

Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622]

Portfolio: Immigration

Authorising Legislation: Migration Act 1958

Last day to disallow: 17 July 2014 (Senate)

Purpose

1.534 The Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [F2014L00622] (the regulation) amends Part 1 and Schedules 1 and 2 to the *Migration Regulations 1994* to provide for the repeal of the following classes of visa from 2 June 2014:

- the Aged Dependent Relative visa classes and subclasses (for a person who is single, meets the aged requirements and both is, and has for a reasonable period been, financially dependent on their Australian relative);
- the Remaining Relative visa classes and subclasses (for a person whose only near relatives are those usually resident in Australia);
- the Carer visa classes and subclasses. (for a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition); and
- the Parent and Aged Parent visa classes and subclasses (for a person who is the parent of an Australian citizen, Australian permanent resident or eligible New Zealand citizen, and where the parent does not pay a significant financial contribution towards their own future health, welfare and other costs in Australia).

1.535 The affected visa classes and subclasses are:

- Parent (Migrant) (Class AX), Subclass 103;
- Aged Parent (Residence) (Class BP), Subclass 804;
- Other Family (Migrant) (Class BO), Subclass 114, 115 and 116; and
- Other Family (Residence) (Class BU), Subclass 835, 836 and 838.

Committee view on compatibility

Right to protection of the family

1.536 The right to respect for the family is guaranteed by articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR) and article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Under these articles, the family is recognised as the natural and fundamental group unit of society and, as such, being entitled to protection.

1.537 An important element of protection of the family, arising from the prohibition under article 17 of the ICCPR against unlawful or arbitrary interference with family, is to ensure family members are not involuntarily separated from one another. Laws and measures which prevent family members from being together, impose long periods of separation or forcibly remove children from their parents, will therefore engage this right.

Repeal of visas classes for relatives

1.538 As noted above, the regulation amends the *Migration Regulations 1994* to repeal:

- Parent (Migrant) (Class AX), Subclass 103;
- Aged Parent (Residence) (Class BP), Subclass 804;
- Other Family (Migrant) (Class BO), Subclass 114, 115 and 116; and
- Other Family (Residence) (Class BU), Subclass 835, 836 and 838.

1.539 The statement of compatibility for the regulation identifies it as engaging and potentially limiting the rights to equality and non-discrimination and the right to health, and concludes that 'the changes' (and presumably any limitations on those rights) are considered reasonable, necessary and proportionate' to achieving the objective of ensuring that 'skilled people comprise at least two-thirds' of Australia's migration program.

1.540 The statement of compatibility also notes that Australia's international human rights obligations apply subject to its jurisdiction, and concludes on this basis that the repeal of the specified visas, insofar as these apply to offshore applicants, does not invoke Australia's jurisdiction in relation to those applicants.¹

1.541 However, while the committee accepts that non-citizens do not have a stand-alone right to family reunification under international human rights law, it notes that the repealed visa classes operated to affect the interests not only the visa applicant but also their relatives in Australia. To this extent, the visa classes in question may be seen as having provided avenues to protect, where appropriate and reasonable, the family unity of persons usually resident in Australia with family members from overseas. To the extent that the repeal of those visa classes may limit the right to the protection of the family, the regulation may therefore be seen as a limitation on that right.

1.542 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1 Explanatory Memorandum (EM), Attachment B, p. 1.

1.543 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of the specified visa classes with the protection of the family, and particularly:

- whether the measure is aimed at achieving a legitimate objective;
- whether there is a rational connection between the measure and that objective; and
- whether the measure is proportionate to that objective.

Right to health and a healthy environment

1.544 The right to health is guaranteed by article 12(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), and is fundamental to the exercise of other human rights. The right to health is understood as the right to enjoy the highest attainable standard of physical and mental health, and to have access to adequate health care and live in conditions that promote a healthy life (including, for example, safe and healthy working conditions; access to safe drinking water; adequate sanitation; adequate supply of safe food, nutrition and housing; healthy occupational and environmental conditions; and access to health-related education and information).

1.545 Under article 2(1) of ICESCR, Australia has certain obligations in relation to the right to health. These include:

- the immediate obligation to satisfy certain minimum aspects of the right;
- the obligation not to unjustifiably take any backwards steps that might affect the right;
- the obligation to ensure the right is made available in a non-discriminatory way; and
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.

1.546 Under article 4 of the ICESCR, economic, social and cultural rights may be subject only to such limitations as are determined by law and compatible with the nature of those rights, and solely for the purpose of promoting the general welfare in a democratic society. Such limitations must be proportionate to the achievement of a legitimate objective, and must be the least restrictive alternative where several types of limitations are available.

Repeal of certain classes of carer visas

1.547 As described above, the regulation repeals a number of visa classes available to carers. These visas enabled a person to care for a relative in Australia with a long-term or permanent medical condition or for a person to assist a relative providing care to a member of their family unit with a long-term or permanent medical condition.

1.548 The statement of compatibility identifies the right to health as engaged by the repeal of the affected classes of carer visas. However, it concludes that 'the changes are considered reasonable, necessary and proportionate' on the basis that:

The repealing of Remaining Relative Visa and Aged Dependent Relative Visas demonstrate that [sic] the government's policy to focus the family stream of the Migration Programme on the entry of close family members, that is, partners, children and those parents who are able to contribute to the cost of their migration and settlement in Australia.²

1.549 The statement of compatibility suggests that the repealed carer visa 'was 'only intended to be used when other forms of care (i.e. hospital, nursing and community services) cannot reasonably be accessed in Australia',³ and notes:

The National Disability Insurance Scheme [the NDIS] and expanding network of disability support services meet those four elements [which require that health care must be available, accessible, acceptable and of a sufficient quality]. Other forms of care (such as hospital access, nursing and community services) which the Carer visa was intended to be used to fill gaps in can now be reasonably accessed throughout Australia. Additionally, more flexible Visitor visa arrangements are available for the relatives of permanent residents to provide short-term care.

1.550 However, the committee notes that the assessment contained in the statement of compatibility provides no analysis to support the conclusion that repeal of the carer's visa in reliance on the NDIS and other existing forms of care does not represent a limitation on the right to health. For example, it is unclear whether persons with particular difficulties in accessing health care services (such as people who face cultural or language barriers) may have reduced access to care and health services as a result of the repeal of the carer visa.

1.551 The committee's usual expectation where a limitation on rights is proposed, is that the statement of compatibility provide an assessment of whether the measure is reasonable, necessary and proportionate to the pursuit of a legitimate objective.

1.552 In addition, in relation to the stated objective of the bill, the committee notes that the statement of compatibility provides only a general and unsupported statement of the policy intention or objective of the measure, being to focus the family stream of the migration program on close family members able to contribute to the cost of their migration.

1.553 The committee notes that, to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations of why the measures are necessary in pursuit of a legitimate objective. The Attorney-General's Department's guidance on the preparation of statements of compatibility

2 EM, Attachment B, p. 4.

3 EM, Attachment B, pp 3-4.

states that the 'existence of a legitimate objective must be identified clearly with supporting reasons and, generally, empirical data to demonstrate that [it is] important'. To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

1.554 The committee therefore requests the Minister for Immigration and Border Protection's advice on the compatibility of the repeal of certain carer visa classes with the right to health, and particularly, and particularly:

- **whether the measure is aimed at achieving a legitimate objective;**
- **whether there is a rational connection between the measure and that objective; and**
- **whether the measure is proportionate to that objective.**