Australian Government

Department of Immigration and Border Protection

ACTING SECRETARY

13 January 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment Bill 2013

Thank you for the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee for Inquiry into the Migration Amendment Bill 2013.

I have enclosed the department's submission to the inquiry.

Yours sincerely

Dr Wendy Southern PSM

6 Chan Street Belconnen ACT 2617
PO Box 25 BELCONNEN ACT 2616 • Telephone 02 6264 1111 • Fax 02 6264 2670 • www.immi.gov.au

Australian Government
Department of Immigration and Border Protection

DIBP Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment Bill 2013

January 2014

6 Chan Street Belconnen ACT 2617
PO Box 25 BELCONNEN ACT 2616 · Telephone 02 6264 1111 · Fax 02 6264 2670 · www.immi.gov.au

Table of Contents

The Department of Immigration and Border Protection welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment Bill 2013, following the introduction of this Bill into the House of Representatives on 12 December 2013.

1.0 PURPOSE OF THE BILL

The Migration Amendment Bill 2013 (the Bill) amends the *Migration Act 1958* (the Act) to address a number of recent court and tribunal decisions that significantly affect the operations of the Department of Immigration and Border Protection (the Department).

Firstly, Schedule 1 of the Bill amends the Act to put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder.

This addresses the court decision in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, in which the Full Federal Court held that a decision by the Refugee Review Tribunal (RRT) on an application for review under Part 7 of the Act did not become final until the review decision was notified outside the RRT "externally and irrevocably".

It also addresses the decision of the Full Federal Court in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104, in which the Court held that notification of a review decision by the RRT forms part of the "core function of review", and that until both the review applicant and the Secretary of the Department are notified of the review decision according to law, the decision on the relevant application remains subject to review and is not "finally determined" within the meaning of subsection 5(9) of the Act.

Secondly, Schedule 2 to the Bill amends the Act to clarify that section 48A of the Act prevents a non-citizen who has been refused a protection visa, or has had a protection visa cancelled, from applying for a further protection visa while in the migration zone.

This addresses issues arising from the judgment of the Full Federal Court in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71, in which the Court held that there were effectively different sets of criteria by which a protection visa can be applied for and granted. The Court concluded that section 48A of the Migration Act does not prevent a non-citizen making a further protection visa application based on a criterion which did not form the basis of a previous unsuccessful protection visa application.

Finally, Schedule 3 to the Bill makes it a criterion for the grant of a protection visa in section 36 of the Act that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) and other associated measures.

This addresses the High Court's judgement in the matter of *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46, in which the Court held that public interest criterion (PIC) 4002 of Part 1 of Schedule 4 to *the Migration Regulations 1994* was not a valid criterion for the grant of a protection visa due to inconsistency with the Act.

The purpose of the amendments is to resolve uncertainty as to the immigration status of certain non-citizens, preserve the integrity of Australia's protection visa program and avoid its abuse, and reinstate a legislative basis to refuse or cancel a protection visa for non-citizens who are a security risk.

2.0 CONTENT OF THE BILL

2.1 When a decision is made and meaning of 'finally determined'

Schedule 1 of the Bill addresses the decisions of the Full Federal Court in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 and *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104, which create uncertainty as to when a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his or her delegate, is taken to be made.

This in turn has the potential to create uncertainty as to a person's immigration status. For example, the concept of an application being "finally determined" within the meaning of subsection 5(9) of the Act is crucial to liability for removal under section 198 of the Act. Subsection 5(9) provides that an application is not "finally determined" until it is "no longer subject to any form of review under Part 5 or Part 7" of the Act.

The amendments will therefore put it beyond doubt that a decision by the Minister or delegate on an application for a visa, cancellation of a visa, or revocation of the cancellation of a visa, is taken to be finally made, and the decision-maker is taken to be *functus officio*, at the time and on the day a record of the decision is made. The Bill also puts beyond doubt that a decision by the RRT or the Migration Review Tribunal (MRT) on an application for review is taken to be made, other than an oral decision, by the making of the written statement, and to have been made on the day, and at the time, the written statement is made. The Bill also puts beyond doubt that an oral decision by the RRT or the MRT is taken to be made and becomes final on the day and at the time it is given. The RRT and the MRT is taken to be *functus officio* at that relevant time.

The amendments will also clarify that, if a review of a decision in respect of an application has been instituted under Part 5 or 7 as prescribed, that application is "finally determined", so that it is no longer subject to a form of review under Part 5 or 7 of the Migration Act, when a decision on the review is taken to have been made by the MRT or the RRT, as the case requires.

Clarifying that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the applicant or the former visa holder, is essential for the proper administration of the Act, including identifying when a person may become an unlawful non-citizen.

The amendments operate prospectively, applying to decisions that are taken to have been made by the MRT or RRT, or the Minister or his or her delegate, on or after commencement of the amendments.

2.2 Statutory bar against further protection visa applications

Schedule 2 of the Bill addresses the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, which concluded that section 48A of the Act does not prevent a non-citizen making a further protection visa application based on a different criterion to that which formed the basis of the previous unsuccessful protection visa application. For example, if a non-citizen previously made a protection visa application (prior to the complementary protection criterion being included in section 36 of the Act as a criterion for a protection visa) raising claims under the refugee convention, section 48A of the Act would not prohibit a new protection visa application based on complementary protection claims.

This is contrary to the policy intention of section 48A, which is that a non-citizen should not be able to make a further protection visa application in the migration zone after a previous protection visa application has been refused or a protection visa held by the person has been cancelled, irrespective of the grounds on which their earlier protection visa application was refused or the grounds on which the cancelled visa was originally granted, and whether or not the grounds or criteria existed at the time of the earlier decision.

By restoring the intended operation of the statutory bar in section 48A of the Act, the amendment will prevent non-citizens from making repeat protection visa applications while in Australia on different grounds each time.

2.3 Protection visa applicant assessed to be a risk to security by ASIO

Schedule 3 of the Bill addresses the decision of the High Court in the matter of *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46, in which the Court held that public interest criterion (PIC) 4002 of Part 1 of Schedule 4 to the *Migration Regulations 1994* was not a valid criterion for the grant of a protection visa because doing so was inconsistent with the Migration Act.

PIC 4002 states that the applicant must not be 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* (the ASIO Act).

The amendments insert a specific criterion for a protection visa reflecting PIC 4002 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 ASIO Act.

The amendments further create certainty and promote efficiency by confirming that the MRT, RRT and Administrative Appeals Tribunal (AAT) will not have the power to review a decision to refuse to grant or to cancel a protection visa on the basis of an adverse security assessment by ASIO that the applicant for, or holder of, a protection visa is a risk to security. The amendments ensure that to meet community expectations, the government must not only have the ability to act decisively and effectively, wherever necessary, to protect the Australian community, but also to have the legislative basis to refuse or cancel a protection visa for those non-citizens who are a security risk.