Australian Government

Department of Immigration and Border Protection

Second Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

February 2014

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The Department of Immigration and Border Protection welcomes the opportunity to provide an additional submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013, following the Committee's hearing on 14 February 2014 in Melbourne, Victoria. This submission clarifies issues raised during the hearing and provides responses to the Committee's questions on notice.

RRT Debts and Ministerial intervention

The department would like to correct the record in regards to the Committee's questioning of the first panel during the hearing (page 8 of the transcript) in relation to debts incurred in relation to unsuccessful RRT applications.

If the Minister intervenes to grant a visa under his section 417 public interest power, the client is entitled to a refund of their RRT fee. The department refers these cases to the RRT for consideration of a refund through the RRT's mechanisms.

A decision from the RRT is essential to request the Minister's intervention under section 417 and all unsuccessful applications to the RRT incur a debt, so debts to the RRT are not brought to the Minister's attention. However, a person's non-Tribunal related debts to the Commonwealth are a legitimate area of enquiry for the Minister. The department asks people with these non-Tribunal related debts whether they have a payment plan in place and if not, they are referred to the department's debt recovery area to initiate such an arrangement.

Questions on Notice

The following questions were taken on notice during the hearing on 14 February 2014.

Question 1. Sen. Seselja (Page 38): What is the average time it takes the RRT to make a decision?'

The RRT caseload summary for 2013-14 (01/07/13 -31/01/14) states:

- 16% of applications were decided within the 90 calendar days' timeframe (from receipt of the Departmental documents); and
- 234 days was the average time taken to decide a case.

Source: http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=84292221-164e-451c-82fd-dc4fbcdbf3d1

Question 2. Sen. Hanson-Young (Page 42): Under the old system, how many complementary protection cases were awarded permanent visas and how many were awarded temporary visas in the 10 years prior to this current legislation being introduced in 2012?

Departmental systems do not record the reason for a visa grant under the Minister's public interest powers. Cases submitted to the Minister for consideration generally involve multiple issues, many of which are not complementary protection related, and the Minister is not required to indicate which of the issues was the reason for the grant of a visa.

Consequently, it is not possible to indicate whether temporary or permanent visas were granted on the basis of complementary protection.

Question 3. Chair (Page 42): Could you give us an idea of how the process currently works and how it would work in the future so that we can make an assessment about how much easier it is?

Current Process

Primary protection visa application
Under the existing Protection visa legislation when a person lodges a Protection visa application their protection claims are first assessed against the Refugees Convention to determine whether they are found to be a refugee. If they are not assessed to be a refugee the person's claims are then considered against the complementary protection provisions to determine whether they engage Australia's non-refoulement and complementary protection obligations.

If a person is found to meet the complementary protection criteria, in addition to any other health, character and security requirements, the person is granted a Protection visa.
If a person is found not to meet the complementary protection criteria and is refused the grant of a Protection visa they may apply for review of that decision at the RRT.

RRT review of protection visa refusal
The RRT considers the claims in the same order as in the primary decision. If a person is found by the RRT to meet the complementary protection criteria, the case is remitted back to the department for reconsideration and grant of a Protection visa if they meet all other health, character and security requirements.

Ministerial Intervention under s48B
At any stage after a person has received a primary Protection visa decision refusal they may request the Minister to intervene under section 48B of the Act to lift the application bar and allow them to lodge a further Protection visa application where they have new claims, or there has been a significant change in circumstances that would enhance the chance of them being successfully granted a Protection visa on either Refugee Convention or Complementary Protection grounds.

Ministerial Intervention under s417
Following an RRT decision a person may request the Minister to intervene in their case to make a more favourable decision using his or her power under section 417 of the Act. In these circumstances a person may believe they meet one or more of the unique or exceptional circumstances set out in the Minister's Guidelines.

Pre removal
Non-citizens in Australia, including those who have not made a protection visa application, but who make during removal preparations claims relating to a fear of harm if returned to their country of origin, have these claims assessed, including in relation to potential complementary protection obligations, prior to a removal proceeding.

Proposed New Administrative Process

Primary protection visa application
The primary protection visa decision will consider only Refugees Convention grounds for protection. If the person is assessed not to be a refugee and issues arising from Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment (CAT) then the case:

a) Of a person in detention, will be immediately referred for an assessment of non-refoulement obligations;
b) Of a person in the community, will be flagged as requiring consideration of non-refoulement obligations if the RRT affirms the assessment that they are not a refugee.

RRT review of protection visa refusal
The RRT decision maker will consider only Refugees Convention grounds for protection. They will also have guidelines relating to Australia's non-refoulement obligations under the ICCPR and CAT indicating that if the person is assessed not to be a refugee and issues are raised that may engage Australia's non-refoulement obligations under the ICCPR and the CAT then such cases must be flagged as requiring further departmental consideration.

Non-refoulement obligations assessment
Cases referred for an assessment of non-refoulement obligations will be assessed in the Department of Immigration and Border Protection by experienced departmental decision makers who have been trained to undertake primary protection visa assessments (including against the current complementary protection provisions in the *Migration Act 1958*). The same decision maker as the primary decision will undertake the non-refoulement obligations assessment. They will be provided with detailed policy and procedural guidance to support these non-refoulement obligations assessments.. In particular:

- The Department will write to the person and seek further information relevant to the assessment of non-refoulement obligations;
- The 'real chance' threshold will be applied in accordance with current case law;

- As part of the assessment a person will be afforded the opportunity to comment on any country information to be used which has a negative bearing on the person's claims and which is credible, relevant and significant to the assessment to be made;
- On a case by case basis a decision maker may invite a person to an interview where it is considered appropriate to do so due to the complexity or exceptional circumstances of the case;
- Where a person is assessed as engaging Australia's protection obligations under the CAT and the ICCPR their case will be referred to the department's Ministerial Intervention Unit for assessment against the Minister's Guidelines for the consideration of the exercise of their intervention power under section 417 of the Act;
- If the case is referred to the Ministerial Interventions Unit the person will be notified of that fact and the Unit will invite the applicant to provide any additional claims or information pertaining to the unique or exceptional circumstances set out in the Minister's Guidelines;
    - That is, any circumstances additional to those relating to Australia's non-refoulement obligations under the ICCPR and the CAT that they would like to be taken into account such as the Convention on the Rights of the Child (CRC) or family unity or any other significant humanitarian concerns that they would like to have considered by the Minister when considering whether to exercise an intervention power;
- Following assessment of this further information a submission will be forwarded to the Minister detailing the entire circumstances (including the non-refoulement obligations plus any other relevant matters) of the case along with a copy of the non-refoulement obligations assessment, and tailored recommendations on the options for the type of visas that the Minister may wish to grant when considering intervention.

The guidance material supporting the process will be publicly available. Public information specifically designed for reference by the people having their s claims against Australia's non-refoulement obligations under the ICCPR and the CAT assessed will also be made available.

Whilst dependent upon the complexity of the case, once the case is allocated back to the initial primary decision maker (where possible), the indicative timeframe for completing a non-refoulement obligations assessment is:

- 21-30 days for people in detention; and
- 30-45 days for people in the community.

Ministerial Intervention under section 48B (unchanged for Refugees Convention claims)
At any stage after a person has received a primary Protection visa decision refusal they may still request the Minister to intervene under section 48B of the Act to lift the application bar and allow them to lodge a further Protection visa application where they have new claims under the Refugees Convention, or there has been a significant change in circumstances, that would enhance the chance of them being successfully granted a Protection visa on Refugees Convention grounds.

Any new non-refoulement obligations under the ICCPR and the CAT being raised will be considered through Ministerial intervention under section 417 of the Act.

Ministerial Intervention under section 417
Following an RRT decision a person may request the Minister to intervene in their case to make a more favourable decision using his or her power under section 417 of the Act. In these circumstances a person may believe they meet one or more of the unique or exceptional circumstances set out in the Minister's Guidelines.

This power would again be used by the Minister to grant a visa on the basis that the person engages Australia's non-refoulement obligations under the ICCPR and the CAT when the relevant person was in the community or in detention (if more appropriate than the section 195A power) at the time the Minister decided to intervene.

Pre removal (unchanged)
Non-citizens in Australia, including those who have not made a protection visa application, but who make, during removal preparations claims relating to a fear of harm if returned to their country of origin, have these claims assessed, including in relation to potential non-refoulement obligations under the ICCPR and the CAT, prior to a removal proceeding.

Question 4. Chair (page 40): Are you able to do for me, on notice, a schematic diagram on what I am calling the El Salvadorian case, which as I understand it went through under the current legislation? Could you explain to me now or through a schematic diagram what the process was in that instance or, if not in that instance, in any instance? What would be the similar process if this legislation is passed?

Attachment A sets out the process under the current Protection visa framework.

Attachment B sets out the new administrative process following the repeal of the complementary protection legislation for persons living lawfully in the community.

Attachment C sets out the new administrative process following the repeal of the complementary protection legislation for persons in detention.

Additional Questions on Notice

The following additional questions on notice from Senator Hanson-Young were provided to the department on 20 February 2014.

Question 1: The changes proposed by this Bill involve a rigorous change to the processes by which a person found to be owed protection on complementary grounds, what are the cost implications of these changes?

The cost implications for moving the complementary protection assessment from a statutory framework to the proposed administrative process will be minimal. Under the current complementary protection framework, complementary protection claims are assessed initially at the primary protection visa stage, at the merits review stage, and in the large majority of cases further complementary protection claims are assessed within the Ministerial intervention and pre-removal assessment processes. Under the proposed administrative process the primary protection decision maker will still be undertaking an assessment of non-refoulement obligations under the ICCPR and the CAT but doing so either immediately following the primary protection visa decision or RRT decision, and similar access to Ministerial intervention and pre-removal assessment processes will be maintained. There will, however be no consideration of non-refoulement obligations under the ICCPR and the CAT during merits review.

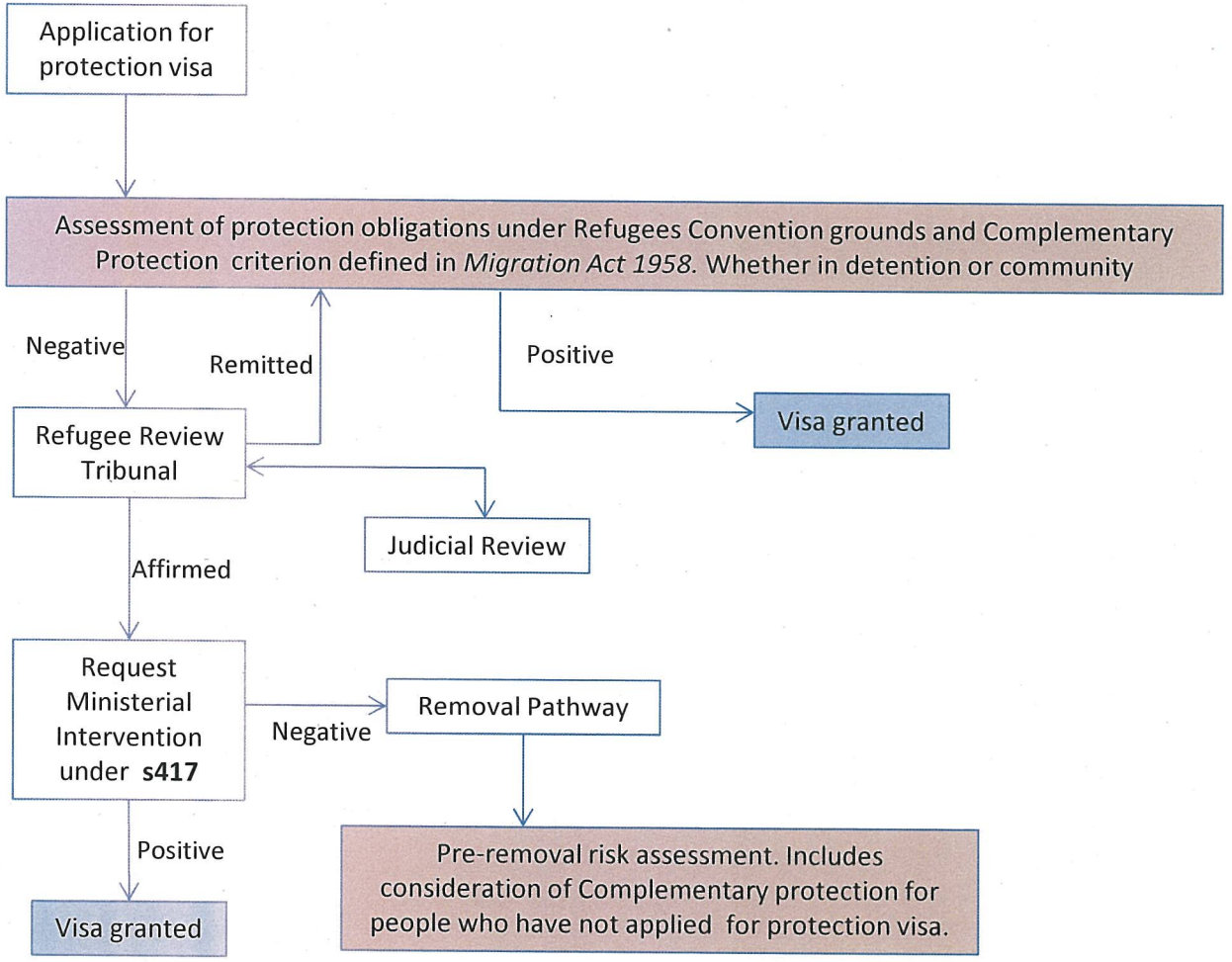
Question 2: Under the proposed changes the Minister will be responsible for assessing approximately 2000 applications for complementary protection a year, what will the cost implications of these changes be due to the prolonged detention of individuals who will be waiting for their claims to be assessed by the Minister?

Approximately 2000 requests were received for Ministerial intervention under section 417 of the *Migration Act 1958* for programme years 2010-2011 and 2011-12. However, not all of these cases were:

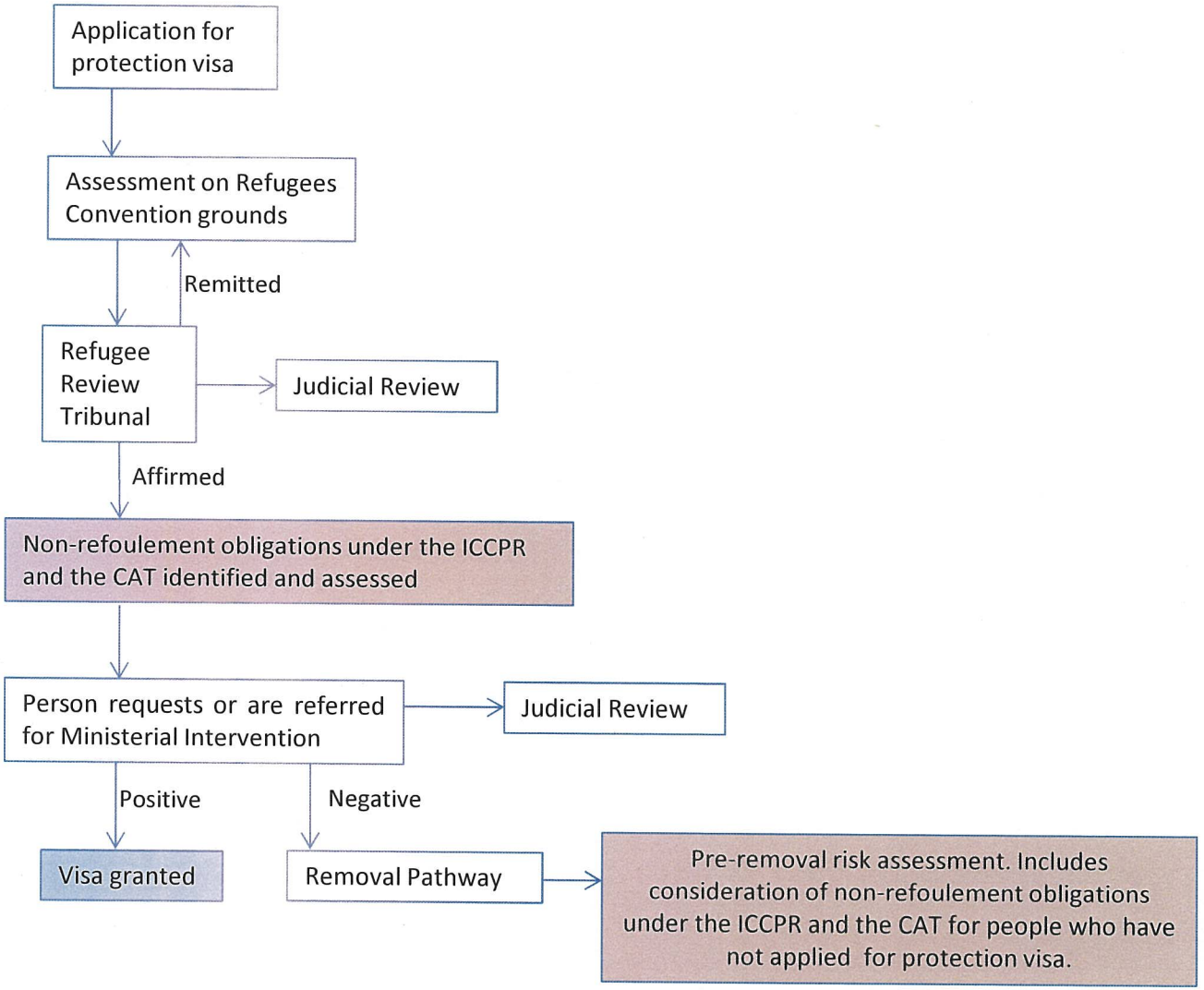
- Referred to the Minister;
- From people in detention;
- The first time a person had sought intervention; or
- Relating to complementary protection.

The proposed administrative process will escalate relevant cases in detention to the Minister's attention within 21-30 days of a primary refusal decision; or 21-30 days of an RRT decision, so prolonged detention and associated costs will not occur as a result of introducing the administrative process.

Current Legislative Process for Complementary Protection
Attachment A



Proposed Administrative Process for Assessing Australia's Non-refoulement Obligations under the ICCPR and the CAT
Attachment B- In Community



Proposed Administrative Process for Assessing Australia's Non-refoulement Obligations under the ICCPR and the CAT
Attachment C- In Detention