HOUSE OF REPRESENTATIVES

BILLS

Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Second Reading

SPEECH

Wednesday, 11 December 2013

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr MARLES (Corio) (09:55): I rise to speak against the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013. This is a bill which seeks to remove the complementary protection regime put in place by the previous Labor government which came into force in March 2012. This was an important regime put in place for our immigration system, but, in stating that, it was a niche area. It applied to a very small number of people—it was important, obviously, for them—in the context of the number of immigration matters that are handled by our department and this country.

That said, it also was, and has been, an administratively efficient regime for dealing with that small number of people who have a claim that could be sustained by complementary protection criteria and the removal of this, which is what this bill seeks to do, will create inefficiencies in the way the Department of Immigration and Border Protection and the review systems which oversee it work. It will make it more difficult for those people to do the work they are called upon to do. It will create added work, and it is for that reason we are opposing the bill that is put before the parliament today. It is for that reason we are supporting efficient public administration as was enacted by the regime put in place by the then Labor government in March 2012.

The Migration Amendment (Complementary Protection) Act 2012 put in place a regime which enabled Australia's non-refoulement obligations under a number of international conventions to be honoured. The principal convention under which Australia's non-refoulement obligation exists is the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees, which is otherwise known as the refugee convention. Most people who come to Australia seeking a protection visa will find themselves, if they are successful in gaining a protection visa, covered by the terms of the refugee convention. But there are a number of people for whom we have non-refoulement obligations which do not derive from the refugee convention. Australia is a party to a number of other international conventions which give rise to non-refoulement obligations on the part of Australia. These are the International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Convention on the Rights of the Child; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These international conventions, to which Australia is a party, give rise to non-refoulement obligations on the part of Australia.

Examples of the circumstances that we are talking about—that is, those people who would qualify under those other conventions I have just described but would not qualify under the refugee convention, which is a small number—are people who may face honour killings in the country from which they have come, women who may be subject to genital mutilation if they are returned, and people in a number of other circumstances which do not squarely come under the refugee convention but which do come under those other conventions to which Australia is a signatory and therefore enliven Australia's non-refoulement obligations.

So what we sought to do when in government, in March last year, through the Migration Amendment (Complementary Protection) Act 2012, put in place a regime which enabled Australia’s non-refoulement obligations under a number of international conventions to be honoured. The principal convention under which Australia's non-refoulement obligation exists is the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees, which is otherwise known as the refugee convention. Most people who come to Australia seeking a protection visa will find themselves, if they are successful in gaining a protection visa, covered by the terms of the refugee convention. But there are a number of people for whom we have non-refoulement obligations which do not derive from the refugee convention. Australia is a party to a number of other international conventions which give rise to non-refoulement obligations on the part of Australia. These are the International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; the Convention on the Rights of the Child; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These international conventions, to which Australia is a party, give rise to non-refoulement obligations on the part of Australia.

Examples of the circumstances that we are talking about—that is, those people who would qualify under those other conventions I have just described but would not qualify under the refugee convention, which is a small number—are people who may face honour killings in the country from which they have come, women who may be subject to genital mutilation if they are returned, and people in a number of other circumstances which do not squarely come under the refugee convention but which do come under those other conventions to which Australia is a signatory and therefore enliven Australia's non-refoulement obligations.
It is important to understand, in the debate that we are having in relation to the current bill, that there is no question at all that the non-refoulement obligations that arise under the conventions to which I have referred still exist. Indeed, the explanatory memorandum to the current bill makes that clear. It says:

This amendment does not propose to resile from Australia's international obligations, nor is it intended to withdraw from any conventions to which Australia is a party. Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations.

So we need to be very clear that this is not a circumstance in which we are talking about an amendment to Australia's legal regime such that we will have some people who are no longer eligible to receive a protection visa. We are only talking about the administrative process by which that protection visa comes to be.

The process that existed before Labor put in place the Migration Amendment (Complementary Protection) Act— which is the process that the government now seeks to return to— was an inefficient public administrative process. It was inefficient for this reason: people who knew that they had non-refoulement obligations applying to them on behalf of Australia, but also knew that they were not covered by the refugee convention, were forced into a situation where they would need to apply for a protection visa that they knew they would not qualify for. They needed to go through that process and indeed exhaust all the merits review processes associated with that. And it was only when they had gone through all of those steps, knowing full well as they went through them that they would not be successful because their particular circumstances did not meet the criteria of the act as it then existed, that they were able to seek an exercise of ministerial discretion to allow them to stay in Australia and be given a protection visa on the basis of enlivening Australia's non-refoulement obligations that existed under the other conventions to which I have referred.

That exercise of ministerial discretion is non-compellable: the minister is not compelled to exercise his or her discretion—the nature of discretion is that its exercise is discretionary; it is not transparent—the criteria by which the minister may or may not exercise discretion are not there for all to see; and it is non-reviewable—and in that sense there is no natural justice that applies beyond that decision if the decision is found to have been inappropriately made, because, at the end of the day, it is simply an exercise of discretion. So that ultimately left a person in this circumstance—and let's be clear: we are talking about a small number of people—existing in a state of enormous anxiety, knowing that if they are returned to the country from which they have come they will be subject to potential death, to torture or to injury.

Those people were needing to wade their way through an administrative process, knowing full well as they went through each step that they would fail, only so that they could reach that final moment of being able to enliven the minister's discretion in the hope that the minister would ultimately meet Australia's obligations under the conventions to which I have referred. That means such people were often in a position of limbo for a number of years before ultimately their claim came to an end.

It is for this reason that we sought to put in place the regime that we had, which made it a much clearer regime, a much more transparent regime, a reviewable regime—but a regime that would occur more quickly and more efficiently and would give certainty to that small number of people who fit the circumstances I have described.

The minister, when he was the shadow minister, described the legislation that the then Labor government put through this parliament as giving rise to further pressure on an already overstressed court system. In saying that, he raises the idea that this would give rise to an enormous number of cases that would overrun our system. In reality that has not been the case—far from it: 83 cases have gone to our review tribunals since March 2012. The minister, in his own second reading speech for this bill, made it clear that there have been only 57 complementary protection visas granted since March last year in relation to this set of circumstances. This is a niche area. It is important in public administration that you get the housekeeping right. There are niche areas throughout our public administration that are much better handled in an efficient way than in an inefficient way. But let us be clear: the attempt to raise grand political objectives in relation to this is misplaced. This is a niche area, and what the Labor government put in place was an efficient administrative process to deal with this niche area. And it is exactly that efficient administrative process that on the basis of politics the government now seeks to remove.

One of the arguments that has been used by the minister and which was referred to in his second reading speech was in relation to people with criminal backgrounds accessing complementary protection visas. A particular case, which is often referred to as the New Zealand bikie case, has been a bit of a cause celebre for those who have sought to criticise the regime that the then Labor government put in place. It is important to understand that that
was a single case. It was appealed by the then Labor government. It has been referred back to the department, and the person in question is yet to be granted a complementary protection visa as a result—or at least was yet to be granted a visa as of two weeks ago. That one case has been the basis for the minister, in the second reading speech for this bill, to refer to a whole lot of people who may have been involved in criminal activity and are seeking to use this complementary protection regime as a basis for getting a protection visa in Australia. This question was put to Kay Ransome, the principal member of the Migration Review Tribunal and the Refugee Review Tribunal. When she was being questioned about the issue of criminal activity during Senate estimates, she said, 'I doubt that there are many that involve criminal activity'. That was her sense of the extent to which people who have been engaged in criminal activity have been accessing the complementary protection regime.

A number of reports over the years have recommended that, in relation to this niche area of public administration, the old regime—which this government seeks to return us to—be amended to put in place the regime that the Labor government put in place in March last year. The Senate Legal and Constitutional Affairs References Committee report titled *A sanctuary under review: an examination of Australia's refugee and humanitarian determination processes* in June 2000 made a recommendation to move down the complementary protection visa path. The Senate Select Committee on Ministerial Discretion in Migration Matters in March 2004 did the same. The Legal and Constitutional Affairs References Committee report titled *Administration and operation of the Migration Act 1958*, which was done in March 2006, did the same. And the Australian Human Rights Commission has made similar reports. Complementary protection visas were also the subject of the Proust report on the exercise of ministerial discretion in migration matters. That report also recommended the implementation of a complementary protection visa regime.

From an international point of view, the United Nations Committee Against Torture, the United Nations Human Rights Committee, and the Executive Committee of the United Nations High Commissioner for Refugees all recommend that administrative processes such as what we put in place when in government ought to exist in a country's protection visa regime. So, by international standards, what the Labor government put in place was in the mainstream of the way in which countries around the world deal with this small cohort of people who do not qualify under the refugee convention but do qualify under the other conventions I mentioned earlier to enliven a country's—in this case, our own—non-refoulement obligations. What we have before us now is a bill that seeks to sweep all of that away and return us to an inefficient past. It is a bill moved by a government that is in a time warp, which sees that everything around immigration policy ought to be as it was in 2007—that that is the means by which we deal with all the problems, as if nothing has changed since 2007 in the way in which people seek to come to this country and the way in which our borders need to be protected, and indeed in the way in which we have made sensible advances around public administration, of which this is an obvious example.

Australia's non-refoulement obligations under the conventions I have described continue to exist. Even when the government passes this bill through the parliament, the sorts of people I have described will still be granted the visas they seek, will still be given the protection for which they ask. The difference is that it will be done in an inefficient way. The difference is that people will be asked to wait longer. The difference is that more public expense will be incurred in order to determine the eligibility of these people to ultimately gain a protection visa. That is what we are talking about in this bill. It will be less fair, and it will concentrate decision making in one already overstretched minister in a way that will be non-compellable, in a way that will involve non-transparent criteria and in a way that will be non-reviewable.

What we have in place in Australia on this day is a system that is working well, a system that applies to a very small number of people but that, for those people, works efficiently and properly. There is no good reason to change it but for the stubbornness and the politics of this government. And for that reason we oppose this bill.