

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

MIGRATION LEGISLATION AMENDMENT BILL (No. 3) 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
for Immigration and Ethnic Affairs,
Senator the Hon. Nick Bolkus)



MIGRATION LEGISLATION AMENDMENT BILL (No. 3) 1995

OUTLINE

1 The Migration Legislation Amendment Bill (No.3) 1995 ("the Bill") seeks to amend the *Migration Act 1958* ("the Act") as a response to the decision of the Federal Court in NG 327 of 1994 (unreported) and to prevent non-citizens from making further applications for protection visas in certain cases.

2 In the abovementioned case the Minister for Immigration and Ethnic Affairs challenged a decision of the Refugee Review Tribunal ("RRT") that a married couple satisfied the definition of "refugee" within the meaning of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Refugees Convention") on the basis that each of the couple had a "well-founded fear of being persecuted for reasons of ... membership of a particular social group".

3 The RRT found that, as a result of the policies of the Government of the People's Republic of China ("PRC"), parents of one child form a social group in the PRC, and further, that "those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised" are a recognisable social group.

4 The Federal Court held it was open for the RRT to make these findings, rejecting the Minister's argument that the existence of a particular social group cannot be identified by reference to the very persecution feared by a protection visa applicant. The Court drew the following conclusions:

- the concept of "particular social group" is not confined to groups comprising members with an associational interest so that parents of one child in the PRC, or a sub-set of them, may constitute a particular social group for the purposes of the definition of "refugee" in the Refugees Convention.
- what constitutes a "particular social group" depends not only on its members having common characteristics, but also on the extent to which society recognises those characteristics as creating an identifiable social group so that "the perceptions and responses of government are likely, in some cases, to be crucial in determining whether a particular social group exists". Thus, where official practices in a country identify people with one child, who wish to have another child, as the subject of a system of rewards and sanctions designed to prevent them from having further children, those people will be likely to form a particular social group.
- the responses of government can include conduct capable of amounting to persecution in a Convention sense so that "the very interaction which causes a group to become identifiable (or cognisable) may include arbitrary, repressive conduct by government or its agencies". There was, in the Court's opinion, nothing circular about a particular social group being identified, in part, by

conduct that might amount to persecution, for the purpose of ascertaining whether there is a well-founded fear of being persecuted within the meaning of the Convention.

that a "particular social group" does not necessarily have to be defined by reference to the innate or immutable characteristics of its members and a person does not cease to be a member of a particular social group because he or she can discard an identifying characteristic if the individual is prepared to do so only to avoid breaches of his or her fundamental human rights.

5 The Government believes that the Court's decision will permit claimants to be found to be refugees on grounds that were not envisaged when Australia ratified the Refugees Convention and incorporated it into domestic migration legislation. This could subject Australia's migration and entry policies and on-shore refugee determination process to considerable strain and has the potential to undermine their integrity and efficiency.

6 In addition, while the Court's decision is limited to the PRC's one child policies, the Government is concerned that it may provide a precedent whereby the fertility control policies of other nations could be held to define the "membership of a particular social group" for the purposes of the Refugees Convention. Therefore, the Bill has the effect that fertility control policies of a foreign government shall not define a "particular social group". Fertility control policies may be enunciated differently from country to country and even within different regions of the same country. The Government intends that however the policies are described and in whatever form the policies are stated, by any person or body acting on behalf of the foreign government, this amendment to the Act will prohibit its consideration in determining whether a non-citizen is a member of a particular social group within the meaning of the Refugees Convention.

7 The proposed Bill will not preclude claims made by persons who may be members of pre-existing particular social groups, that is, groups defined by reference to factors other than fertility control policies. In addition, claims based upon other Convention grounds by persons who may incidentally be subject to fertility control policies will also be able to be considered in the normal way. This will ensure that 'other' claims are fully considered on their merits.

8 The Act is also being amended to stop the use of repeat applications for protection visas by non-citizens to delay their removal and to circumvent the immigration requirements of Australia. This amendment will contribute to increasing the efficiency of Australia's refugee determination system and to minimising ill-founded protection visa applications. Where the Minister thinks it is in the public interest to do so, he or she will have the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application. The Minister must table a statement in Parliament setting out his or her reasons for thinking this decision is in the public interest.

FINANCIAL IMPACT STATEMENT

9 The amendment relating to fertility control policies should shorten the decision-making processes of the primary delegate and the RRT. The barring of repeat applications will result in a reduction to the number of protection visa applications considered. This is likely to result in some savings.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 This clause provides that the Act may be cited as the *Migration Legislation Amendment Act (No. 3) 1995*.

Clause 2 Commencement

2 This clause provides that the amendments commence on Royal Assent.

Clause 3 Schedule

3 This clause provides that the *Migration Act 1958* ("the Act") is amended as set out in the Schedule. Items 1 and 7 do not amend the Act but have effect according to their respective terms.

Schedule Amendment of the *Migration Act 1958*

Item 1 Objects of amendments

4 This clause sets out the object of clauses 2 and 4 of the Bill which is to amend section 36 of the Act as a response to the decision of the Federal Court in NG 327 of 1994 (unreported) and to amend the Act (by the insertion of new sections 48A and 48B) to prevent non-citizens from making applications for protection visas in certain cases where the non-citizens have already made such applications.

Item 2 Section 36

5 Proposed new subsection 36(3) provides that the fertility control policies of the government of a foreign country are to be disregarded in determining if a non-citizen is a member of a particular social group (within the meaning of the Refugees Convention as amended by the Refugees Protocol) for the purposes of considering an application for a protection visa. Proposed new subsection 36(4) provides that the fertility control policies of the Government of the PRC are such an example.

Item 3 Paragraph 46(1)(d):

6 Section 46 of the Act, which provides for valid visa applications, is amended to exclude a repeat protection visa application within the meaning of section 48A and applications that have ceased to be valid applications by virtue of section 91E.

Item 4 After section 48

7 Proposed new section 48A provides that a non-citizen, while he or she remains in the migration zone, who has made an application or applications for protection visas which have been refused may not make a further application for a protection visa. This provision applies even if a non-citizen's application for a protection visa has not been finally determined (that is, if, for example, it is being reviewed by the RRT). An application for a protection visa, for the purposes of this proposed section, includes any application by a person for refugee status or for a visa or entry permit in existence before or after 1 September 1994, a criterion of which involved determination of refugee status. Dependents of such persons are also included in this definition.

8 Proposed new section 48B provides the Minister with the power to exercise a non-compellable discretion in favour of allowing a particular individual to lodge a repeat application if the Minister thinks it is in the public interest to do so. In exercising this power, the Minister must table a statement in Parliament setting out the determination and the reasons for it, referring particularly to the Minister's reasons for thinking his or her actions are in the public interest.

Item 5 Subsection 49(3)

9 Subsection 49(3) of the Act is amended to ensure that a refused visa application within the meaning of proposed new section 48A does not include an application that has been withdrawn.

Item 6 Section 50

10 A note is inserted at the end of section 50 to indicate that new section 48A prevents repeat applications for protection visas in most circumstances where the applicant is in the migration zone.

Item 7 Application of amendments

11 This item makes it clear that the amendments in item 2 relating to fertility control policies apply to protection visa applications that have not been finally determined at the commencement of this item.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation