HOUSE OF REPRESENTATIVES

BILLS

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

Second Reading

SPEECH

Wednesday, 4 December 2013

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES
Mr MORRISON (Cook—Minister for Immigration and Border Protection) (10:05): I move:

That this bill be now read a second time.

This government keeps its election commitments. The Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013 implements the coalition's election commitment to amend the Migration Act to remove the statutory criterion for the grant of a protection visa on the basis of complementary protection, and to remove other related provisions.

'Complementary protection' is the term used to describe a category of protection for people who are not refugees as defined by the refugees convention but who also cannot be returned to their home country because there is a real risk that they would suffer a certain type of harm that would engage Australia's international non-refoulement obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), namely:

- arbitrary deprivation of life;
- having the death penalty carried out;
- being subjected to torture; or
- being subjected to cruel, inhuman or degrading treatment or punishment.

The complementary protection criterion currently in the act, having commenced on 24 March 2012, allows consideration of claims raising Australia's non-refoulement obligations under the CAT and the ICCPR as part of the protection visa process and allows a protection visa to be granted if those obligations are engaged and other visa requirements are met. This is in addition to the consideration of the refugees convention criterion.

The government has always opposed the implementation of complementary protection in the protection visa framework. It is the government's position that it is not appropriate for Australia's non-refoulement obligations under the CAT and the ICCPR to be considered as part of a protection visa application under the Migration Act. Such a measure creates another statutory product for people smugglers to sell.

In saying this, the bill does not propose to resile from or limit Australia's non-refoulement obligations, nor is it intended to withdraw from any conventions to which Australia is a party. Australia remains committed to adhering to our non-refoulement obligations under the CAT and the ICCPR. Anyone who is found to engage Australia's non-refoulement obligations under these treaties will not be removed from Australia in breach of these obligations. However, determining the appropriate mechanism for considering complementary protection claims is a separate issue.

Introducing the complementary protection criteria into the statutory protection visa framework goes beyond the requirements of the refugees convention. Under the previous government, this created a new channel for asylum seekers to gain access to a permanent protection visa outcome even though they were found not to be a refugee and engage a lengthy process.

Since the commencement of the complementary protection provisions on 24 March 2012, only 57 applications have satisfied the requirements for the grant of a protection visa on complementary protection grounds. This begs the question as to why it was necessary to introduce complementary protection into a statutory framework which required a complementary protection assessment to be undertaken for every asylum seeker. This was a costly and inefficient way to approach the issue given the small number of people who meet the complementary protection criterion.
In fact, by far the greatest proportion of people who engage Australia’s protection obligations are currently captured under the refugees convention. The interpretation of the refugees convention grounds has evolved to encompass wide ranging protection issues where a person’s claims are able to form a nexus to the refugees convention, including such examples as women fleeing honour killings and female genital mutilation.

On the other hand, in a number of cases that have been found to meet the complementary protection criteria, people who have committed serious crimes in their home countries, or people who are fleeing their home countries due to their association with criminal gangs or their involvement in blood feuds, have been found to engage protection obligations.

Australia accepts that the position under international law is that Australia’s non-refoulement obligations under the CAT and the ICCPR are absolute and cannot be derogated from. However, there is no obligation imposed upon Australia to follow a particular process or to grant a particular type of visa to those people for whom non-refoulement obligations are engaged. This is particularly the case where people are of security or serious character concern and they do not meet the criteria for grant of a protection visa.

If a person cannot be returned to their home country, the way to resolve the person’s status will be to rely on the Minister for Immigration and Border Protection’s personal and non-compellable intervention powers to consider granting a visa. This will be the case regardless of whether a person of security or character concern has been assessed against the complementary protection criterion in the Migration Act or as part of an administrative process.

The complementary protection provisions that were introduced in the Migration Act by the previous government are complicated, convoluted, difficult for decision-makers to apply, and are leading to inconsistent outcomes. Moreover, while the intention was to interpret and implement Australia’s non-refoulement obligations under the CAT and the ICCPR without expanding the obligations in a way that goes beyond current international interpretations, the courts have since broadened the scope of the interpretation of these obligations beyond that which is required under international law.

For example, the risk threshold test for assessing whether a person engages Australia’s complementary protection obligations has this year been lowered to the same ‘real chance’ threshold as under the refugees convention. Another effect of the court decisions is that even where a person’s home country has a functioning and effective police and judicial system, in order for Australia to conclude that that country will in fact seek to, and manage to protect the person from the risk of harm, the protection by that country’s authorities must reduce the level of harm to below that of a ‘real chance’. The ‘real chance’ test is a very low bar and lower than required under the CAT and the ICCPR. The court’s interpretation of who should be provided complementary protection has transformed provisions intended to be exceptional into ones that are routine and extend well beyond what was intended by the human rights treaties.

Through removing the complementary protection criterion from the Migration Act, it is the government’s intention to re-establish the consideration of complementary protection issues within an administrative process similar to that which was undertaken prior to the enactment of the complementary protection legislation by the previous government. This consideration will happen either as part of pre-removal procedures, which are undertaken by departmental officials to assess whether the removal of an asylum seeker could engage Australia’s non-refoulement obligations, or through the use of the Minister for Immigration and Border Protection’s discretionary and non-compellable intervention powers under the act.

Considering complementary protection issues under an administrative process allows the government to regain control over Australia’s protection obligations and assess whether a person’s specific circumstances engage Australia’s non-refugee non-refoulement obligations, as interpreted by the government in accordance with international law. This will allow the Minister for Immigration and Border Protection to consider a range of options for resolving the person’s immigration status including the consideration of the exercise of the Minister for Immigration and Border Protection’s personal and non-compellable public interest powers under the act to grant either a temporary or a permanent visa.

Assessing Australia’s non-refugee non-refoulement obligations within an administrative process will demonstrate Australia’s continued commitment to adhering to its protection obligations as it gives more scope to provide protection in different ways. The Minister for Immigration and Border Protection’s personal powers have the
advantage of being able to deal flexibly and constructively with genuine cases of individuals and families whose circumstances are invariably unique and complex, and who may be disadvantaged by a rigidly codified criterion.

It will allow the Minister for Immigration and Border Protection to exercise his or her intervention powers to grant the most appropriate visa dependent upon the individual circumstances of the case by taking into consideration not only Australia’s non-refoulement obligations, but also Australia’s broader humanitarian considerations, in an administrative process. This is particularly relevant where people may be caught up in situations of civil strife and unable to return home in the short term.

By re-establishing an administrative process it is the government’s intention to ensure that where a person raises claims that are found to engage Australia’s non-refoulement obligations under the CAT and the ICCPR they will not be removed from Australia in breach of those obligations but, rather, dealt with in the most appropriate manner to resolve their case.

The bill will also make a range of consequential amendments to the Migration Act.

Amendments to the Migration Regulations will also be required to remove complementary protection criteria from the protection visa subclasses.

I commend the bill to the House.

Debate adjourned.