nations High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees Inquiry into Migration Amendment (Complementary Protection) Bill 2009* (September 2009) [34].
[23] McAdam, J., *Complementary Protection in International Refugee Law*, (2007) p 123; McAdam J., Submission to the Senate Standing Committee on Legal and Constitutional Affairs in relation to the Inquiry into the Migration Act (Complementary Protection) Bill 2009 (28 September 2009), [17] (available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2008-10/migration_complementary/submissions).

[24] See also Joseph, S. and Castan, M., *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (3rd ed, 2013) p 262-3.

[25] Second Reading Speech, above, p 108

[26] Second Reading Speech, above, p 107.

[27] See footnotes 9 and 10 above.

[28] Second Reading Speech for the Migration Amendment (Complementary Protection) Bill 2011, Commonwealth, Parliamentary Debates, House of Representatives, 24 February 2011, p 1356 (The Hon Chris Bowen MP, Minister for Immigration and Citizenship).