Review of Migration Legislation Amendment Bill (No. 2) 2000

Mrs C. Gallus MP

Chair: Joint Standing Committee on Migration

9 OCTOBER 2000

The Minister for Immigration and Multicultural Affairs referred the Migration Legislation Amendment Bill (No. 2) 2000 to the committee on 12 April 2000. The committee received 31 submissions on this very specialised area of legislation; it held public hearings in Canberra, Melbourne and Sydney, and heard evidence from 11 organisations. On behalf of the committee, I extend our appreciation for the assistance given to this review by all those who provided submissions and gave evidence to the hearings.

The bill's broad aim is to reduce the opportunity for non-permanent residents to seek to use judicial review of migration decisions as a backdoor way to extend their stay in Australia. The committee considered the issues raised in connection with the bill and concluded that the bill's aim was justified. In addition, having examined the evidence put to it, the committee concluded that the bill's proposed restriction of access to class actions by non-permanent residents did not breach Australia's international obligations.

The committee considered that the rejection by the courts of cases pursued through class actions in the migration jurisdiction did not necessarily indicate an abuse of the judicial review process. However, the committee believed that judicial review provided an opportunity for abuse, and there was persuasive evidence that this was occurring in the case of class actions. The opportunity for potential abuse arises because non-permanent resident applicants for judicial review automatically acquire bridging visas which entitle them to legally remain in Australia until 28 days after their case has been decided. Class actions can take an average of 18 months to resolve, compared with approximately five months for individual action. The potential duration of class actions can be the incentive to pursue them, rather than a desire to resolve a point of migration law or any expectation that a member of a class action will acquire residency in Australia as a result of the class action.

The fact that a large number of participants would not benefit from a positive decision in the class action which they had joined was a key determinant of the committee's decision to support the bill's aim of restricting access of non-permanent residents to class actions. The committee also found it significant that some involved in class actions might not have even applied for the visa which was

the subject of the class action. These points are crucial. Although some participants in class actions have subsequently been granted permanent residency, not one person has done so as a direct outcome of the 10 class actions resolved between January 1997 and December 1999 which involved 4,458 individuals at a considerable cost to the Commonwealth.
Overall, the committee concluded that there had been an abuse of the judicial review and the class action process and that the proposed legislation would end the opportunity for that abuse. The committee believed that issues currently addressed by class actions could appropriately be handled by test cases. Test cases permit a number of cases to be resolved through the hearing of a single case and having the outcome apply to cases which have been identified as similar. This arrangement permits efficient use of the court's resources. The committee noted that some of those commenting on the bill held that test cases would be precluded or that class actions in other non-migration jurisdictions would be prevented. The committee therefore recommended that these potential unintended consequences of the bill be clarified. With those provisions, the committee concluded that access to class actions should be restricted.

Class actions in the migration jurisdiction offer the opportunity for a number of cases to be resolved though the hearing of one appeal which represents many others. This considerably reduces the case load on courts. Although the committee supported the restriction of access to class actions in the migration jurisdiction, it considered that efficient use of the court system should be encouraged. Therefore, in addition to recommending the adoption of the bill's proposals for restriction on access to class action, the committee also recommended steps to encourage more use of test cases. A test case will resolve a point of law in the migration area and that decision will flow through to cover non-permanent residents to whom it is relevant.

Although the committee concluded that there was evidence of abuse of the review process and that some people had joined class actions in order to obtain a bridging visa, the committee also noticed that some of the perceived abuses of judicial review would have arisen because of the advice which applicants had received about seeking the review. The committee was critical of migration agents who encouraged non-permanent residents to participate in class actions without apparent regard for the specifics of the individual cases. When unsuccessful applicants for judicial review are advised, `You might be able to immediately qualify for a new class action and obtain a bridging visa,' the potential for exploitation of both the legal system and the applicants is obvious. In response to such approaches to migration litigation, the committee has recommended that the activities of migration agents be brought under closer and continuing scrutiny.

Migration Legislation Amendment Bill (No. 2) 2000 also limits access to judicial review by more strictly defining those able to apply for judicial review. The

proposed provisions are designed to ensure that only those who stand to benefit from the outcome of a review may bring a challenge to the Federal Court. The committee saw this as an important move to improve the operation of judicial review and recommended that the proposed changes to clarify who may commence or continue a proceeding in the Federal Court should be adopted. The bill proposes to impose time limits on applications for judicial review by the High Court. The committee noted that migration jurisdiction appeals to the Federal Court have to be undertaken within 28 days of a decision being notified. However, no such time limit applies to the High Court. That court, therefore, rather than the more appropriate Federal Court, was being required to determine migration matters.

The committee noted that there are already time limits imposed in other jurisdictions, and the committee concluded that there should be time limits placed on applications for judicial review of migration decisions. Although evidence was presented to the committee that the proposed time limit of 28 days was not unreasonable, the committee was nevertheless sensitive to the importance of the court as the last resort for people seeking review of their migration status. The committee was advised that decisions of the court could raise genuine life and death concerns. The committee therefore recommended an extended but still fixed period for appeal to the High Court of 35 days. The committee believed that, because the initial application to the High Court required only an outline of the grounds for appeal rather than a detailed argument, 35 days was a sufficient time period. The committee considered whether there should be an option for the High Court to waive the time limit but believed that this was against the intention of the bill and would simply raise another way of application. There was some confusion about witnesses' beliefs about how this would limit non-permanent residents accessing the courts. There are restrictions, but individuals still have access to judicial review if they appeal within a reasonable time and stand to benefit from the outcome.

I would like to extend my thanks to the committee secretariat—Gill Gould, Steve Dyer, Emma Herd and Vishal Pandey. I thank them very much for the help that they gave me during the committee hearings. I commend this report to the House.

(*source: Hansard 9 October 2000*)