(D)

FEDERAL COURT OF AUSTRALIA

Principal Registry

MEMORANDUM

Our Ref:
Your Ref:

TO: Chief Justice

THROUGH: Acting Registrar

FROM: Deputy Registrar

SUBJECT: Leave to appeal in migration cases

DATE: 9 January 2003

I refer to your memorandum to Lina Galea dated 7 January 2003 in which you sought advice in relation to the Court's request to the Attorney-General for legislation to introduce a leave to appeal requirement in migration cases.

Current status of the proposal

I confirm that, according to the Attorney-General's Department, the Minister for Immigration has deferred consideration of the proposal until the High Court decision on the validity and effect of the privative clause has been delivered. I also confirm that the Attorney-General's Department has asked the Court to suggest some possible models as to how a leave to appeal system might work.

I understand that the proposal has not been referred to any of the Court's committees. The proposal might be referred to the Management of Appeals Committee, or alternatively the Practice and Procedure Committee.

Overseas models

It has not been possible in the time available to undertake a comprehensive study of the models in force in England and Wales, Canada and New Zealand. The following summaries should therefore be treated conservatively.

England and Wales

The *Immigration and Asylum Act 1999* currently sets out the provisions for the review of migration decisions. In 2003 this legislation will be replaced by the *Nationality, Immigration and Asylum Act 2002*. However, in general terms the system for reviewing migration decisions will remain the same.

Applications by people seeking to remain or settle in the United Kingdom, including asylum seekers, are dealt with by the Immigration and Nationality Directorate ('IND') of the Home Office. A person who disagrees with a decision by the IND may apply to the Immigration

Appellate Authority for a review. The Authority has two tiers: the Immigration Adjudicators and the Immigration Appeal Tribunal.

An application to review a decision by IND will normally be heard and determined by an Immigration Adjudicator. A party to that review may apply to the Immigration Appeal Tribunal for leave to appeal against the adjudicator's determination. An application for leave may be determined by a single member of the Tribunal in the absence of the parties.

If the Tribunal hears an appeal and makes a final determination, any party to the appeal may bring a further appeal to the appropriate appeal court on a question of law material to that determination. However, such an appeal may be brought only with the leave of the Immigration Appeal Tribunal or, if such leave is refused, of the appropriate appeal court. An appropriate appeal court is defined as

> (a) if the appeal is from the determination of an adjudicator made in Scotland, the Court of Session; and
> (b) in any other case, the Court of Appeal.

Neither of the immigration Acts provide for how the Court of Appeal must deal with applications for leave to appeal against a decision of the Immigration Appeal Tribunal. Nor are there any specific rules or practice directions for dealing with such applications. The general provisions of the *Supreme Court Act 1981* (UK) ('SC Act'), Part 52 of the Civil Procedure Rules ('CPR') and Practice Direction 52 ('PD52') therefore apply.

In relation to an application for leave to appeal (referred to as 'permission to appeal' in the SC Act, CPR and PD52), the following provisions are of interest:

- no appeal may be made against a decision of a court to give or refuse permission to appeal (but the rules of court may provide for a further application for permission to be made to the same or another court) [subsection 54(4) SC Act];
- the court may be constituted by one or more judges [subsection 54(2) SC Act];
- permission to appeal will only be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard [subrule 52.3(6) CPR];
- an order giving permission may limit the issues to be heard and may be made subject to conditions [subrule 52.3(7) CPR];
- a party may request a hearing to reconsider a decision of a single judge made without a hearing [subrule 52.16(6) CPR];
- an application for permission to appeal may be considered by the appeal court without a hearing [paragraph 4.11 PD52], but if a decision is made to refuse permission or to limit the appeal to certain issues then each party must be notified of that decision and the reasons for it, and the appellant may apply to have the decision reconsidered at an oral hearing [paragraphs 4.13 and 4.20 PD52];
- notice of the oral hearing to reconsider a decision to refuse permission need not be given to the respondent unless the court so directs [paragraph 4.15 PD52].

Canada

Since 28 June 2002, the legislative scheme for immigration and refugees in Canada has been set out in the *Immigration and Refugee Protection Act 2001*. This Act replaced the *Immigration Act 1985*.

In general terms, the Department known as Citizenship and Immigration Canada ('CIC') has overall responsibility for immigration and refugee matters. The Immigration and Refugee Board, through it four divisions, determines claims for refugee protection made within Canada, conducts immigration admissibility hearings and detention reviews, and hears and determines appeals against a range of decisions by the CIC.

Decisions by the CIC and the IRB may be the subject of an application for leave to the Federal Court of Canada for judicial review. The relevant provisions of the *Immigration and Refugee Protection Act 2001* (which are in similar terms to those in the earlier *Immigration Act 1985*) are set out below.

> **72.** (1) Judicial review by the Federal Court with respect to any matter—a decision, determination or order made, a measure taken or a question raised—under this Act is commenced by making an application for leave to the Court.
>
> (2) The following provisions govern an application under subsection (1):
>
> (*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted;
>
> (*b*) subject to paragraph 169(*f*), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court—Trial Division (''the Court'') within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;
>
> (*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;
>
> (*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and
>
> (*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.
>
> **73.** The Minister may make an application for leave to commence an application for judicial review with respect to any decision of the Refugee Appeal Division, whether or not the Minister took part in the proceedings before the Refugee Protection Division or Refugee Appeal Division.
>
> **74.** Judicial review is subject to the following provisions:
>
> (*a*) the judge who grants leave shall fix the day and place for the hearing of the application;
>
> (*b*) the hearing shall be no sooner than 30 days and no later than 90 days after leave was granted, unless the parties agree to an earlier day;
>
> (*c*) the judge shall dispose of the application without delay and in a summary way; and
>
> (*d*) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.
>
> **75.** (1) Subject to the approval of the Governor in Council, the Chief Justice of the Federal Court may make rules governing the practice and procedure in relation to applications for leave to commence an application for judicial review, for judicial review and for appeals. The rules are binding despite any rule or practice that would otherwise apply.
>
> (2) In the event of an inconsistency between this Division and any provision of the *Federal Court Act*, this Division prevails to the extent of the inconsistency.

Under this legislative scheme, a leave requirement must be satisfied in order to obtain a hearing by the Court at first instance. It is not a requirement for leave to appeal. Appeals to

the Federal Court of Appeal are, however, only permitted if the trial judge certifies that a serious question of general importance is involved and states the question.

The *Federal Court Immigration Rules, 1993*, which required minor amendment to reflect the new Act, deal with the form and disposition of an application for leave, the disposition of an application for judicial review if leave is granted, and the form of appeal.

New Zealand

In New Zealand, immigration and refugee matters are governed by the *Immigration Act 1987.*

Most decisions under that Act are made by officers of the New Zealand Immigration Service or the relevant Minister. There are different mechanisms for the review of those decisions depending on the subject matter of the decision:

- The Residence Appeal Authority ('RAA') considers and decides appeals by unsuccessful applicants for New Zealand residence visas or residence permits.
- The Removal Review Authority ('RRA') hears and determines appeals against the statutory requirement for a person who is unlawfully in New Zealand to leave the country.
- The Deportation Review Tribunal ('DRT') hears and determines appeals against a decision by the Minister to issue a deportation order.
- The Refugee Status Appeals Authority ('RSAA') hears and determines appeals by unsuccessful applicants for refugee status, and by applicants whose refugee status has been revoked.

A party to any appeal to the RAA, RRA or DRT may appeal to the High Court on a question of law [sections 115, 115A and 117 *Immigration Act 1987*]. Any party to an appeal to the High Court against a decision of the RAA or RRA may only appeal to the Court of Appeal with the leave of the High Court or, if that leave is refused, the leave of the Court of Appeal [subsection 116(1) *Immigration Act 1987*]. In determining whether to grant leave, consideration must be given to whether the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal [subsection 116(2) *Immigration Act 1987*]. There are no statutory provisions or court rules concerning the manner in which applications for leave are to be determined. No leave requirement is needed for an appeal to the Court of Appeal against a High Court decision in relation to the DRT.

A party to an appeal to the RAA, RRA, DRT or RSAA may apply to the High Court for judicial review of the decision by the relevant Authority or Tribunal [*Judicature Amendment Act 1972* (as amended)]. Where the application involves a decision by the RAA, RRA or DRT and there is also an appeal under the Immigration Act, the judicial review application and the appeal must be heard together unless the Court considers it impracticable to do so [section 146A *Immigration Act 1987*].

Under section 66 of the *Judicature Act 1908*, the Court of Appeal may hear and determine an appeal from a judicial review decision by the High Court. There does not appear to be any leave requirement for such an appeal.

A possible model for the Federal Court of Australia

A requirement for leave to appeal to the Full Court of the Federal Court in migration matters might have the following features:

1. An appeal to a Full Court of the Federal Court against a decision of a Federal Magistrate or a single judge of the Federal Court in relation to a matter under the Migration Act may only be made with the leave of the Federal Magistrate or judge (as the case may be) or, if such leave is refused, of the Full Court of the Federal Court.

2. For the purpose of determining whether leave should be granted, the Full Court may be constituted by one or more judges.

3. Leave should only be given where the court is satisfied that the appeal has a real prospect of success of there is some other compelling reason why the appeal should be heard.

4. An application for leave to appeal may be considered without a hearing or personal appearance unless the court orders otherwise – query whether there should be a provision to allow a party to request an oral hearing to reconsider a decision made without a hearing (an example of such a provision is paragraph 4.13 of the UK Civil Procedure Rules).

5. Leave may be limited to certain issues and be subject to conditions.

6. No appeal lies against a decision to:
   - consider the leave application without a hearing;
   - refuse or give leave to appeal;
   - limit leave to certain issues;
   - make the leave subject to conditions, or the terms of those conditions.

Within such a framework, a number of procedural matters would need to be considered. These matters include the form of the leave application, the form and content of the material in support of it, the material that may be provided by the respondent, and related issues. There may also need to be clarification as to whether the power to grant or refuse leave is an exercise of original or appellate jurisdiction.

Further action

Please let me know if I can be of further assistance in relation to this matter.

PHILIP KELLOW

(F)

Federal Court of Australia

Note on the United States' system for dealing with meritless cases

In response to a flood of hopeless, meritless cases by unrepresented persons without means, the US system presumes that, if on the face of the papers there is no arguable case, actions should not proceed and must be dismissed. The "papers" include an affidavit covering the nature and merit of the action.

The US system is set out in 28 USC section 1915. Under 28 USC section 1915(a)(1), any court may authorise the commencement of an action or appeal, without payment of the relevant fee, by a person who can establish, by affidavit, that he or she is unable to pay the fee. The affidavit must also state the nature of the action or appeal (so as to enable an assessment of the nature and strength of the case).

28 USC section 1915(e)(2) provides that the court

> "shall dismiss the case at any time if the court determines that:
> (A) the allegation of poverty is untrue; or
> (B) the action or appeal –
> (i) is frivolous or malicious;
> (ii) fails to state a claim on which relief may be granted; or
> (iii) seeks monetary relief against a defendant who is immune from such relief."

In practice, the registry of the court first assesses the financial circumstances of the litigant and, if the litigant qualifies for a fee waiver, screens the documents under 28 USC section 1915(e)(2)(B) for the purpose of deciding whether to refer the matter to a Judge to consider making an order under that section to dismiss the case. The screening of claims or appeals by self represented litigants is usually carried out by legally qualified court employees (similar to the Federal Court's registrars) or, in some cases, by a member of the relevant judge's staff. Screening is usually based on an assessment of the claims and facts presented in the originating process and supporting documents. That is, it is done 'on the papers'. If there is any prospect of the case being arguable, it will be allowed to proceed.

A person may appeal against a decision under 28 USC section 1915(e)(2)(B) to dismiss his or her action. However, it seems that few appeals get to a hearing because:

- in most cases the person still has no money and must apply under 28 USC section 1915(a)(1) for non-payment of the relevant fee;
- under 28 USC section 1915(a)(3), an appeal may not be taken in forma pauperis if the trial court certifies in writing that the appeal is not taken in good faith;
- the Court of Appeal has held that an appeal is 'not taken in good faith' if it is 'legally frivolous' – so a decision under 28 USC section 1915(e)(2)(B)(i) that an action is frivolous automatically means that the appeal is also 'legally frivolous' and can not proceed in forma pauperis.

There is no equivalent to 28 USC section 1915(e)(2)(B) in relation to a person (other than a prisoner) who can pay the relevant fees. However, a court may, on its own motion, rely on rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss a case on the basis that the court lacks jurisdiction over the subject matter of the claim.

Other information provided by the US Federal system indicates that:

- in many cases, before accepting a document for filing, the court staff will indicate to a litigant that the proposed claim appears hopeless and that, if not revised, may be dismissed – on these occasions, some litigants return with improved documents and many do not return at all;
- it is rare for a case filed by a lawyer on behalf of a client to be dismissed for being frivolous – this is probably due to the power of the court to impose financial sanctions on a lawyer who files such a case;
- there has been no criticism of having different screening procedures for litigants depending on whether or not they pay the prescribed fees – the fact that all litigants are subject to some form of screening process appears to be accepted as a satisfactory arrangement;
- there are no national statistics on the number of cases dismissed under 28 USC section 1915(e)(2)(B) or rule 12(b)(1) of the Federal Rules of Civil Procedure, but it is apparent that a large percentage of cases (in some places as much as 80 per cent) brought by self represented litigants are dismissed though the screening process.

The key to the US system operating as an effective and efficient filter is that it is based on a quick and simple assessment of whether the claim, on its face, presents an arguable case. It does not involve a detailed assessment of the strength or likely success of the case, which often requires consideration of extrinsic material and can often take as long, and consume the same judicial and registry resources, as hearing the substantive application or appeal. If the application or appeal does not present an arguable case, it is dismissed.