RILC Refugee & Immigration Legal Centre Inc

Submission to the Migration Litigation Review

1. Introduction

1.1 The Refugee & 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 their inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants.

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. In addition, we run a substantial volunteer program, involving approximately 80 persons, many of whom are migration agents and who register under and perform the majority of their work as non-fee charging migration agents within our organisation.

1.3 We are also a contractor under the Department of Immigration's Immigration Advice and Application Scheme ("IAAAS") and we visit the Maribyrnong Immigration Detention Centre often. RILC has been assisting clients in detention for over eight years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited some of these Immigration Reception and Processing centres on a number of occasions. We are also a regular contributor to the policy debate on a broad range of issues in the refugee and general migration areas.

1.4 In the financial year ended June 2003, RILC gave assistance to over 3,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford private legal assistance and are often disadvantaged in other ways, such as being victims of torture and trauma.

1.5 RILC has had the benefit of reading the joint submission made by the Public Interest Law Clearing House and the Victorian Bar, and the submission made by Amnesty International Australia to the Migration Litigation Review and endorses, in general terms, the comments made in those submissions.

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2. "Measures for the more efficient managements and quicker disposition of migration cases and for the reduction of the large numbers of unmeritorious cases": Term of Reference (a)

(i) Limitations on judicial review

2.1 RILC endorses the need to ensure that all migration cases are dealt with expeditiously and efficiently, however, submits that measures designed to improve efficiency and expediency must not be at the expense of fundamental safeguards or risk placing Australia in breach of its international obligations.

2.2 By way of context, we note that RILC (and its predecessor organisations, RACS and VIARC) have previously expressed strong opposition concerning the introduction of provisions in past legislation which have related to restrictions on the ability of applicants to access judicial review in the courts of decision of the Migration Review Tribunal and the Refugee Review Tribunal. RILC is strongly of the view that the entitlement to seek judicial review is a fundamental right of the individual which has it basis in the common law system and international law.[1] RILC is opposed to legislative provisions which deny the access to judicial review of government decisions, by a class of people, namely refugees and migrants, in violation of the prohibition of such discriminatory limitations at international law.[2] As RILC has previously stated, judicial review is a fundamental safeguard in ensuring accountability of government decision making and, importantly, in diminishing the risk of *refoulement* of refugees in breach of Australia's international obligations.

2.3 In this regard, we refer to the following excerpt from RILC's submission in 2003 to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Procedural Fairness) Bill 2002 & Migration Legislation Amendment Bill (No.1) 2002 concerning the fundamental importance of preserving the role of the courts in judicial scrutiny of administration decision-making in the migration jurisdiction:

> "As mentioned, we have previously indicated to this Committee our strong opposition to the introduction of privative clauses of the kind enacted by the new section 474…
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> Firstly, the Procedural Fairness Bill seeks to bring the rules of natural justice within the scope and consequent protection of the section 474 privative clause. In short, it is an attempt to make lawful actions which would otherwise be considered unlawful. This seriously undermines 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. We again endorse the comments of the Senate Standing Committee for the Scrutiny of Bills on the perilous nature of ousting judicial review:

[1] See ICCPR, Article 14(1), 16 and 26.
[2] See ICCPR, Article 14(1), 16 and 26, and 1951 Convention on the Status of Refugees, Article 16.

Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with the law. It is cause for the utmost caution when one arm of government (in this case the executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.[3]

In our submission, the importance of protecting a basic safeguard such as the right to judicial scrutiny of a denial of procedural fairness 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 judicial review of natural justice grounds runs the very real risk and alarming consequence that a person may be sent back to a place of persecution, in contravention of Australia's international obligations. The importance of preserving this residual safeguard is underscored by the recent further restriction on available grounds of judicial review.

In relation to the risk of refoulement, it is clear that mistakes are 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 potentially critical to the outcome of the application.

In addition, regardless of the outcome of remittal of a decision on judicial review, it is critical that there remain in place a mechanism to ensure that administrative decision-makers, who already have increased powers by virtue of the privative clause, are accountable in relation to the lawfulness of their decisions as they relate to procedural fairness.

Further, we remain concerned that the Procedural Fairness Bill would have the effect of ensuring that codes of procedure will not be subject to jurisprudential developments in relation to common law rules of natural justice, and thus will not continue (to the extent that they already do) to so develop. Clearly, the Procedural Fairness Bill would also deny the administrative decision-makers, and the jurisdiction more generally, critical guidance in respect of natural justice requirements and their development.

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[3] Scrutiny of Bills Committee report quoted in Submission No 8, National Council of Churches in Australia, page 3.

> In our submission, in a society governed by the rule of law and doctrine of the separation of powers, it is unjustifiable to seek to oust from judicial scrutiny principles and safeguards as fundamental as those of procedural fairness. In our submission, justifications for ouster of the Court's role, such as the costs and delays involved, are totally insufficient reasons for such a radical departure from ensuring adequate safeguards for the individual from otherwise unlawful decisions, particularly where the matters at stake and the implications of a mistake may be the difference between life or death for the applicant."

2.4 We refer to the Federal Court decisions cited in the joint submission of the Public Interest Law Clearing House and the Victorian Bar to the Migration Litigation Review at paragraph 27, in particular, the two recent cases where the Federal Court found bias on the part of the Tribunal. The decisions cited highlight the common flaws in the decision making process and the critical need for judicial supervision as to the proper conduct and approach of decision makers at the Tribunals.

2.5 Moreover, RILC is of the view that measures which seek to restrict access to judicial review are unlikely to improve the efficiency and expediency of the system. RILC submits that restrictions on judicial review will undermine accountability, transparency and scrutiny in the migration determination system and undermine the procedural fairness and natural justice afforded to applicants. Such measures are therefore likely to degrade the quality of administrative decision-making, causing further delays, increasing the need for applicants to resort to litigation and incurring greater costs.

(ii) Measures to improve the quality of decision making at the review stage

2.6 RILC submits that the measures which are more likely to improve the efficiency and expediency of the system are those which are aimed at improving the quality of decision making at the primary and review stage.

2.7 In this regard, improvements in access to legal advice and assistance for applicants at the primary and review stage are likely to improve the capacity of decision makers to properly determine applications. In addition, measures which improve applicants' comprehension of the migration determination process and the limited nature of judicial review are likely to decrease the number of applications in the courts.

2.8 RILC notes that under the IAAAS, migration agents are not contracted to attend hearings of the Refugee Review Tribunal. In RILC's experience, given the complexity of evidentiary and legal issues at stake, representation at hearings of the Refugee Review Tribunal is critical in ensuring that applications are properly prepared, considered and determined. In RILC's view, changes to the IAAAS to include representation at the Refugee Review Tribunal are likely to facilitate more effective refugee determination and reduce applications for judicial review.

2.9 Further, RILC is of the view that additional funding to increase the available legal services for disadvantaged migrants and asylum seekers who cannot otherwise afford immigration advice and assistance is likely to reduce the making of

inappropriate visa applications and improve the quality of applications, thereby improving the efficient management and disposition of migration cases.

2.10 With respect to the refugee determination system in particular, RILC has previously expressed its concerns regarding the effectiveness of the Refugee Review Tribunal in determining who is and who is not a genuine refugee. In our submission to the Senate Legal and Constitutional Affairs Committee in 1999 regarding the committee's inquiry into the operation of Australia's Refugee and Humanitarian Program, RILC stated its concern that it considered there to be a substantial number of genuine applicants who are failed by the system. RILC set out a number of suggestions for improving the effectiveness of the refugee determination system and the quality of decision making, including the codification of appropriate credibility guidelines into Tribunal practice directions and the introduction of a three member Tribunal to determine applications which would allow for greater consistency in decision making and provide an additional safeguard. RILC submits that such measures are likely to improve the efficiency of management and disposition of applications by the Tribunal. RILC notes that the Senate Legal and Constitutional Affairs Committee recommended that the Refugee Review Tribunal be able to sit as a single member body and as a panel of two and up to three members as appropriately determined by a Senior, or the Principal member.[4]

2.11 In addition, it is noted that in RILC's experience, there is significant inconsistency and unevenness of decision making and outcome in relation to applications of a similar nature. For example, we refer to the inconsistent approach taken by the Refugee Review Tribunal to applications by Afghans after the fall of the Taliban in late 2001. The inconsistency in decision making may partly be attributed to the fact that the Tribunals are expert Tribunals which are not bound by precedent. We refer to our submissions above regarding the critical role of jurisprudential developments in relation to common law rules of natural justice in providing guidance to administrative decision makers. RILC is of the view that judicial decisions play a significant role in the development of jurisprudence in this complex area, providing guidance and greater clarity for administrative decision makers. Limitations on access to judicial review of administrative decisions are therefore undesirable as such limitations are likely to stifle the development of jurisprudence and further degrade the quality and consistency of decision making.

(iii) Prohibition on *refoulement* and consideration of humanitarian claims

2.12 RILC acknowledges the importance of discouraging persons from making applications for migration, refugee or humanitarian visas when they do not meet the criteria. However, RILC is of the view that although an application may be determined to be 'unmeritorious' in that the applicant is determined not meet the criteria for grant of the visa, there are a number of applicants who make visa applications in order to access the Minister's humanitarian discretion. The Minister's personal, discretionary powers of 'public interest' intervention are designed to give effect to protection and related human rights obligations owed

[4] Senate Legal and Constitutional Affairs Committee, *Sanctuary Under Review: An examination of Australia's refugee and humanitarian determination progress*, 'Summary of Recommendations', Recommendation 5.4.

under certain human rights treaties to which Australia is a signatory, as well as providing an avenue for relief to persons with other compelling humanitarian circumstances. There is no specific humanitarian visa class, nor are there any specific criteria for the exercise of the Minister's humanitarian intervention. Instead, guidelines have been developed which provide examples of some of the circumstances in which the Minister may intervene. The Minister's humanitarian discretion is absolute and there is no obligation upon the Minister to consider any application. If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal, a decision more favourable to the applicant. The only way that an applicant may trigger the Minister's power to intervene is following an unsuccessful decision of the Tribunal, and an applicant cannot apply for Ministerial intervention without having first made a visa application and sought merits review of the decision to refuse the visa. Given that humanitarian requests are entirely discretionary in nature, and in particular, non-compellable and non-appellable, there is no merits review or form of scrutiny in relation to such decisions.

2.13 RILC submits that there is at present no appropriate system for consideration of Australia's non-refoulement obligations in domestic law, in contravention of Australia's obligation to ensure that persons are not refouled to situations of persecution or other forms of torture. RILC is of the view that an additional legal mechanism should be adopted for independently assessing whether persons who have been determined not to be refugees are nevertheless at risk of serious human rights violations if returned to their country of nationality. In RILC's submission, provision for such assessment would reduce the need of applicants to resort to judicial review and applications in the courts and increase the expediency of the system in reaching final determinations, and would implement Australia's obligations under international law.

2.14 Further, RILC submits that there should be additional measures introduced for the consideration and determination of compelling humanitarian claims, such as an onshore humanitarian visa subclass. This would be likely to significantly decrease the number of visa applications made in order to access the Minister's power to intervene on humanitarian and public interest grounds.

3. "The adequacy of the existing framework for ensuring that migration agents and members of the legal profession do not encourage the bringing of unmeritorious migration cases": Term of Reference (b)

3.1 RILC submits that the existing framework for ensuring that migration agents, lawyers and members of the legal profession do not encourage the bringing of unmeritorious migration cases is adequate.

3.2 In this regard, we refer to our submission to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003. As noted, clause 2.17 of the Code of Conduct states that agents must not encourage vexatious applications and must obtain written acknowledgement if a client wishes to proceed with an application against

the advice of a migration agent.[5] RILC considers this to be the proper codification of the responsibilities of a migration agent.

3.3 RILC is seriously concerned that measures which seek to limit a migration agent's or lawyer's ability to properly advise a client do not create a situation conflict of interest. RILC is concerned that any measures adopted do not drive a wedge between applicant and agent to the extent that agents are placed in situation in which they are prevented from freely and fully acting in the 'legitimate' (best) interests of their client. A fundamental, guiding obligation of migration agents is not to act for a client where there is a conflict of interest which would in any way affect the agents ability to act in the legitimate interests of their client.[6] In addition, in the area of provision of legal and other advice in the context of fiduciary relationships (e.g. lawyer/client; doctor/patient etc), acting in the 'best interests' of the 'client' is, for good reason, considered essential and sacrosanct.

3.4 RILC would welcome any reforms designed to improve both legal knowledge and ethical standards in the profession, providing that they are implemented in ways which do not interfere with the professional obligations of a migration agent to act on instructions within the law and in the clients 'legitimate' (best) interests, whilst maintaining client confidentiality.

4. "The effect that non-compliance with specific provisions of the *Migration Act* 1958 should have on review rights": Term of Reference (d)

4.1 RILC notes its concern about the lack of clarity and particularity with respect to this term of reference. RILC submits that there is already a whole regime of measures contained in the *Migration Act* and *Migration Regulations* regarding the consequences of and sanctions for non-compliance with specific provisions of the *Migration Act.* It is entirely unclear why further measures are necessary at all. More importantly, RILC is opposed to any measures which seek to deny an applicant the right to seek review on the basis of purported non-compliance with specific provisions of the *Migration Act*. As stated above, the right to seek review is a fundamental right of the individual which has its basis in common law and international law.[7] There is no justification for compromise of this fundamental right.

4.2 Further, if the stated aims of introducing new measures are to improve efficiency and expediency and limit vexatious litigation, it is difficult to see how such aims are to be furthered by introducing punitive provisions which limit the review rights of applicants as a consequence of non-compliance with provisions of the *Migration Act.* In RILC's experience, non-compliance with provisions of the *Migration Act* may be motivated by an applicant's genuine fear of persecution or other compelling reasons. Non-compliance with specific provisions of the *Migration Act* does not necessarily imply that the visa application itself lacks merit, and an applicant's application must still be properly and fully considered. For this reason, sanctions for non-compliance should be separate to the determination of visa applications. We note further that non-compliance with provisions of the *Migration Act* is already a relevant issue with respect to the

[5] See Item 2.17, Schedule 2 of Regulation 8 of the Migration Agents Regulations
[6] See Item 2.1A (d), Schedule 2 of Regulation 8 of the Migration Agents Regulations 1998
[7] See ICCPR, Article 14(1), 16 and 26.

public interest criteria for grant of a visa under Schedule 4 of the Migration Regulations.

4.3 RILC is opposed to any measures which seek to sanction an applicant for non-compliance by denying the applicant access to merits or judicial review. In RILC's view, such measures are unnecessary, would undermine accountability in the decision making process and are likely to significantly increase the risk of *refoulement* in breach of Australia's international obligations.

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