SUBMISSION TO THE JOINT STANDING COMMITTEE ON MIGRATION 2003 REVIEW OF MIGRATION REGULATION 4.31B

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EXECUTIVE SUMMARY

1. Nature of the fee

The fee in question is effectively payable only by applicants to whom the Refugee Review Tribunal finds obligations under the Refugees Convention are not owed. Therefore, the effect of the fee is a financial penalty imposed for an unsuccessful application, rather than a fee for review as the wording of paragraph (1) of the regulation suggests.

2. Debt to the Commonwealth

Unsuccessful applicants who are unable to pay the fee will owe a debt to the Commonwealth and are therefore excluded from being granted any visa to which public interest criterion 4004 applies until the debt is repaid or arrangements are made for its repayment. The fee therefore 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.

3. International obligations

We believe that the regulation places Australia in breach of its international obligations. We agree with the submission made by the Human Rights and Equal Opportunity Commission to this Committee during the 1999 review of the regulation in regard to breaches of Australia's international obligations, as it is extracted in the 1999 dissenting report of the Committee.

4. Inability to specifically target abuses

The aim of the regulation is to deter abuse of the refugee visa system, and not to deter any applicant who may fear that their application will not succeed. However, the regulation as it is presently worded does not distinguish between unsuccessful applicants whose application is an abuse of process and those who apply for a review of a primary decision in good faith.

5. Conclusion

The true intention behind the regulation is to deter applicants who consider pursuing their right to have an adverse decision reviewed. It punishes those who apply and are unsuccessful.

The fee may impede unsuccessful applicants who are unable to pay the fee from making future meritorious applications for an Australian visa, by leaving them with a debt to the Commonwealth.

There is no evidence that the fee has been effective in deterring abuse of the refugee application process, while it is self-evident that the fee can impose a large financial burden on persons who can ill afford it.

This fee is punitive and discriminatory, a punishment for lodging a review application. This punishment is by way of a $1000 fine and is an encroachment on the judicial function that can only be performed by a Chapter 3 Court.

In our submission, regulation 4.31B ought to cease to operate.

1. NATURE OF THE FEE

1.1 The "fee" payable under regulation 4.31B is not a really a fee but a penalty. A "fee" is a payment made in return for the provision of something be that a right, goods or services. The regulation is worded to give the appearance that it provides for just that – payment in return for something – "*for review by the Tribunal of an RRT-reviewable decision...*". During the 1999 review of the regulation, the Department of Immigration and Multicultural Affairs described the fee as the proper implementation of a user-pays principle[1]. If the fee were really on a "user-pays" basis it would presumably apply to all "users", ie all applicants. Yet the fee only applies to applicants who are unsuccessful and is only payable after a decision has been made by the Tribunal.

1.2 The nature of the fee provided for in regulation 4.31B is more apparent when contrasted to the fees of other courts or tribunals that are payable in advance, are payable by all users and are unconditional on the outcome of a decision. In contrast to those fees, the fee in regulation 4.31B was never intended to be a fee for service and calling it a fee does not change its nature. The fee imposed by regulation 4.31B seems more similar to a costs penalty imposed on an unsuccessful litigant. The fee is intended to act as a deterrent against abuse of the protection visa system. It is intended to be taken into account by applicants so that they are aware that if they are unsuccessful they will be required to pay $1,000.00.

1.3 That the fee will never apply to successful applicants is only apparent through the operation of qualifications in paragraphs (2) and (3) to what appears to be a general rule in paragraph (1). There is no need for a general rule as the fee was only ever intended to apply to unsuccessful applicants. Paragraph (1) of regulation 4.31B makes the regulation appear to provide for something that it does not – a fee for service. Criticisms of the regulation that focus on what the fee actually is – a penalty, cannot be fairly addressed while the fee is given the appearance of, and is treated as if it is, a fee for service when it simply is not.

1.4 We refer to the 1999 Dissenting Report of the Committee where it was stated:

"Regulation 4.31B, however, is a penalty in all but the narrowest legal sense. It applies only to those who fail to be granted protection visas, and no one else. In those circumstances, it is fair to regard the $1,000 as a penalty, not a general fee."

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[1] responder Mr Sullivan, Joint Committee on Migration Review of Migration Regulation 4.31B Discussion, page 97, 23 March 1999.

2. DEBT TO THE COMMONWEALTH

2.1 In comparison to litigants in other spheres, applicants for review of decisions relating to protection visas are more often people with few available financial resources, in some cases having abandoned their possessions and resources in the country from which they have fled. This situation may be exacerbated by the inability of applicants to work while awaiting the outcome of their application. It therefore follows that many applicants whose review by the Tribunal is unsuccessful will be unable to pay what to them is a substantial fee within the short time allowed by paragraph (2) of the regulation.

2.2 An inability to pay the fee within the specified time results in the applicant owing a debt to the Commonwealth.

2.3 Public interest criterion 4004 in schedule 4 to the Migration Regulations applies to the grant of almost all visa categories. The criterion requires that:

> *"The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment."*

2.4 The intention of public interest criterion 4004 is to prevent persons who have accumulated debts to the Australian government, usually in the form of unpaid detention costs and court costs from entering Australia until the original debt is repaid. Regulation 4.31B imposes a punitive fee on an unsuccessful applicant for review on the basis that in the opinion of the Tribunal member, the applicant is not owed protection obligations under the Refugee Convention. An applicant who is unable to pay the charge is therefore greatly restricted in his or her ability to enter Australia in the future unless arrangements can be made to repay the debt.

2.5 The Federal Court has criticised on numerous occasions the unduly harsh operation of public interest criterion 4004 in respect of some applicants. In *De Silva v Ruddock*[2], Merkel J said "*I accept that the regulation* [criterion 4004] *can operate harshly and oppressively against individual applicants.*" In *Minister for Immigration and Multicultural Affairs v Zamora*[3], the Full Court urged the Minister not to enforce an order for costs against the impecunious applicant given the harsh consequences criterion 4004 would impose in those circumstances.

2.6 In *Li v Minister for Immigration and Multicultural Affairs*[4], Einfeld J said:

> *"There are cases in which, it seems to me, it would be particularly harsh to order costs, such as where a person has humanitarian merits but is unable to win a review for technical reasons but may be able to make an application for migration to Australia at a later time upon returning to his or her own country. However otherwise*

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[2] Federal Court decision no 311/98, unreported
[3] Federal Court decision no 1170/98, unreported
[4] [1999] FCA 436

acceptable, such an application cannot be granted if there is a debt to the Commonwealth such as non-payment of the Commonwealth's legal costs even if caused by impecuniosity. In some cases this result would be unduly penal."

Whilst we note that there is potentially a significant difference in quantum between an order for costs and the fee imposed by this regulation, the principle remains the same.

2.7 It is submitted that a debt to the Commonwealth incurred through the imposition of the fee in Regulation 4.31B would give rise to unduly harsh penalties on an applicant, particularly where the applicant cannot afford to pay the fee. In the area of law in which the Tribunal operates, it is submitted that impecuniosity is so common amongst applicants that an unusually large proportion of persons who incur the fee will never be able to pay it and will therefore be severely curtailed in making an otherwise meritorious future application for migration to Australia.

3. INTERNATIONAL OBLIGATIONS

3.1 Submissions to this Committee in 1999 and 2001 comprehensively addressed Australia's international obligations under the Refugees Convention and we expect the same will be true of the present inquiry. We do not think it necessary to repeat those points, however we wish to express our agreement with the submission of the Human Rights and Equal Opportunity Commission (HREOC) extracted in the Dissenting Report of the Committee in 1999.

3.2 In that submission HREOC stated that the operation of the regulation breached Australia's obligation of non-refoulement under the Refugee Convention and impeded access to a system that provided accessible, effective determination of refugee status. HREOC stated:

"Access to this effective procedure cannot be made dependant upon the capacity of the applicant to pay. Nor can it be discouraged [by] being made subject to a penalty in the event the applicant has misapprehended his or her situation in light of the Refugee Convention definition or has been unable to muster the evidence required to establish his or her case.

Yet this is the effect of Migration Regulation 4.31B."[5]

[5] HREOC Submission, page 19-20, 1999.

4. INABILITY TO SPECIFICALLY TARGET ABUSES

4.1 There are two ways in which this regulation does not succeed in adequately targeting abusers of the system. First, in the process of attempting to target abusers it has a deterrent effect upon bona fide applicants. Second, while penalising abusers it also penalises bona fide applicants who may for various reasons have had their applications rejected.

4.2 Although the aim of the fee is to deter abuse of process it does not distinguish between abusers of the system and a bona fide applicant who may fear that their application may not succeed. If the fee does work to deter applicants there is no way of ensuring that it only deters those who are abusers of the system, as presumably any person seeking review of the initial treatment of their application has some reason to think that they could be unsuccessful. Not the least reason for this is that a person seeking a review of a primary decision has had their application for refugee status denied at first instance. A person cannot know before seeking a review whether or not the review will be successful.

4.3 This Committee's previous reports have raised questions about the level of evidence available to show that the current fee system deters bona fide applicants. DIMIA has submitted in previous years, and again to this Inquiry, to the contrary, that the fee acts as an effective deterrent to prevent abuse of the system. Yet it is difficult to understand how a system that deters abuse does not at the same time to some extent deter bona fide applicants. We submit that it is inevitable that in a system where a fee penalty exists to deter use (albeit aimed at abusive use), that bona fide use will also be successfully deterred.

4.4 In the Dissenting Report of the Committee in 1999 it was stated that the argument put by DIMIA that the success of the regulation is difficult to separate from the package of migration regulations and immigration systems and that therefore it is an important element in the successful deterrent strategy, was contradictory and not entirely logical. One could argue that if it is difficult to separate the operation of the regulation from the package, it is also therefore difficult to show how successful it has been as a deterrent. Therefore removal of the fee may not have a significant contra effect, ie. to remove the fee would not be a removal of all effective deterrents to those who abuse the system. Rather, it will remove one aspect of the package which does risk targeting bona fide applicants as well as abusers.

4.5 A further difficulty is the ambiguity between bona fide applicants, applicants abusing the system, and rejected applicants. On this point we refer the Committee to the Submission of the Refugee Council of Australia to the 1999 Inquiry as quoted in the Dissenting Report of the Committee, where the Refugee Council listed 5 different "types" of refugee applicants based on their various motivations for applying. Of those, only one type of applicant would qualify as "genuine" under refugee based assessments, but yet only one would be classified as a type of applicant that is knowingly abusing the system. The fact remains that an asylum seeker can have their application for protection rejected but yet still be a bona fide refugee, given the limited nature of both the Refugee Convention and the Migration Act.

4.6 Thus the system in its current form continues to impose a harsh and unfair penalty upon applicants who may not succeed in their current application for refugee status, but are nonetheless not "abusing the system". It is those applicants who believe they have genuine refugee and humanitarian grounds upon which to apply that are being most affected by this regulation, as they are the most likely to be disadvantaged by the creation of a debt to the Commonwealth, as detailed above in Section 2.

5. CONCLUSION

5.1 While the regulation purports to impose a fee for review of a decision by the Tribunal, its intention is clearly to penalise unsuccessful applicants, to act as a disincentive to applicants seeking review and to prevent unsuccessful applicants making further attempts to enter Australia.

5.2 The government must accept that the Department of Immigration and Multicultural Affairs sometimes refuses to grant a protection visa to a genuine refugee, for a wide range of reasons. Universal access to the Tribunal is therefore essential to maintain the integrity of the refugee system, to maintain Australia's international reputation and to serve the interests of justice.

5.3 Similarly, it must be recognised that persons who genuinely fear for their safety or wellbeing, or the safety or wellbeing of a family member, are sometimes unsuccessful in the Tribunal. This may be because they do not fit the definition of a refugee under the Refugees Convention, or may even be because the Tribunal has erred in its decision. To impose a penal fee on all unsuccessful applicants can therefore be extremely harsh on individual applicants, and if the applicant is impecunious, may severely impede subsequent justified attempts by that person to enter Australia.

5.4 In our submission, this regulation is unduly harsh in its operation, particularly given the humanitarian nature of the subject matter. The regulation also places Australia in breach of its international obligations. It is therefore our submission that it ought to cease to operate.