SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE AUSTRALIAN CITIZENSHIP AMENDMENT (CITIZENSHIP TEST REVIEW AND OTHER MEASURES) BILL 2009

Supplementary Submission from the Department of Immigration and Citizenship – 1 September 2009

Pathways through the Migration Act 1958 to enable non-citizens to be granted a permanent visa to become eligible for Australian citizenship and the case of SNMX

We refer to the supplementary submission put forward by Professor Rubenstein in relation to the pathways for a child potentially to get to the Minister's intervention power.

In relation to the second part of Professor Rubenstein's supplementary submission, she made comments that evidence provided by Mr Moroney was incorrect and that, in particular, on page 5 of her supplementary submission:

> "That the statement above: "To extrapolate that the child would not have a pathway to potential citizenship is, with the greatest of respect, incorrect": Is with the greatest of respect not correct".

Professor Rubenstein took issue with Mr Moroney's evidence to the Committee which was to the effect that a child in the situation of the child in the case of *SNMX* would be able to make an application for a protection visa in their own right and possibly an application for another substantive visa, depending on the criteria applicable to the visa in question.

Visa applications by children

In response, Professor Rubenstein said:

> 'This child would no longer have a pathway to **potential** citizenship either. Children are, largely dependant upon the parent's claim under the Migration Act. SNMX showed very clearly that there are instances where the child's claim is independent of the parent's claim and this section enabled the Minister to make a determination in the best interest of that child. This was and would not be under the current Migration Act an avenue available to the child, as the Act currently stands.
>
> If the Minister is sincere about the desire to enable children like those in SNMX the opportunity through the Migration Act to get permanent residence as a step to citizenship, then amendments would need to be made in the Migration Act enabling a broad visa status for children enabling them to apply in their own right, regardless of their parent's status. Perhaps this could be entitled the 'Best Interests of the Child' visa in which a child could make an application in his/her own right.'

To say that '(c)hildren are largely dependent upon the parent's claim under the Migration Act' is true if the child is applying for a visa as a secondary applicant, i.e.

as a member of their parent's family unit, the parent being the primary applicant. However, that does not mean that a child cannot apply for a visa other than as a member of their parent's family unit.

In the case of a protection visa, under subsection 36(2) of the Migration Act, there are different criteria according to whether the applicant claims to be a person to whom Australia owes protection obligations (paragraph 36(2)(a)) or the spouse or dependant of such a person who holds a protection visa (paragraph 36(2)(b)).

If a child applies for a protection visa on the basis of their relationship with a parent who is claiming refugee status (i.e. relying on paragraph 36(2)(b)), then clearly the outcome of the child's application will be dependent on the outcome of the parent's application.

But there is nothing to prevent a child making an application relying on their *own* claims to being a person to whom Australia has protection obligations (paragraph 36(2)(a)), subject only to the issue of the child's capacity to understand the nature of the application. If the child is too young to understand the nature of the application, then he or she could only make a valid application through a parent or legal guardian, albeit that the application (and the claims made in it) would be the child's own application: see *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJ 775; *Soondur v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 324 at [35] – [36]; *Re Woolley; Ex parte Applicant M276/2003* [2004] HCA 49 at [103], [155].

Particular circumstances of SNMX

At paragraph 2 of the judgment of the Administrative Appeals Tribunal in *SNMX v Minister for Immigration and Multicultural Affairs* [2009] AATA 539 (21 July 2009) the following is stated:

> "The applicant spent the whole of his life in Australia. Both parents have been denied protection visas by decisions of the Refugee Review Tribunal (RRT). Applications made to the Minister pursuant to s417 of the Migration Act 1958 (Migration Act) to reverse those decisions were unsuccessful."

The child SNMX never made a Protection visa application in his own right, and now as a citizen, there is no capacity for him to do so, and he has no need to do so. However, prior to SNMX being made an Australian citizen, he had an absolute right to make an application for a protection visa, or any other visa that could be validly made onshore. This is because he was never joined to another person's Protection visa application, he has never had a Protection visa application refused at the primary decision stage and he has never been the subject of a section 48 bar or section 48A bar under the Migration Act. Further, as he was not an offshore entry person, he was not, and could not have been, subject to a section 46A bar on making a valid visa application.

Section 48 and 48A statutory bars on making further visa applications

Section 48 of the Migration Act provides a statutory bar on visa applications, made by non-citizens in the migration zone who do not hold a substantive visa and have either had a visa other than a bridging visa refused or cancelled since last entering Australia. Section 48 however allows such persons to apply for certain visas of a class prescribed in Regulation 2.12 of the *Migration Regulations 1994* (the Regulations). For example, subregulation 2.12(1) prescribes a number of visa classes including: Medical Treatment (Visitor) (Class UB); all bridging visas; and Protection (Class XA) visas. A non-citizen subject to a section 48 bar may only apply for a Protection visa provided they are not subject to a section 48A bar.

Section 48A of the Migration Act provides that, subject to section 48B, a non-citizen who while in the migration zone, has made:

> (a) an application for a Protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
>
> (b) applications for Protection visas, where the grant of the visas have been refused (whether or not the applications have been finally determined); may not make a further application for a Protection visa while in the migration zone.

Section 48B Minister may determine that section 48A does not apply to non-citizen

Section 48B of the Migration Act provides that the Minister may exercise a non-compellable, non-delegable power, in the public interest, to determine that section 48A of the Migration Act does not apply to the non-citizen to prevent an application for a protection visa being made.

Merits review under section 411 to the Refugee Review Tribunal (RRT)

Once a protection visa application is made and if refused at the primary decision level the decision may reviewed by the RRT. If the review is unsuccessful, an applicant then has a separate right to request the Minister to substitute a more favourable decision if it is in the public interest to do so under section 417 of the Migration Act.

The matter of SNMX

According to departmental records SNMX was never included in either his father or mother's protection visa application nor had he applied for a protection visa in his own right. Under section 78 of the Migration Act SNMX was taken to have been granted a bridging visa without making an application, that was the same visa as his parent's, on his birth. Section 78 of the Migration Act provides that if a non-citizen child is born in Australia and at the time of the birth one of the child's parents holds a visa other than a special purpose visa the child is taken to have been granted at the time of birth a visa of the same kind and class as that same visa. If both parents hold a visa then the child is taken to have been granted each of those visas.

Regulation 2.08 provides that if a non-citizen applies for a visa and after the application is made, but before it is decided, a child (other than a contributory parent

newborn child) is born to the non-citizen, then the child is taken to have applied for a visa of the same class at the time he or she was born and the application is taken to be combined. Therefore, regulation 2.08 did not apply to SNMX as he was born after the protection visa applications had been refused by the delegate of the Minister. .

This accords with the evidence given by Mrs Stewart. Mrs Stewart, in her evidence, stated at page 12 of the transcript:

> "The child was born after the mother's application for refugee status had been lodged and the tribunals decision had been handed down."

Mrs Stewart also stated that the child had been erroneously added to the father's section 417 application for Ministerial intervention.

Therefore, as SNMX never applied for a visa, it is not possible for him to have been subject to a section 48 bar. As he never applied for a Protection visa, it is not possible for him to be subject to a section 48A bar on making a Protection visa application.

When a valid visa application is made

Section 46 of the Migration Act provides when a valid visa application is made, *inter alia*, that "it satisfies the criteria and requirements prescribed under this section". Subsection 46(3) provides that the Regulations may prescribe criteria for an application for a visa of a specified class. Item 1401 of Schedule 1 to the Regulations provides the requirements for making a valid protection visa application, provided, of course, that a person is not barred from making such an application.

It is clear from item 1401 in Schedule 1 to the Regulations that a valid application for a protection visa is not dependent upon whether a person is an unlawful non-citizen, the holder of a bridging visa, or the holder of a temporary visa. As a matter of law, it is simply irrelevant, as SNMX was not subject to the section 48A bar to which his parent's were subject to.

Being erroneously added to a section 417 request for the Minister to exercise an intervention power after a RRT decision in relation to his parents did not constitute a visa refusal. Therefore, SNMX was not subject to the section 48 bar or the section 48A bar as a result of that "erroneous" addition. That is, by the Minister not exercising his power under section 417 the bar in section 48 or 48A did not come into effect.

Once a visa application is validly made in accordance with the requirements of section 46 of the Migration Act, it is clear as a matter of law, that the Minister must consider that application as required by section 47 of the Migration Act. Subsection 47(2) specifically provides that the requirement to consider an application for a visa continues until the application is withdrawn, or the Minister grants or refuses the visa, or the consideration is prevented under section 39 or suspended under section 84 (both of these considerations are not relevant to the case of SNMX).
The strength or otherwise of that application is irrelevant - if the application for the visa is validly made, the Minister or delegate must decide it. Likewise, if a valid

application for a protection visa is refused by the primary decision maker, the applicant has the right to apply for review of that decision by the RRT (see section 411 of the Migration Act).

If SNMX had made a valid protection visa application in his own right, regardless of the strength of such a claim for protection under the *United Nations Convention relating to the Status of Refugees 1951*, and that protection visa application was refused, he had the right to make an application to the RRT. If that application was unsuccessful, he had the right to request the Minister to substitute a more favourable decision under section 417.

It is a matter for his legal advisers as to why such an application was never made by SNMX in circumstances where he was not subject to a statutory bar. Given that he was eligible to apply for Australian citizenship, there may have been no need to do so, however he was not subject to a statutory bar which prevented him from making an application for a protection visa which would have provided a pathway through to holding a permanent visa to be eligible for Australian citizenship.

Ministerial intervention under section 417

It is clear that the Minister has the power, in the public interest, to grant a person the subject of an unsuccessful RRT review a permanent visa. Similar Ministerial intervention powers to substitute a more favourable decision in certain circumstances also exist under section 351, 391 and 454 of the Migration Act.

Minister's power under section 195A

The Minister's also has public interest powers under section 195A were introduced into the Migration Act by the *Migration Amendment (Detention Arrangements) Act 2005*. Paragraph 10 of the Explanatory Memorandum provided as follows:

> The Bill inserts a new section 195A, which provides the Minister with a non-compellable power to grant a visa to a person who is being held in immigration detention where the Minister is satisfied that it is in the public interest to do so. In the exercise of the power the Minister will not be bound by the provisions of the Migration Act or Regulations governing application or grant requirements. The Minister will have the flexibility to grant any visa that is appropriate to that individual's circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future.

In her supplementary submission, Professor Rubenstein has underlined the following words in Mr Moroney's testimony at page 4:

> "The minister has a non-compellable power to grant any visa, permanent, temporary or bridging to any person in immigration detention."

If the Committee would like any further clarification on these matters, Mr Moroney would be happy to provide it.