4

Continuation of Migration Regulation 4.31B

4.1 In its previous review, the Committee concluded that:

> the fee should be retained, but it should be subjected to a further sunset clause to allow for a thorough assessment to be made of its effectiveness.[1]

4.2 The Committee's aims in this, its second, review were to examine the evidence presented to it to:

- consider whether, in the light of new information, the Committee's original conclusions still stood; and
- determine whether new issues had been raised which required Committee consideration.

4.3 Chapter 2 examined the impact of the fee prescribed in regulation 4.31B and Chapter 3 examined proposals for administrative changes. This Chapter reviews the debate about whether the regulation (and the fee) should continue.

4.4 Of the 21 organisations and individuals that made submissions to the Committee, 13 recommended abolition of the fee and five recommended its retention. In addition, a number of new considerations were brought to the Committee's attention. These were that some applicants should be exempt from the fee; that the fee could be increased; and that formal external reviews of the fee be discontinued with future reviews being undertaken in the normal course of government business.

4.5 DIMA's position was that:

> the data now shows that the fee is effective in controlling *mala fide* applications and providing for cost recovery without having a

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1 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

> negative effect on *bona fide*[2] applicants… Accordingly, on all the evidence, the most appropriate course would be to remove the sunset provision from Regulation 4.31B.[3]

Removal of the fee

4.6 A number of submissions questioned whether a fee was an appropriate way of approaching the problem of abuse of the PV process. Many of the issues raised during the Committee's review of regulation 4.31B in 2001 were the same as those brought to the Committee's attention in 1999.[4]

4.7 Some objections raised with the Committee were directed at the concept of the regulation. These objections to underlying principles remained unaffected by the outcomes of the operation of the regulation in the two years since the Committee's last review. The objections were that:

- the fee was in conflict with Australia's international obligations;
- the fee was a disguised penalty;
- the fee had unfair consequences; and
- there were pragmatic grounds for discontinuing it.

Conflict with international obligations

4.8 In its 1999 review, the Committee concluded that:

> there is no evidence that regulation 4.31B breaches Australia's international obligations to refugees.[5]

4.9 This issue was raised with the Committee in its current review. The Australian Catholic Migrant and Refugee Office (ACMRO) held that the fee was:

> out of character with the spirit and purpose of the Refugee Convention.[6]

2 *Bona fide* is used in this report to indicate that the applicants have a genuine belief that they are refugees, whether or not they are eventually assessed to meet the refugee criteria.

3 DIMA, Submissions, p. 111.

4 The following submissions to the current review were the same as those in 1999: Amnesty (pp. 57-62); ICJ (pp. 39-40, Exhibit 1); RACS (pp. 15-22).

5 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

6 ACRMO, Submissions, p. 64.

4.10 Amnesty argued (as in 1999), that the fee:

> impedes the right of all applicants to seek and enjoy … asylum from persecution as stated in Article 14 of the Universal Declaration of Human Rights.[7]

4.11 ICJ argued in more detail (as it had in its 1999 submission), that the fee:

> may well be in breach as it discriminates against persons seeking review before the RRT.[8]

4.12 KLC claimed that the fee 'constituted less favourable treatment of asylum seekers' than of Australian citizens appealing to a review tribunal, in apparent contravention of Article 29 of the Refugees' Convention, and that the fee appeared to breach Australia's non-refoulement obligations.[9]

4.13 YLLRC and NCCA supported the arguments made in the course of the Committee's 1999 review such as those made above by ICJ and Amnesty.[10]

4.14 The Committee considered the implications of regulation 4.31B for Australia's international obligations in its 1999 review and concluded then that the fee did not breach Australia's international obligations.

4.15 In its current review the Committee concluded that the fee had not discouraged *bona fide* applicants. This was significant because, if *bona fide* applicants were not discouraged from applying, then they were not being discriminated against by the fee. This effectively countered the argument that the fee put Australia in breach of its international obligations because it was discriminatory.

4.16 Further, the office of United Nations High Commissioner for Refugees stated in another forum that:

> Australia fulfils its international obligations scrupulously and fairly.[11]

Conclusion

4.17 The Committee considered that no new arguments had been advanced to cause it change its view that:

> there is no evidence that regulation 4.31B breaches Australia's international obligations to refugees.[12]

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7 Amnesty, Submissions, p. 60.
8 ICJ, Exhibit 1, p. 5.
9 KLC, Submissions, p. 124.
10 YLLRC, Submissions, pp. 66, 69; NCCA, Submissions, p. 36.
11 Quoted in DIMA. Submissions, p. 82.
12 JSCM, *Review of Migration Regulation 4.31B*, p. 37.

Fee is a disguised penalty

4.18 As in 1999, submissions claimed that the fee was in reality a penalty,[13] with KLC, describing it as:

> an unashamedly punitive change to our refugee system, which seeks to restrict displaced people's rights to stay in Australia and have their claims thoroughly considered.[14]

4.19 KLC highlighted how, in their view, the fee was inconsistent with tribunal charging arrangements both internationally and in Australia:

> countries historically categorised as similar to the Australian experience such as Canada and New Zealand [have] no fees in the determination of asylum seekers applications;[15] and
>
> in the RRT, just as in the Social Security Appeals tribunal and the Victims Compensation Tribunal there is no other party to compensate and accordingly …no application fees nor post decision fees.[16]

4.20 YLLRC described the fee as:

> a financial penalty imposed for an unsuccessful application, rather than a fee for review;[17]

4.21 In its 1999 evidence, DIMA had pointed out that the fee did not meet what they were advised was the legal definition of 'penalty'.[18]

4.22 With regard to practices elsewhere, DIMA contended that in other countries the costs of review are often borne by the applicant regardless of the outcome of the application.[19]

4.23 DIMA also set out the Government view that taxpayers generally should not have to take up an unfair burden of the cost of providing services from which they do not benefit and that:

> it is appropriate to recover costs of unsuccessful RRT applications from the applicants.[20]

4.24 The Committee addressed similar arguments in its previous review of regulation 4.31B and noted that they appeared to reflect the assumption

13 Mr A. Payne, Submissions, p. 14; RACS, Submissions, p. 16; NCCA, p. 35; Ms T Lesses, Submissions, pp. 54-55.
14 KLC, Submissions, p. 124.
15 KLC, Submissions, p.123.
16 KLC, Submissions, p. 124.
17 YLLRC, Submissions, p. 66.
18 *DIMA, 1999 Submissions, pp. 85, 120.*
19 DIMA, Submissions, p. 82.
20 DIMA, Submissions, p. 101.

that the fee must be a penalty if it is to be a deterrent. The Committee did not accept that view.[21]

Conclusion

4.25 The Committee concluded that the fee can deter unmeritorious applicants simply because they are aware of its existence. It need not be a penalty to achieve that result. The Committee therefore did not accept this argument as a reason to discontinue the fee.

Unfair consequences

4.26 A number of submissions argued that, quite apart from whether the fee deterred bona fide applicants, the fee imposed undesirable strains on applicants at a time when they already had heavy burdens such as surviving in strange country and grappling with an unfamiliar legal system which would determine their future.[22]

4.27 The RRT advised that applicants suffering financial hardship could be given priority in the Tribunal.[23] The Committee noted that there was no evidence that the fee had discouraged a person with a *bona fide* belief that they merited a PV from applying for an RRT review.

4.28 Both YLLRC and KLC raised the implications of failing to pay the fee.[24] In the words of YLLRC, the fee:

> operates to make it unjustly difficult for impecunious applicants who are once denied a protection visa from successfully applying to enter Australia by another lawful avenue.[25]

4.29 The Committee's view was that the restriction on re-entry was not unique to regulation 4.31B, and was not absolute. It was possible to re-enter Australia on another visa if the fee was paid, or arrangements had been made to pay the fee. DIMA could therefore grant a subsequent substantive visa to a person who still had a debt to the Commonwealth.[26]

4.30 Since mid-1997 some 715 people liable for the fee have returned to Australia, indicating that they have either paid the fee or made arrangements, acceptable to the Commonwealth, to do so.[27]

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21 JSCM, *Review of Migration Regulation 4.31B*, p. 40.

22 MIA, Submissions, pp 43-44; T Lesses, Submissions, pp. 54-55; ACRMO, Submissions, p. 64; ICJ, Exhibit 1, p. 4; RACS, Evidence, p. 40.

23 RRT, Evidence, p. 28.

24 KLC, Submissions, p. 122.

25 YLLRC, Submissions, p. 66.

26 DIMA, Submissions, p. 84.

27 DIMA Submissions, p. 180.

Conclusion

4.31 The Committee concluded that, because no evidence had been advanced that the fee had dissuaded *bona fide* applicants, there was no reason to remove it. The Committee considered that the restriction on re-entry until the fee had been paid (or arrangements made to pay it) was not unusual or unfair and because this long-term outcome affected only unsuccessful appellants, it was not grounds for removing the fee.

Pragmatic grounds

4.32 The chief pragmatic argument advanced against continuing regulation 4.31B was that that the fee was not (as DIMA claimed):

> a disincentive to *mala fide* applicants proceeding to the RRT.[28]

4.33 MIA itemised a range of *mala fide* applicants and the reasons why they would not be deterred by the possibility of paying the fee,[29] and concluded that:

> Migration Regulation 4.31B is clearly failing to prevent the abuse of the review system… should be repealed.[30]

4.34 As indicated previously, the Committee considered that the available evidence did not support that contention.

4.35 Both YLLRC and MIA contended that many people who become liable for the fee would be unable to pay it.[31] MIA argued that:

> a major consideration for the Government should be the fact that the costs of administering… will far outweigh the small likelihood that these fees will ever be paid.[32]

4.36 DIMA claimed that the Government sought not full:

> but at least partial cost contribution for unsuccessful RRT applicants;[33] and
>
> the amount of the fee…is a secondary question… the most important one is that the fee exists to provide a disincentive.[34]

4.37 Its evidence to the Committee showed that, to 30 June 2000, more than 14,000 people had become liable for the imposition of the fee. In that

28 DIMA, Submissions, p. 110.
29 See Chapter 2 under *Is the fee effective in reducing abuse?*
30 MIA, Submissions, p. 45.
31 YLLRC, Submissions, p. 69; MIA, Submissions, p. 43.
32 MIA, Submissions, p. 43.
33 DIMA, Submissions, p. 79.
34 DIMA, Evidence, p. 6.

period it appeared that the fee had been imposed in more than 4,281 cases and fees totalling $1,318,455 had been paid.[35]

4.38 During 1999/00 DIMA processing of information on 4,252 debts cost approximately $164,900, or $38.78 per debt. The total cost comprised direct costs of $149,900, an estimated $6,000 for Movement Alert List data input and removal, and $9,000 incurred by the RRT in processing information for provision to DIMA. During the same period DIMA recovered $832,600, or five times the cost of administering the fee recovery process.[36]

4.39 It was apparent from the DIMA data that the fee revenue exceeded the collection costs and was increasing rapidly, indicating to the Committee that it would be premature to conclude that the fee was not being paid.

Conclusion

4.40 The Committee concluded that the apparently pragmatic arguments for removing the fee (such as non-payment of the fee, and the cost of collection), could not be sustained.

Exemption of some applicants from the fee

4.41 MIA recommended that illegal arrivals should not be subject to the fee because the abuses it is designed to discourage are not going to be perpetrated by them. Illegal arrivals are in detention, unable to work, and not trying merely to prolong their stay in Australia.[37]

4.42 The Committee felt that this proposal, although similar to others urging that the RRT have discretion to waive the fee, went further by identifying a group who would not be subject to the fee at all. This apparently assumed that there were no *mala fide* applicants among those who arrived illegally, and this had not been demonstrated. The proposal also had the potential to open a loophole whereby *mala fide* applicants would seek to avoid the risk of a fee by arranging an illegal arrival.

Conclusion

4.43 The Committee considered that, as there was no evidence that the fee dissuaded *bona fide* asylum seekers from pursuing review, there was no need to grant exemptions.

35 1,179 fees paid, 3,102 debts outstanding: DIMA, Submissions, pp. 102-3.

36 DIMA, Submissions, p. 180.

37 MIA, Submissions, p. 44.

Retention of Regulation 4.31B (possibly raising the fee)

4.44 Five submissions urged that the fee should be retained. Migration agencies JMVS, MMS and MIA, and Mr Kimberley, in a private submission, recommended the retention of the fee and its possible increase.[38] Mr Downey, also in a private submission argued that it was:

> sound as a disincentive to those who have little or no cause to be considered for the very generous United Nations classification of Refugee.[39]

4.45 DIMA did not seek to increase the fee. However it argued that the sunset provision should be removed from regulation 4.31B because maintaining it, and thus causing the fee to cease to be applicable from 1 July 2001, would:

- send an inappropriate message about the Australian Government's intentions regarding abuse of the protection process to the Australian and international community and to potential *mala fide* applicants;
- result in a reduction in revenue of in excess of $830,000 per annum;
- remove an avenue for partial cost contribution; and
- remove the only element of the 1997 package that impacts at the review stage resulting in an increase in *mala fide* applications.[40]

4.46 DIMA claimed that a decision to maintain a sunset clause would:

> send a message to the Australian and international community that Australia was softening its attitude to misuse of the system;[41]
>
> seen by people smugglers as weakening our approach to these issues.[42]

4.47 The Committee's view was that if retention or abolition of the sunset clause was going to be exploited by people smugglers, then that would have been evident already because of the debate which had been generated by the Committee's previous review and the subsequent continuation of the sunset clause. The Committee was offered no evidence that this had occurred.

4.48 In weighing the revenue effect of the discontinuance of the fee the Committee recalled that the revenue received from fees had been

38 JMVS, Submissions, p. 38; MMS, Submissions, p. 10; G. Kimberley, Submissions, p. 30; MIA, Evidence, p. 63.
39 R. Downey, Submissions, p. 2.
40 DIMA, Submissions, p. 110.
41 DIMA, Evidence, p. 3.
42 DIMA, Evidence, p. 60.

increasing and was expected by DIMA to continue to do so.[43] However, the Committee was mindful that the total revenue over three years was still low, that DIMA had not sought to increase the fee, and that the actual revenue aim of the fee was not to recover costs but:

> at least partial cost contribution.[44]

4.49 The Committee also recalled that the decision to recover only $1000 of the estimated cost of $2,755 per applicant[45] was arbitrary. It was:

> related to the trigger point… for placing persons on our movement alert list…when a decision maker is faced with a further visa application from that person the visa will not be granted unless the debt has been repaid or adequate arrangements have been put in place.[46]

4.50 Further, the requirement to remove a person in Australia without a valid visa took priority over fee recovery, so that the payment of the fee may not be a crucial consideration for DIMA.

4.51 With this background in mind, the Committee did not consider that the revenue implication of removing the fee should be an overriding issue in its deliberations.

4.52 In relation to the expectation that removal of the fee would precipitate a rise in *mala fide* applications, the Committee considered that the evidence *to date* merited serious consideration.

Conclusion

4.53 The Committee noted that DIMA, the authority for collection of the fee, did not propose its increase. The Committee therefore did not pursue that suggestion.

4.54 Conversely, the Committee did not consider that the revenue implication of removing the fee should be a determining issue in the Committee's deliberations.

4.55 For the Committee the central issue was whether the fee had, as intended, acted as a deterrent to abuse of the PV system.

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43 $832,600,in 1999/00 compared with $104,000 in 1997/98, DIMA, Submissions, p. 102.

44 DIMA, Submission, p. 79.

45 DIMA, Evidence, p. 3. The RRT Tribunal is funded pursuant to a Resource Agreement with DIMA and the Department of Finance and Administration which provides funding…per case finalised. RRT, *Annual Report, 1999-2000*, p. 21. www.rrt.gov.au/

46 DIMA, Evidence, p. 4.

4.56 The Committee noted that, because it was considering cohort data, not all 1999/00 applications had been finalised.[47] The practical implication of this was that reliable take-up rates were available for only 'two and a half, maybe three' financial years of the nearly four during which the fee had applied.[48]

4.57 The Committee therefore returned to DIMA's assessment that:

> it is hard to disentangle which part of the package of measures that we have taken over the last eight or 10 years has uniquely contributed to deterring misuse of the asylum system… [but] the post-determination RRT fee…is an important part of the package;[49]
>
> and
>
> in five years time we will have a better idea.[50]

4.58 In the Committee's view, there was insufficient data to either confirm or refute DIMA's claim that:

> whatever the current level of misuse of the RRT is… it would be higher without the fee.[51]

Recommendation 3

4.59 **The Committee recommends that Migration Regulation 4.31B be retained, subject to a two-year sunset clause commencing on 1 July 2001, and that its operation be reviewed by the Committee early in 2003.**

Discontinuance of formal review

4.60 The Committee is aware that the recommendation to review the regulation again was at odds with DIMA's conclusion that future reviews should be undertaken in the normal course of government business. In the Committee's view this proposal did not take into account the Committee's

47 DIMA, Submissions, p. 94.
48 DIMA, Evidence, p. 51.
49 DIMA, Evidence, p. 7.
50 DIMA, Evidence, p. 51.
51 DIMA, Submissions, p. 110.

resolution of appointment , passed by both the House of Representatives and the Senate, which specifically authorises it *inter alia:*

> to inquire into and report upon:
>
> (a) regulations made or proposed to be made under the Migration Act 1958…[52]

52 House of Representatives, *Votes and Proceedings*, Thursday 3 December 1998.