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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the Migration Amendment (Review Provisions) Bill 2006

Thank you for the opportunity to make submissions on the Migration Amendment (Review Provisions) Bill 2006.

Please find attached a written submission on ALHR's concerns about the implications of this Bill.

ALHR would be happy to attend a hearing in Canberra, Sydney or Melbourne to make further submissions if required.

Please either contact me (contact details below) or Simeon Beckett, President, on (02) 8233 0300 or 0412 008 039, or president@alhr.asn.au .

Yours faithfully,

By email

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Submission to the Senate Committee for Legal and Constitutional Affairs

Inquiry into the Migration Amendment (Review Provisions) Bill 2006

Introduction

1. Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make submissions on the *Migration Amendment (Review Provisions) Bill 2006*. ALHR has played an active role in advocating for the protection of human rights with respect to migration legislation introduced in recent years, especially in regard to the requirement of procedural fairness. It has made written and oral submissions to the Senate Committee on Legal and Constitutional Affairs on such legislation. Please note in particular submission no. 19 to the inquiry into the provisions of the *Migration Litigation Reform Bill 2005*.

Overview of concerns

2. ALHR opposes the *Migration Amendment (Review Provisions) Bill 2006* (hereafter, 'the Bill') on the basis that it hinders the creation of a review system that is transparent, fair, accessible to applicants, efficient and just. The key fault of the Bill lies in its attempt to add to the flexibility and efficacy of the merits review process without providing for sufficient safeguards to ensure such gains do not compromise the procedural fairness that is the very reason for merits review. Asylum claimants as well as many applicants for migration should be understood to be amongst those most in need of procedural safeguards. This is due not only to their vulnerability in a different social, cultural and legal context, but also to the consequences of an incorrect

decision, including the risk of forcible return to human rights abuses in the event of a miscarriage of justice.

3. The focus of this submission is not on the Bill as a whole but instead on some of its key provisions. The Bill contains two sets of identical provisions, relating to the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT') respectively. Out of convenience, only the MRT-specific sections 359AA and 359A(4)(ba) are referred to in this submission. These references should be taken to include and/or where appropriate also to mean the RRT, section 424AA and section 424A(3)(ba). In ALHR's view, all these provisions represent, from a human rights perspective, a backward step in the determination process for applicants under Australia's migration regime.

4. ALHR reiterates its view that the restrictions on full judicial review of migration decisions by the Federal Court should be lifted.

Relevant international law

5. In relation to refugees and asylum-seekers, the position of the Office of the United Nations High Commissioner for Refugees ("UNHCR") is that, for States party to the *1951 Convention relating to the Status of Refugees*, asylum claims should be examined by a fully qualified and competent authority and an independent review/appeal process should be provided to review negative decisions, with suspensive effect.

6. According to Conclusion No 8 (XXVIII) of the UNHCR Executive Committee, the review authority may be administrative or judicial, according to the State Party's prevailing system. Review by the RRT is acceptable although the UNHCR has asked that full access be given to the State party's court system for judicial review.

7. Such processes should be consistent with broader human rights standards of due process and the right to equality before the law,[1] and the basic principle at international law that refugee status determination procedures should be conducted in a manner that gives the applicant the benefit of the doubt.

1 As to which, see ALHR submission no. 19 to the inquiry into the provisions of the *Migration Litigation Reform Bill 2005*.

8. The UNHCR Handbook states at paragraph [190] that:

> It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.

9. Although Australia is not yet a party to the *1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, the Convention has been in force since July 2003. It therefore provides the applicable international standard in relation to the rights of migrants.[2]

Section 359AA

10. Section 359AA provides that the Migration Review Tribunal ('MRT'), in giving an applicant for review the particulars of any information that it considers would be the reason, or a part of the reason, for affirming the decision under review, and in inviting the applicant to comment on or respond to such particulars, may do so orally. This contrasts the current legislative arrangement under which the above must occur in writing.

11. Section 359(4)(ba) provides that information given by the applicant during the process that led to the decision under review, except that provided orally by the applicant to the Department, is exempted from the requirement of s 359A, mentioned above, that the MRT must give the review applicant the particulars of any information that it considers would be the reason, or a part of the reason, for affirming the decision under review, and invite the applicant to comment on or respond to such particulars. Currently, no such exemption exists.

12. Section 359AA is a direct response to the High Court's decision in *SAAP v MIMIA* ('SAAP'). There it was held, by a 3-2 majority, that s 359A must be

2 Article 18(1) of that Convention provides, as relevant: "Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

complied with in writing. The suggested provision attempts to alter this arrangement on the ground that the C

18. In such situations, the importance of a written as compared with an oral communication cannot be underestimated. Upon receiving the latter, the applicant possesses in tangible form a document upon which s/he can receive advice or elaborate by providing further information. Just as importantly, it distils the reasoning and preliminary conclusions of the MRT into physical form, providing a record of the decision making process beyond the ultimate decision itself.

19. Moreover, it may be difficult to judge the adequacy of the understanding of the applicant as to the particulars put to her/him. It is common for written communications to be taken more seriously than oral communications. Operating in an unfamiliar environment and/or in a state of personal anxiety, a tendency may exist to agree with propositions advanced by the MRT. This tendency may be heightened where an applicant associates the review process with the Department itself.

20. In *SAAP*, it was noted that migration review is a largely documentary process. While oral communication plays an important part in migration determination, the Bill expands its role without providing the criteria needed to regulate the discretion conferred by section 359AA. Further, the Bill provides no remedy where it is later demonstrated that the applicant did not sufficiently understand the context of the particulars put to her/him by the MRT.

21. The flaws of the Bill in this respect highlight the traps that accompany the establishment of a highly prescriptive code of procedure. As cases like *S157 v The Commonwealth*[3] demonstrate, however, attempts to exhaustively define rules of procedural fairness will rarely be endorsed by the judiciary.

22. Justice John Basten of the NSW Supreme Court, a leading migration law expert, has noted with regard to *SAAP*:

> In order to understand how the High Court dealt with the matter, it is necessary to take a step back and examine the statutory history. The key to this history, as is now well known, lies in a succession of attempts by various governments to tie down the elements of procedural fairness which it was considered should properly govern the exercise of powers under the Migration Act, so that decisions would not be invalidated by overly generous and unpredictable judicial assessment of what procedural fairness required in a particular situation. One way in which that was sought to be done was by setting out the procedures in the Act and preventing

3 (2003) 211 CLR 476.

any judicial review in the Federal Court for breach of non-statutory obligations of fairness: see old s.476 (now repealed) inserted by the Migration Reform Act 1992 (Cth). Another step taken was of course the inclusion in 2001 of the privative clause, which was undoubtedly intended to be the stick which would kill the snake, though interestingly amendments which sought to codify exhaustively statutory procedural fairness followed the introduction of the privative clause. The judgment of the Court in Plaintiff S157 v Commonwealth (2003) 211 CLR 476, effectively precluded the privative clause from fulfilling its intended function. However, Plaintiff S157 did not deal with the new provision stating that the statutory procedures set out exhaustively the content of the obligation of procedural fairness: see s.422B.[4]

Section 359A(4)(ba)

23. Section 359A(4)(ba) is an attempt to void the conclusions reached by the Full Court of the Federal Court of Australia in *MIMA v Al Shamry* ('Al Shamry'). There, it was held that the reference in section 359A to 'application', in the context of information excepted from the requirements of the provision with respect to the putting of particulars to an applicant for review, was to the application for review to the MRT, not to the application for a visa more broadly.

24. The effect of this finding is that only information submitted for the review application is not required to be put to the applicant if forming at least part of the reason for affirming the decision. The Minister's submission was that all information submitted as part of the broader visa application process, including information conveyed to Department officials by an applicant as part of standard operating procedures, and not formally in connection with a visa application, should be classed as not being required to be put to an applicant if forming at least part of the reason for affirming the decision.

25. The aim of section 359A(4)(ba) is to enact the Minister's submission in *Al Shamry* into law. At the same time, it respects the case's specific finding that an interview conducted by the Department with the applicant upon arrival at Sydney airport was not information for the purposes of a visa application. This is achieved by creating a carve-out from the section's operation for information provided orally by an applicant to the Department.

26. From the perspective of ALHR, section 359A(4)(ba) represents a regrettable attempt to narrow the scope of the merits review process. Although claiming

4 Justice John Basten, Limits on Procedural Fairness, AIAL Administrative Law Forum Canberra – 30 June 2005.

to loosen what is stated to be a strict interpretation of section 359A, the Bill fundamentally alters the role of the MRT to the detriment of applicants and the review process more broadly.

27. Section 359A(4)(ba) modifies the review process from one effectively conducted on a de novo basis to a more narrow process which appears likely to focus upon fresh information. If passed, there is little to prevent the MRT refusing an application for review on the same grounds which the Department rejected the original application without being required to put the relevant information to the applicant for comment and response.

28. Such a change represents a radical departure from the status quo. Currently, the review process conducted by the MRT is an inquisitorial, non-adversarial procedure unconnected with prior proceedings as far as they might define issues for consideration. In considering an application, the MRT may exercise all of the powers and discretions conferred on the primary decision-maker in addition to its own specific powers.

29. Thus applicants for review undergo administrative reconsideration of the subject matter of their case. Consistent with the common law rules of natural justice, applicants have the right to be informed of information that could lead to an adverse outcome against them, and the opportunity to respond to such information. Hence the MRT is able to state it is committed to ensuring that outcomes do not depend on whether applicants have obtained professional advice or assistance.

30. However the proposed amendment creates a procedure more akin to an appeals system. While the MRT will continue to be able to conduct a full administrative reconsideration of the subject matter the basis of the applicant's case, in practical terms only information not previously supplied to the Department (except that provided orally) or the MRT will be put to an applicant for comment and response if forming at least part of the reason for affirming the decision under review.

31. Hence the key feature of the migration review process is radically undermined. In *Al Shamry*, it was noted that an applicant may have no record of the information provided to the Department (or the MRT) and, more importantly,

not be aware of its significance to the review being conducted. Thus it is only fair that the MRT should be required to put information to an applicant for comment if it is likely to lead to an adverse outcome. As an inquisitorial, non-adversarial process, this is indeed a particularly crucial step.

32. Absent such a practice, only a shadow of the procedural fairness that the MRT is tasked with discharging can be delivered. Despite this, it is claimed the Bill will 'uphold the fundamental right of all review applicants to receive procedural fairness during review proceedings'. For the reasons given above, this is incorrect.

33. It should be noted that far from simplifying migration review and limiting 'unnecessary process and paperwork', section 359A(4)(ba) is likely to engender greater bureaucracy and increase the legal formality that the MRT aims to avoid in its operation. It is clear that if applicants are denied the right to have adverse information put to them for comment and response, greater detail will go into preliminary written submissions. In turn, more of the MRT's time will be spent on dealing with the issues there raised.

Problems with current exceptions

34. Rather than loosening current exceptions, recent statements by judicial officers show there may be serious problems with them. This can be seen in relation to the ratio in *SZHMM v RRT* [2006] FMCA 932 (16 June 2006) per Scarlett FM, on appeal to Madgwick J *SZHMM v Minister for Immigration & Multicultural Affairs* [2006] FCA 1541 (13 November 2006) in the Federal Court.

35. This case was raised in a recent article by Tim Dick, 'Immigration laws worry judge', *Sydney Morning Herald*, 7 December 2006 which ALHR would like to bring to the Committee's attention:

> A FEDERAL Court judge has pleaded for immigration law reform, saying the present regime prevents his court giving genuine asylum seekers a fair hearing.
>
> Rodney Madgwick heard an appeal last month by an asylum seeker which he said caused him "considerable unease". The appellant, known only as SZHMM, is a Hindu who claimed he fled persecution by Muslim fundamentalists in Bangladesh.
>
> The Refugee Review Tribunal rejected his claim for asylum, basing its decision on a single article from an Indian newspaper.

SZHMM complained that, had he known of the article, he would have produced contrary articles to support his case, but migration laws prevent the court declaring that he was denied natural justice.

"As a matter of an ordinary Australian 'fair go', procedurally this appellant appears not to have had one," Justice Madgwick said. "Frankly, it ought to be a matter of shame for every Australian citizen that the law has been put into this condition."

He acknowledged a past problem with "legally worthless and merely cynical" claims for asylum being made by people "a long way from being refugees of any kind" except in an economic sense.

"Such cynicism is, however, unaccompanied, at least on my part, by any degree of moral condemnation, because I do not know what I would do in their shoes. I suspect: probably not much different."

But the problem had dissipated with the setting up of the Federal Magistrates Court. He said restrictions on what the Federal Court could consider in migration appeals should be lifted to deliver a "considerable advance in affording genuine applicants a fair hearing".

Justice Madgwick asked the Immigration Department's solicitors to ensure his comments reached the minister "personally".

Recommendation

36. ALHR recommends that this Bill not be passed.

19 January 2007