RILC Refugee & Immigration Legal Centre Inc

Submission to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Judicial Review) Bill 2004

1. Introduction

1.1 The Refugee and Immigration Legal Centre (RILC) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2. RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Assistance Scheme (IAAAS) and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 8 years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited Port Hedland Curtin, and Baxter Immigration Reception and Processing Centres on a number of occasions. We are also a regular contributor to the policy debate on refugee and general migration matters.

1.3 In the 2002-2003 financial year, RILC gave assistance to 3,103 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford to pay for legal assistance and are often disadvantaged in other ways. Due to funding and resource constraints, in recent years we have generally provided advice and assistance at the administrative level only.

2. Overview and summary of submissions

2.1 By way of introductory comment, we note that RILC[1] has previously expressed strong opposition to this Committee concerning a wide range of provisions in proposed and passed legislation which have related to further restrictions on the ability of applicants to access judicial review, particularly by way of introduction of privative clauses. We also recently provided a submission to the Attorney- General's Migration Litigation Review, a copy of which we attach. In this context, we remain acutely concerned that any residual, basic safeguards which are afforded by the common law or statutory rules be preserved for the purposes of judicial review. This includes the three main matters which the Migration Legislation Amendment (Judicial Review) Bill 2004 (the Judicial Review Bill) seeks to restrict: namely, discretionary time limits; actual notification of certain decisions; and judicial review of primary decisions. In strongly opposing the introduction of the Judicial Review Bill, we intend to focus primarily on

[1] And its predecessor organisations, RACS and VIARC.

the impact of such provisions on individual applicants, and the jurisdiction more generally.

2.2 In this regard, we note that the Judicial Review Bill essentially seeks to immunise certain migration decisions in certain circumstances from any form of judicial review.

2.3 In summary, we submit that:

- The proposed strict, non-extendable time limit of 84 days to seek judicial review would result in substantial unfairness and injustice in some cases where individuals are denied the right to appeal. It also has the real potential to frustrate its own objective, by encouraging the lodgement of 'protective' appeals. A residual judicial discretion to extend statutory time limits for seeking judicial review should be preserved to avoid such situations.
- The proposed requirement of only deemed notification for High Court appeals would merely compound the potential for substantial unfairness and injustice resulting from non-extendable time limits. Actual notification should be required as well as a residual discretion to extend the time limits for seeking review.
- The proposed bar on judicial review of primary decisions would again cause quite unwarranted unfairness and injustice to some individuals.

Each of the above proposed amendments would necessarily preclude meritorious cases from seeking relief, thereby undermining the central objective of barring unmeritorious judicial review applications from being made. More alarmingly, for the perceived benefits of achieving increased efficiencies and cost reduction, the amendments would necessarily place some people's lives at further, grave risk. Such a sacrifice of fundamental safeguards to individual rights and obligations – including protection from persecution - cannot be justified.

2.4 Moreover, the proposed Bill fundamentally fails to address the complex, core factors involved in increased judicial review applications in the migration area, including where applicants have missed the statutory time limit for appeal or have failed to seek administrative review. Many of these factors are, in our experience, not primarily due to vexatious or abusive applicants. The approach in this Bill is consistent with a alarming trend in recent years to deal with concerns about increased judicial review applications by seeking to restrict the Courts' role, rather than properly examining the actual as opposed to imagined causes and developing policy and legislative measures which are responsive to these matters.

3. The need for a residual discretion in time limits for seeking judicial review

3.1 RILC is fundamentally opposed to the provisions of the Judicial Review Bill which seek to introduce a regime of strict, non-extendable time limits for applicants seeking judicial review of migration decisions. In substance, we note that these proposed amendments are designed to completely bar an applicant from seeking judicial review of any migration decision where he or she fails to apply within 28 days, or, if the Court's discretion is invoked, at best 84 days. Thus the judicial discretion to extend the time

limit for appeals to 56 days is statutorily defined and non-extendable, regardless of the reasons for delay.

3.2 RILC's central objection to these measures is that they would, in our experience, cause substantial unfairness and injustice in some cases where individuals are denied the right to appeal, which in turn, we consider wholly unnecessary and unjustified. Some individuals would not only be deprived of the fundamental right to access judicial review and to thus have their case heard, but in some cases, would also be deprived of relief from failures of administrative decision makers to exercise their jurisdiction lawfully. Substantial failures of justice would be want of a remedy.

3.3 Thus, the Bill fundamentally fails to properly distinguish between meritorious and unmeritorious applications for judicial review by applying the non-extendable time limits to all applicants. All will be caught by the provisions regardless of the merit of the case or reasons for delay, such that "unmeritorious" applications which the Bill seeks to reduce will inevitably be achieved at the cost of preserving and protecting the rights of those with meritorious applications.

3.4 In our submission, this is the inevitable and wholly undesirable consequence of fixing an arbitrary, absolute time limit as one the benchmarks of that which is considered fair and just in relation to the rights of individual to access judicial review. We note in the Second Reading Speech to the Bill it asserted that a 56 day judicial discretion is "fair". No specific reason is offered for why this specific length of time has been chosen, nor, more particularly, why this period meets the conceded requirements of being "fair". In our submission arbitrary and absolute time limits are a crude and inflexible instrument inherently incapable of operating fairly and doing justice in many circumstances.

3.5 In relation to the actual operation of arbitrary, absolute time limits, consider for example, the following hypothetical scenario. Two applicants – one in the community, one in detention - with very similar claims for refugee status appeal to the Courts and the one in the community is able to lodge his appeal on the 83rd day, whilst the applicant in detention misses the 84 day deadline by one hour due to an operational error made by one of the Departmental detention centre staff who the applicant was required to leave the application with for faxing, due the detention centre policy. The former applicant ultimately succeeds in having his case remitted the Refugee Review Tribunal, where he is found to be refugee. The latter is barred from seeking any from of judicial review of his decision, and faces the prospect of return to persecution. Can this be considered a fair or just outcome in the circumstances? We respectfully think not.

3.6 Laws which seek to preclude judicial review in the manner mentioned above are undesirable in the context of any case in which an individual is seeking review of alleged injustice of an administrative decision. They have the potential to seriously undermine the doctrine of the separation of powers between the Executive, Judiciary and Legislature. The importance of judicial review of administrative decision-making is deeply rooted in the doctrine of the separation of powers, and in particular, the fundamental necessity of ensuring that the executive is made accountable for decisions affecting the rights and entitlements of individuals.

3.7 However, as previously submitted to this Committee, the importance of adequately protecting a basic safeguard such as the right to judicial scrutiny is particularly acute when the decision is one affecting refugees. In such cases, where the consequences of an unlawful decision are extremely grave, namely, being sent back to a situation of persecution, it is vital that sufficient safeguards are preserved. In our submission, failure to preserve the safeguard of a residual judicial discretion to extend time limits for judicial review applications runs the very real risk and alarming consequence that a person may be sent back to a place where they face torture or death, in contravention of Australia's international obligations.

3.8 In relation to the risk of refoulement, it is clear that mistakes are routinely made at the administrative review level. It would be a nonsense to suggest otherwise. Further, as the cases referred to in this submission demonstrate, the nature of these mistakes are sometimes serious and potentially critical to the outcome of the application.

3.9 Our concerns are by no means confined to the situation of protection visa applicants. In our experience, severe, unwarranted hardship and injustice would equally apply to many applicants for general migration applications, particularly in the family migration area. For example, it is quite conceivable that the proposed Bill would result in denial of one spouse and their children from being permitted to live with the other spouse in Australia for many years or at all. It could cause irreparable harm to a family unit of which some members are Australian permanent residents or citizens.

3.10 Thus, as RILC has often argued, given the gravity of the matters so routinely at stake in migration cases and the dire consequences of an erroneous decision – which could lead, for example, to loss of life or prolonged separation from family – the safeguards afforded to applicants should be at least as comprehensive as those available in other domestic legal jurisdictions in Australia. This should include the same availability of mechanisms to seek extension of judicial review time limits at the discretion of the courts.

3.11 For example, under section 11 of the Administrative Decisions (Judicial Review) Act 1977 Act there is a fixed 28-day period for lodging applications in the court, subject to a discretionary power to extend the time limit. The section provides that an application "shall be lodged within the prescribed period or within such further time as the court (whether before or after the expiration of the prescribed period) allows" (section 11(1)(c). An applicant must apply to the court for an extension of time to lodge an application. An application for an extension of time must be supported by an affidavit stating the nature of the applicant's case; the questions involved in the case; and the reasons why the extension should be granted (Federal Court Rules, Order 54, Rule 2A). The court has developed principles regarding the exercise of its discretion to extend the time limit. Matters which the court will take into consideration include the explanation for the delay and action taken by the applicant since the decision was made, any prejudice to the respondent which may result from the grant of an extension of time, the merits of the substantial application and the seriousness of the issues involved.[2] It is the prima facie rule that proceedings commenced outside the prescribed period will not be entertained

[2] *Hunter Valley Developments Pty Ltd And Others V Minister For Home Affairs And Environment*, 58 ALR 305, Federal Court Of Australia,

and the court will not extend the time unless it is positively satisfied that it is proper so to do.

3.12 We are not aware of other statutory schemes which impose time limits on seeking judicial review without providing for judicial discretion to extend those time limits. Moreover, the courts are well-equipped to exercise a discretion according to established principles in the interest of justice and there is no evidence that the exercise of the discretion has miscarried. We submit that applicants in the migration law jurisdiction should be afforded the same safeguards as applicants in other jurisdictions. When viewed in context, to do otherwise, as proposed by the Bill, lacks clear justification and appears discriminatory in nature. Such a further erosion of safeguards is of even more profound concern when viewed in the context of the potentially grave consequences of the removal of such safeguards and the radical restriction of, in particular, the rights of asylum seekers and refugees in recent years through a wide range of legislative measures, such as the eight Migration Acts passed in Parliament during September 2001.

3.13 Further, there a number of international human rights instruments to which Australia is a party and which require, inter alia, that all persons should have equal access to the courts.[3] Thus, where laws operate in any way that affords differential rights to some groups or individuals in relation access to judicial review, this may be contrary to our international obligations. For example, the Bill seeks to limit access to judicial review for applicants for migration decisions (asylum seekers, refugees, and migrants) in a way which does not generally apply to other persons who have applied for judicial review of other administrative decisions, given that in the latter case, we understand that there exists a residual judicial discretion to extend time limits for review.

3.14 In our experience, there are compelling circumstances which result in applicants failing to lodge an application within the time limit which are completely unrelated to the merits of the application. Some of the common factors include:

- Applicants lack of comprehension of their right of appeal, compounded by the fact that the law of judicial review is a highly complex and technical area of law.
- Lack of access to appropriate legal advice about their right of appeal, the consequences of and the prospects of success of an appeal.
- In relation to the above, we note that a high proportion of applicants have scarce means and are unable to pay for legal advice. In turn, there remains an endemic shortage of competent pro bono assistance in relation to the demand for legal advice.
- Poor English skills and lack of access to qualified interpreters.
- The negligence of migration and legal advisers and poor advice to applicants.
- The high prevalence of mental illness, often due to past experience of torture and trauma, which contributes to failure to exercise rights to appeal.

[3] See for example, the Article 14 of International Covenant of Civil and Political Rights, which states that "All persons should be equal before the courts … ". See also, in relation to asylum seekers and refugees, Article 16 of the 1951 Refugees Convention.

- The actions of third parties such as administrative officers of the Department or detention centre operators.

- Inadvertent mistakes by applicants and advisers.

3.15 The above factors are particular acute for applicants in immigration detention, in particular remote detention centres, on account of structural deficiencies which impede applicants ability to pursue their legal rights. In RILC's experience, applicants in immigration detention regularly face significant difficulties in exercising their legal rights on account of their isolation, their limited language skills, their lack of access to communication facilities to obtain pro bono legal advice and communicate with advisers, and their dependence on the Department of Immigration to facilitate legal advice.

3.16 In illustration of the above point, we refer to a specific example from RILC's experience. In 2003, RILC acted for an Iranian asylum seeker whose application for a protection visa was considered a second time by the Refugee Review Tribunal after the Minister for Immigration consented to the application being remitted to the Refugee Review Tribunal on account of the Tribunal's failure to consider certain aspects of the applicant's claim. The applicant had spent more than three years in immigration detention before his release on a bridging visa on account of his psychological condition. Following the first decision of the Tribunal, the applicant had attempted to seek judicial review in the Federal Court. However, his application had been lodged out of time, on account of his lack of access to legal advice while detained at Woomera IRPC, his limited English language skills and the limited access to interpreters, his dependence on the Department of Immigration (which had made the decision he was seeking to challenge) to provide him with a copy of the necessary forms for applying to the court and the Department's delay in doing so. The applicant was one of 17 asylum seekers who applied to the Federal Court for extensions of time to apply for judicial review, which were considered by Mansfield J of the Federal Court in *Salehi v Minister for Immigration & Multicultural* Affairs [2001] FCA 995. The difficult circumstances which affected the asylum seekers ability to make applications to the Federal Court are described in the decision of the court. Mansfield J held that he was precluded from granting the extensions of time pursuant to section 479(2) of the Migration Act. Our client applied to the High Court for judicial review under its original jurisdiction, and the Minister for Immigration consented to the application being remitted. The Refugee Review Tribunal determined that the applicant faced a real chance of persecution if he was returned to Iran on account of his political opinion and past political activities. If the applicant had been unable to seek judicial review in the High Court of Australia, he would have been denied the right to have his claim for refugee status properly determined. This may have resulted in his removal to Iran where he was likely to have been persecuted by the government, placing Australia in breach of its obligations of non-refoulement under international law.

3.17 We are also aware of a number of applicants in remote detention who have sought urgent legal assistance to lodge a Federal Court application in circumstances where they were unable send their application by facsimile to the Court because they were denied access to use of a facsimile machine. In one such case, we were contacted on the last day of their time limit for appeal to the Federal Court. The applicant advised he had been told by DIMIA that it was the policy that only faxes that related to his application

at the administrative stage could be sent without charge. All other faxes, including those regarding judicial review, had to be paid for. The applicant, an impecunious asylum seeker who had been detained for many months, could not pay the 30 cents required by the DMIA for the fax to be sent. It was only after further negotiations between a legal adviser and DIMIA officials that a decision was made to waive the payment and send the application for Federal Court review by facsimile literally within minutes of the deadline expiring in what were described by DIMIA as exceptional circumstances. In our view, without this intervention, the applicant could well have missed the deadline for appeal to the Federal Court.

3.18 The Government's justifications for introducing this legislation are primarily on grounds of a concern that resources and taxpayer money are being needlessly expended on unmeritorious and abusive applications. As we have previously submitted to this Committee in relation to the introduction of privative clauses, the way in which to address increased levels of appeals to the Courts is to properly inquire into and to tackle the core causes of applicants making appeal to the Courts, including where the statutory time limits have expired, rather than to devise laws which merely provide blanket privation of jurisdiction regardless of the merits and justice of their claims. In our experience, causes of delays in seeking judicial review commonly include the matters referred to above, which are unrelated to frivolous or abusive motives. That is not to deny that some applications for judicial review are of such an unmeritorious and abusive nature, but that some are not, and to deny these applicants full access to the Courts would be to unjustifiably sacrifice fundamental rights and protections owed to individuals for the sake of some potential increased efficiencies and cost savings.

3.19 We also submit that one of the key objectives of the Bill, namely, to reduce the amount of unmeritorious migration related review applications, may well be somewhat frustrated and undermined by the potential lodgement of many 'protective' applications to the Courts. In our experience, the non-extendable time limits will inevitably result in some persons lodging appeals in the Courts to preserve their rights before obtaining proper advice about the merits of an appeal.

4. The need to retain the right to seek judicial review of primary decisions

4.1 RILC is of the view that the proposed bar on judicial review of primary decisions would cause further unwarranted unfairness and injustice to individual applicants. We refer to our submissions above regarding the undesirability of precluding judicial review in circumstances where the consequences of an unlawful decision are extremely grave. We submit that where an applicant no longer has the opportunity to seek merits review for reasons beyond his or her control, the retention of the right to seek judicial review of the primary decision is an important safeguard, and removal of this right may lead to substantial injustice. We note that we have had the benefit of reading the submission made by PILCH and the Victorian Bar, and we concur with the comments opposing the proposed amendments to bar judicial review of primary decisions where merits review was available. In particular, we refer to the discussion of the common law principles which have been developed concerning the exercise of judicial discretion to allow an application for review of a primary decision where merits review was available, in particular circumstances. RILC is of the view that retention of the judicial discretion to

allow such review according to established principles is a fundamental safeguard that should not be removed.

4.2 An example from RILC's experience where substantial injustice may have occurred if an applicant had not been able to seek judicial review of the primary decision is set out as follows. RILC has advised an Afghan refugee who was the holder of a temporary protection visa, whose application for a further protection visa had been refused by the Department of Immigration. The client had failed to apply to the Refugee Review Tribunal within the prescribed 28-time period. He could not read the letter from the Department in English sufficiently to understand that he must apply within 28 days. He had sought legal advice about his case within the prescribed period. However, he did not make an application for merits review at the RRT for reasons beyond his control. RILC referred the refugee to a private solicitor who has assisted him to seek judicial review of the primary decision of the Department of Immigration. In this regard, we note that a significant percentage of decisions of the Department of Immigration regarding applications for further protection visas by Afghan TPV holders have been set aside by the Refugee Review Tribunal in the period October 2003- March 2004, and the Tribunal has in general adopted a very different legal and factual approach to the Department with respect to this class of applications. Given the serious ramifications involved in assessing whether a person recognised as a refugee is still owed protection by Australia, we submit that it is desirable that the courts retain the discretion to allow judicial review of the primary decision in such circumstances.

4.3 We are also aware of numerous instances of individuals failing to seek administrative review of their migration decision where their legal adviser/migration agent has been responsible for this failure. For example, our advice has been sought where the adviser has been the authorised recipient of the applicant's correspondence and there has been a delay or failure to communicate with the applicant which, in turn, has resulted in the applicant missing the non-extendable deadline for administrative review. In some cases, applicants have been able to seek judicial review of the primary decision and their matter has ultimately been remitted to the relevant Tribunal for review.

5. The need for *actual* notification of decisions and applications to the High Court of Australia

5.1 We submit that the proposed requirement of only deemed notification for High Court appeals would further compound the potential for substantial unfairness and injustice resulting from non-extendable time limits. We submit that the proposed provisions which require only deemed notification of decisions in conjunction with an absolute time limit of 28 days to appeal to the High Court is likely to lead to situations of significant injustice, and may constitute an unconstitutional limitation on the original jurisdiction of the High Court pursuant to section 75(v) of the Constitution.

5.2 For example, we refer to the example cited above at section 3.1.15. If the proposed amendments had been in effect, our client may have been unable to seek judicial review in the High Court, and would therefore have been unable to have his ultimately successful claim for refugee status properly determined according to law. In RILC's experience, there are also a number of factors which can result in individuals not receiving notification due to circumstances largely beyond their control. For example, there is a prevalence of poverty and consequential homelessness among applicants

residing in the community on account of the restrictions on work rights and access social security afforded to many persons as conditions of their bridging visas. Consequentially, some applicants in the community have at times no fixed or regular address, which has inhibited the actual notification of decisions of the Department of Immigration, leading to delays in seeking review of such decisions for reasons unrelated to the merits of the application. Another example is where an applicant has notified the Department of Immigration of his change of address on the same day a decision is posted to the applicant, resulting in a failure to actually notify the applicant in circumstances beyond the control of the applicant. We submit that actual notification should be required as well as a residual discretion to extend the time limits for seeking review.

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