ACT Refugee Action Committee
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15 January 2014

Ms Sophie Dunstone
Secretary
Senate Legal and Constitutional Affairs
Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
15 January 2010

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Dear Ms Dunstone,

Thank you for your invitation to the ACT Refugee Action Committee to make a submission concerning the Migration Amendment Bill 2013.

We deplore the timetabling of consideration of this Bill so that the period for preparation of submissions falls largely within the Christmas–New Year holiday period. This has considerably curtailed the research we have been able to do, and it appears that others have had the same experience (see submission no. 2 from the Law Council of Australia). However, we thank the Committee for granting us an extension of time to lodge this submission.

Yours sincerely,

(Ron Fraser) (former Principal Legal Officer, Commonwealth Attorney–General's Department)

on behalf of the ACT Refugee Action Committee

ACT Refugee Action Committee Submission on Migration Amendment Bill 2013 [provisions]

ACT Refugee Action Committee

The ACT Refugee Action Committee (RAC) is a Canberra-based committee with a mailing list of about 850 people who want Australian governments to treat asylum seekers humanely, with dignity and sympathy, in line with all the requirements of the 1951 Refugee Convention and its 1967 Protocol (the Convention), under which there

are no grounds for deterring those fleeing persecution from seeking protection here, however they may arrive. To this end, we argue specifically for abolition of mandatory detention and offshore processing of boat arrivals.

The treatment of asylum seekers is a humanitarian and human rights issue rather than a security issue. Australia should accept its fair share of refugees by processing refugee claimants who arrive in Australian territory and resettling those found to be refugees under the Convention, and do so in accordance with internationally accepted standards. This should be done without mandatory detention.

Summary

Schedule 1: We urge the Committee to reject these parts of the Bill. The court decisions in question are of much greater legal substance and utility in achieving administrative justice than the Minister acknowledges, and should not be overturned.

Schedule 2: ACT RAC requests the Committee to reject these changes. The court decision that the Minister seeks to overturn does not interfere with the barring of "repeat claims" for a protection visa under s 48A, but enables an applicant who has been refused a protection visa under one criterion for that visa to apply under another criterion.

Schedule 3: Schedule 3 of the Bill should not proceed without the government also introducing satisfactory legislative changes to address the breaches of international obligations, involving potentially indefinite and damaging detention, the denial of natural justice, and other widely recognised defects of the security assessment system for recognised refugees.

When a decision is made and meaning of "finally determined" (Schedule 1)

RAC strongly supports the opposition of the Refugee Advice and Casework Service (submission no.4) to this seemingly innocuous amendment designed to overturn the decisions of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131; (2012) 206 FCR 25, and *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104. The former decision decided in effect that the Refugee Review Tribunal (RRT) was not *functus officio* in relation to a review until the decision and reasons had been externally notified as required by the *Migration Act 1958* (the Act). The majority of the court in the latter decision (Griffiths and Mortimer JJ; Buchanan J dissenting), held that no final determination had been made until both the Secretary of the Department (who had in fact been notified) and the applicant for RRT review had been notified of the decision in the manner specified in the Act.

The decision in the *SZRNY* case enabled the applicant to take advantage of the fact that the Migration Act had changed, to allow for consideration by the RRT of complementary protection claims, after the decision had been recorded within the RRT and notified to the Secretary, but before it was sent to the applicant's most recently notified address (as required in the Act) – a former address was accidentally used.

In the decision in *SZQOY*, the court held that mere transmission of the RRT member's intended decision for administrative action on notification did not mean the member was legally prevented from receiving further documents from the applicant before the decision had been notified to the applicant or the Secretary. The question whether the

member was bound to consider the material lodged before notification was not determined, but from the judgments it seems unlikely. What was required as a matter of law was that he should have considered whether or not to take the material into account, and was not prevented from doing so before notification to the applicant and the Secretary.

In both cases the court referred to similar decisions in the past, so there was no real novelty in their reasoning.

All judges in *SZQOY* in effect accepted the principle stated by Finn J in *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422, at [19]:

> For present purposes I am prepared to hold that the making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion – as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final. (quoted by Buchanan J)

Some brief quotations indicate the tenor of the decision in *SZQOY*:

Buchanan J relied heavily on a passage from the reasoning of Madgwick J in *Semunigus* (above):

> … the conclusion to which the RRT member had arrived in his own mind had not been communicated to anyone outside the RRT's own staff. The taking of administrative steps, as part of an orderly system of case management, to have support staff communicate the decision (and the reasons for it) to the parties could therefore have been halted or countermanded by the RRT member. … a[n] RRT member might have had second thoughts about the proper factual conclusions in a case; or a new judicial decision might change the member's understanding of the relevant law. Mere case management practices, even if publicly decreed, cannot stand in the way of justice being done: *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.
>
> Logan J made a similar point:
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> The intellectual process in undertaking the core function of the review is not an end in itself. The decision and reasons which are the result of that process must be made known to the persons interested. Those persons are the applicant for the review and the Secretary.
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> The Act … indicates communication to a party –and probably to the Secretary too – as a critical point in the process by which the decision arising from the review process is 'beyond recall'." (Barker J) Only then, in his Honour's view can the applicant and the Department take advantage of their rights to make an application in respect of the decision as provided for in s 478.

His Honour Barker J also said:

> While finality is important in any decisionmaking process, there is a much greater public policy to be served if, despite having written up the reasons for a decision and instructing they be despatched to the affected party and the Secretary, the RRT has the flexibility to correct any error so as to avoid legal error or to take steps to avoid any possible injustice. [The point of the review process] is to ensure that good and fair decisions are made in the course of the public administration of the Act in this difficult area of decisionmaking.

In the later case of *SZRNY* the majority relied on a close reading of the provisions of the Act, and rejected Buchanan's minority view that in effect any external communication of the outcome of a case put the case beyond reconsideration for any reason.

The decisions in a complex area were carefully reasoned and consistent with earlier jurisprudence. Does the Minister make out a good case on balance for overturning them?

In essence the proposed change provides that a decision is made and a review is "finally determined" when it is made (a) by the making of a written statement, (b) on the day, and at the time, the written statement was made (see eg proposed new paragraphs 368(1)(e) and (f), and new subsection 368(2), in Items 16 and 17 of Schedule 1 to the Bill; there are other similar provisions in the Bill). The Bill provides for a bright line between the consideration of a matter and its outcome becoming legally effective.

The Minister argues in his Second Reading Speech for the greater administrative convenience of a clear point at which it can be said a decision – whether of a primary decision maker, the Minister or a review tribunal – has been finally made and a matter or review determined. "These findings cause potential difficulties and risks in the administration of the Act. For instance, the concept of an application being 'finally determined' is crucial to liability for removal under section 198 of the act."

This view has some weight, but we suggest it is outweighed by consideration of the nature of a primary decision or a merits review, where it is desirable for the decision maker to be open to new material, new legal decisions, or new legal circumstances which may persuade the decision maker that his or her written decision needs to be changed in a significant way, in the case of the RRT up to the point where both the party (the applicant) and the Secretary have been notified of the terms of the decision. This is especially so in relation to a merits review tribunal like the RRT. The fact situation in *SZRNY* is an example of a situation where it was clearly in the interests of justice for the complementary protection changes to be taken into account, even at a late stage of proceedings.

The Refugee Advice and Casework Service (in submission 4), on the basis of its own experience of running refugee claims, points to the difficulties, over which the applicant has no control, in obtaining evidence and documentation to support an applicant's case in the RRT, often up until very late in the review. In its view: "Proper procedural fairness allows decision makers the ability to consider all relevant facts, including those that surface at a late stage of the decision-making." It is preferable, in its view, that the RRT have flexibility to enable it to make the correct and preferable decision in each case; formality should not take precedence over fairness.

In addition to these points, we note that (as the Minister says) very important consequences flow from the finalisation of a decision, such as removal under s 198, or application for judicial review by either party. It is vital for applicants to have notice of adverse outcomes as early as possible.

We urge the Committee to reject these parts of the Bill. The court decisions in question are of much greater legal substance and utility in achieving administrative justice than the Minister acknowledges, and should not be overturned.

Statutory bar against further protection visa applications (Schedule 2)

We also support the Refugee Advice and Casework Service's opposition to the proposed amendment in Schedule 2 to reverse the effect of the Full Court of the Federal Court decision in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71.

That case, as the Minister says, determined that the bar in s 48A against re-applying for a protection visa only applied to an application for a protection visa by reference to the same criterion as in the former application. (The Minister's summary is inaccurate in referring to the "same *ground*" (not criterion) as the already refused protection visa application.) There are at the moment four criteria in s 36(2) for successful protection visas: a claim for protection on the basis of being a refugee within the meaning of the Refugee Convention; a claim for complementary protection as defined in the Act; and claims by non-citizens in Australia based on membership of the family of a person who holds a protection visa under one or other of the two substantive claims.

The court's reading of the interaction of s 48A(1) and (2) led it to the conclusion that the bar in s 48A operated in effect only to prevent "repeat claims" on the same criterion as earlier where there had been an opportunity to agitate the central issues. This was supported in the extrinsic material, in the court's view.

The court gave a hypothetical example of a wife arriving before her husband and making an unsuccessful refugee claim based on the Convention meaning of "refugee". Her husband arrives later and makes a successful refugee claim. In their Honours' view there was nothing in the Act or extrinsic material to indicate that the wife should be precluded from applying again for a protection visa based this time on membership of the family unit of a person with a protection visa.

In *SZGIZ* itself, the appellant had previously been refused a refugee protection visa; after unsuccessful attempts to persuade the Minister to exercise his discretionary powers under s 417 of the Act, he sought to make an application based on the then recently-introduced complementary protection criterion. The court held, in effect, he should have been allowed to do so as this was not a repeat application.

The Minister states he seeks to restore the intended operation of the statutory bar in s 48A, but this is far from obvious in view of the court's careful reading of the interlocking provisions. The decision also has policy merit in allowing claims on completely different criteria, that may not have been possible to make earlier and were not canvassed, and thereby minimise the chances of *refoulement* of applicants denied the opportunity to argue a completely new case, not a "repeat claim". In particular, as contended by the Refugee Advice and Casework Service, it is vitally important that claims for complementary protection should be able to be argued where they were not previously considered. This will become less important as time goes on as more applicants are assessed against both criteria, but for the moment it remains a strong ground for leaving the decision in *SZGIZ* undisturbed.

On 13 December 2013 the High Court rejected the Minister's application for special leave to appeal against the decision in *SZGIZ* on the ground that, though it raised a contested question of statutory interpretation, it did not raise any issue of general importance warranting a grant of special leave ([2013] HCATrans 315)..

ACT RAC requests the Committee to reject the changes proposed in Schedule 2 of the Bill.

ASIO security assessments of applicants for protection visas and their review (Schedule 3)

The legislation responds to the decision of the High Court in *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46 invalidating the regulation providing that an applicant for a protection visa must not have received an adverse ASIO security assessment.

We oppose its passage on a number of grounds.

The amendment to s 36 (protection visas) virtually inscribes the former regulation into the Act without confronting any of the widely identified defects of the present system, and risks creating further defects of its own. One of the worst features is that the legislation specifically maintains the lack of any kind of merits review or any other kind of procedure whereby a recognised refugee could challenge the findings and conclusions of ASIO in their cases.

The Bill should not proceed without the government also introducing satisfactory legislative changes to address the breaches of international obligations involving potentially indefinite and damaging detention, the denial of natural justice, and other widely recognised defects of the security assessment system for recognised refugees.

Criticisms of the former and proposed security procedures for protection visa applicants

The Bill introduces a further criterion for a protection visa, that "the applicant is not assessed by [ASIO] to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*)" (proposed s 36(1B)). This is in the same terms as the regulation that was held invalid on the ground that it was inconsistent with the Act. Under the former processes, since 2011 refugee claimants have not been subjected to an ASIO assessment unless their claims for recognition of refugee status are successful. This seems to be both for resources reasons and because it is not necessary to evaluate all refugee claimants when some of the claims will fail.

While the criterion in new s 36(1B) does not *require* an ASIO assessment to be conducted for all refugee claimants, its very presence in the Act may result in an assessment being required at earlier stages of the process for all or a greater proportion of refugee claimants. This is wholly undesirable, especially while the process remains deeply flawed in human rights and natural justice terms. There is also a danger that such early adverse assessment could be used to decide that the refugee claim be discontinued and the visa application denied on the security criterion alone. That could lead to *refoulement* of those in this situation, and should be specifically precluded in legislation.

We think there needs to be reconsideration of the grounds on which ASIO makes an assessment. An Australian citizen who is assessed to be a risk to Australia's security is not subject to the dire penalty of removal from the country, and unless specific activities or suspected activities are engaged in could not be detained preventively. Clearly the present criteria have resulted in a substantial number of recognised refugees being potentially indefinitely detained, and the highly cautious nature of a security assessment under the test in the ASIO Act is probably not appropriate in the case of refugees held in detention.

The fact that all, or virtually all, of those Convention refugees who have been detained in this respect have been Sri Lankans seems significant. Australians were shocked at the detention of Mrs Ranjini and her family, who had been living in the community without giving any offence. It would be important to know, even as a mere statistic, which of the elements of the definition of "security" in s 4 of the ASIO Act were involved in these cases (eg para (b) concerning responsibilities to foreign countries in relation to actual behaviour of security concern mentioned earlier in the definition). Again, it seems from the outside that refugees with former and/or family connections with the Tamil Tigers may have been assessed as risks to security, when in practice there may be little that they could do that would harm either Australian security or Sri Lanka's. This suspicion reinforces the imperative need on other grounds that the whole security process in relation to refugees be reconfigured to give refugees a genuine chance to challenge adverse assessments and to prevent them from resulting in indefinite detention.

A number of academic commentators and bodies have concluded that the potentially indefinite detention of recognised refugees who are subject to an adverse security assessment is contrary to Australia's obligations under the International Covenant on Civil and Political Rights (ICCPR). It is not necessary or possible to rehearse these in detail here, but it is surely shameful that the United Nations Human Rights Committee, as recently as July 2013, found that Australia's conduct in detaining 46 recognised refugees was in breach of Articles 7 (cruel, inhuman or degrading treatment or punishment) and 9 (liberty of the person, including prohibition of arbitrary arrest or detention) of the ICCPR, amounting to "cruel, inhuman and degrading treatment, inflicting serious psychological harm on them".[1]

As Professor Saul has said, the real purpose of continuing detention of recognised refugees with adverse security assessments is preventive security detention, but that is not authorised by law, and there are no circumstances of public emergency that would derogate from Article 9 of the ICCPR.[2] On the experience thus far, it appears that the assessment based on "a risk to security" is far too blunt an instrument in relation to the liberty of the refugees concerned. What is needed is something in the nature of an assessment, for the purposes of continued physical detention, of whether individual recognised refugees constitute a present danger to the Australian community, but even that probably goes too far to meet the requirements of Article 9. In effect, this is just another indication that the existence of mandatory detention enables the government to go much further than it needs to protect the community.

It should be possible to devise means by which continuing and potentially indefinite detention is removed in relation at least to recognised refugees. Professor Saul has previously suggested that it would be possible to transfer the power to issue adverse security assessments from ASIO to a federal court, which could evaluate any alleged dangers in the refugee living in the community.[3]

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[1] Taken from submission no. 3 to this Committee from Refugee Advice and Casework Service, p 10. For greater detail see Ben Saul, "Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law" (2013) 13(2) *Melbourne Journal of International Law*, at Part III, available at: law.unimelb.au/files/dmfile/03Saul1.pdf..

[2] Saul, note 1, p 45.

[3] Saul, note 1, p 46, referring to an article of his in (2012) 37(4) *Alternative Law Journal*.

The present procedure once an adverse assessment is issued is deeply flawed in every way, a conclusion supported by most commentators. It is necessary to revise the procedure so that refugees with adverse assessments:

- know that this has occurred;
- know sufficient details of the grounds of the assessment to enable them to meaningfully challenge it;
- are not frustrated in obtaining this information by government use of interlocking legislative provisions and use of the common law concept of public interest immunity;
- are able to obtain meaningful external review, perhaps by the AAT – but if so, the procedure should preferably allow the refugee's case to be assisted by another person to whom information can be given that cannot be given to the applicant (Professor Saul's Special Advocate); and
- in the case of continuing detention, refugees are subject to meaningful periodic reviews, preferably by an independent external authority, with power to determine that the refugee be released.

In Professor Saul's words we need a process under which:

> … only those who truly pose risks to Australia's security are adversely assessed or detained on the basis of an independent decision that the evidence substantiates an assessment. …
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> … Every person – citizen or non–citizen – deserves equal respect from a rule of law which precludes protracted, arbitrary detention, secret allegations and ASIO's dark justice.[4]

Serious consideration should be given to the comprehensive suite of reforms proposed by Professor Saul in his *Alternative Law Journal* article in 2012.[5]

The present Bill continues the former situation that the AAT is precluded from reviewing security assessments of recognised refugees. It takes no steps to try to resolve the scandal of the former system, only partly ameliorated by recommendations by the Independent Reviewer of ASIO assessments. As mentioned in the submission of the Refugee Advice and Casework Service comments (no. 4, at p 11), the relatively high number of assessments changed by the assessor and ASIO itself indicates the imperative need for ASIO decisions to be "subject to a transparent review process by an external, independent and binding process".

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[4] Saul, note 1, p 47

[5] Ben Saul, "'Fair Shake of the Sauce Bottle': Fairer ASIO security assessments of refugees" (2012) 37(4) *Alternative Law Journal*. (My electronic copy does not have page numbers.)