

1998-1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**MIGRATION LEGISLATION AMENDMENT (TEMPORARY SAFE HAVEN
VISAS) BILL 1999**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
the Hon. Philip Ruddock MP)

MIGRATION LEGISLATION AMENDMENT (TEMPORARY SAFE HAVEN VISAS) BILL 1999

OUTLINE

Overview

1 The Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999 ("the Bill") provides the legislative framework for the Australian Government to provide persons with temporary safe haven in Australia. The Bill will ensure that persons to whom temporary safe haven is provided are unable to change their status to remain in Australia after temporary safe haven is no longer necessary. Consistent with the Government's commitment on 6 April 1999, to provide temporary safe haven for 4,000 persons displaced from their homes in Kosovo any applications made from that date will be rendered invalid.

2 The Bill also contains specific powers to enable prompt action to be taken to withdraw temporary safe haven to persons who represent a danger to the Australian community, or Australia's security or whose presence in Australia would be harmful to Australia's international relations.

3 The amendments to the *Migration Act 1958* ("the Migration Act"):

- establish that there is to be a class of visas known as temporary safe haven visas;
- provide that the Minister may, by notice in the *Gazette*, extend or shorten the visa period of a temporary safe haven visa so that the visa ceases to be in effect on the day specified in the notice;
- provide that where new Subdivision AJ applies, a non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, is not be allowed to apply for any other type of visa;
- provide the Minister with the power to determine, if he or she believes it to be in the public interest, to allow a particular non-citizen who holds a temporary safe haven visa, or who has not left Australia since ceasing to hold such a visa, to make a valid visa application for another type of visa;
- provide a removal power in section 198 for those unlawful non-citizens in detention to whom subdivision AJ applies;
- provide the Minister with a special power to cancel a person's temporary safe haven visa or refuse to grant a person a temporary safe haven visa on character grounds without the rules of natural justice applying to his or her decision;

- extend the Minister's decision to refuse to grant or cancel a temporary safe haven visa to each member of the immediate family of that person;
- provide that any decision to refuse to grant a temporary safe haven visa or to cancel a temporary safe haven visa is not reviewable under Part 5 of the Migration Act; and
- provide that the Minister's decision to extend or shorten the visa period of a temporary safe haven visa, or whether to exercise the power to allow a particular non-citizen to make a valid visa application for another type of visa is not judicially reviewable.

FINANCIAL IMPACT STATEMENT

4 The amendments proposed in the Bill are intended to limit the costs incurred by the Australian community to those associated with the provision of temporary safe haven. The Bill stops persons from seeking to change their status to remain in Australia and limits the use of costly review processes to delay departure from Australia.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

5 This clause provides that the Act may be cited as the *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999*.

Clause 2 Commencement

6 Subclause 2(1) provides that, subject to this section, this Act commences on the day on which it receives the Royal Assent.

7 Subclause 2(2) provides that, item 11 of Schedule 1 commences immediately after the commencement of item 10 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 1998*.

Clause 3 Schedule(s)

8 This clause provides that, subject to section 2, the provisions of each Act set out in the items of the Schedule to this Act are amended or repealed as indicated and any other item has effect according to its terms.

Clause 4 Applications for certain visas made before the commencement of this Act

9 This item ensures that if, during the period between 6 April 1999 and the commencement of this section, a non-citizen in Australia who holds a temporary safe haven visa or who has not left Australia since ceasing to hold a temporary safe haven visa, makes an application for a visa and is not granted a substantive visa as a result of that application, that person no longer has a valid application.

10 This provision applies even if the application or a decision in relation to the application is the subject of a review by a review officer on internal review or by a Tribunal, or by a court.

Clause 5 Visas taken to be temporary safe haven visas

11 This clause provides that a visa that falls within Class UJ of the regulations is deemed to be a temporary safe haven visa on the commencement of this section. Therefore, a visa within Class UJ issued before the commencement of this Act will be subject to the provisions of this Act.

SCHEDULE 1 – AMENDMENT OF THE *MIGRATION ACT 1958*

Item 1 Subsection 31(2)

12 This item is consequential to reflect the insertion of new section 37A into the Migration Act.

Item 2 Subsection 31(3)

13 This item is consequential to reflect the insertion of new section 37A into the Migration Act.

Item 3 After section 37 New section 37A – Temporary safe haven visas

14 New section 37A provides that there is to be a class of temporary visas known as temporary safe haven visas. The Minister may by notice in the *Gazette*, extend or shorten the visa period of a temporary safe haven visa, so that the visa ceases to be in effect on the day specified in the notice. The Minister may do this despite any other provision in the Act. The Minister does not have a duty to consider whether to exercise his or her power to extend the period of temporary safe haven, irrespective of whether he or she is requested to do so by the visa holder, or any other person, or in any other circumstances.

Item 4 Paragraph 46(1)(d)

15 This item is consequential to reflect the insertion of new section 91K in the Act.

Item 5 Subparagraph 65(1)(a)(iii)

16 This item is consequential to reflect the insertion of new section 500A in the Act.

Item 6 Subdivision AI of Division 3 of Part 2 (heading)

17 Subdivision AI in Division 3 of Part 2 of the Migration Act, is amended to reflect the more accurate description that this Subdivision refers to certain non-citizens who are covered by the “CPA” or in relation to whom there is a “safe third country” as defined in that Subdivision.

Item 7 After Subdivision AI of Division 3 of Part 2
Subdivision AJ – Temporary safe haven visas

Section 91H Reason for this Subdivision

18 This section sets out Parliament's intention that this Subdivision is enacted to ensure that persons to whom this Subdivision applies are not to be able to apply for a visa other than another temporary safe haven visa. If a person to whom this Subdivision applies ceases to hold a visa then that person is subject to removal under Division 8 of Part 2 of the Migration Act.

Section 91J Non-citizens to whom this Subdivision applies

19 New section 91J provides that this Subdivision applies to non-citizens who hold a temporary safe haven visa, or who have not left Australia since ceasing to hold such a visa.

Section 91K Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

20 This provision ensures that if this Subdivision applies to a non-citizen at a particular time and at that time the non-citizen applies or purports to apply for a visa (other than a temporary safe haven visa) then that application is not a valid application. This provision applies despite any other provision that may apply in the Act, but is subject to new section 91L.

Section 91L Minister may determine that section 91K does not apply to a non-citizen

21 This section provides the Minister with the discretion, if he or she believes it to be in the public interest to do so, to determine that section 91K does not apply to a particular non-citizen. If the Minister makes such a determination, then that non-citizen may make a valid application for a visa within seven working days of receiving the Minister's written notice.

22 This power can only be exercised by the Minister personally (new subsection 91L(2)). If the Minister makes such a determination then the Minister must table before each House of Parliament a statement that sets out the determination and the reasons for the determination (new subsection 91L(3)). The statement must not provide any information that could identify the person who is the subject of the determination or any other person in connection with that statement (new subsection 91L(4)). The statement must be tabled in Parliament within 15 Sittings days of the making of determination as set out in new subsection 91L(5).

23 The Minister does not have a duty to consider whether to exercise this power in any circumstances (new subsection 91L(6)).

Item 8 After paragraph 118(e)

24 This item inserts new paragraph (ea) at section 118 and is consequential to reflect the insertion of new section 500A in the Migration Act. This item ensures that the Minister's new power to refuse to grant or to cancel a temporary safe haven visa under new section 500A is in addition to the other powers to cancel under the Migration Act.

Item 9 At the end of section 198

25 New subsection 198(8) is inserted to provide that an unlawful non-citizen in detention covered by new Subdivision AJ must be removed, unless the Minister has given a notice under new subsection 91L(1) to the non-citizen and that person has made a valid application for a substantive visa that can be granted when the applicant is in the migration zone within the time required by new subsection 91L(1). This amendment operates in addition to the other circumstances where removal of unlawful non-citizens is required by section 198.

Item 10 Section 337 (at the end of the definition of *Part 5 reviewable decisions*)

26 This item provides that a "Part 5 reviewable decision" does not include any decision to refuse to grant, or to cancel a temporary safe haven visa. That is, any decision to refuse to grant or to cancel a temporary safe haven visa is not internally reviewable by a review officer nor by the Immigration Review Tribunal.

Item 11 At the end of subsection 338(1)

27 This item provides that any decision to refuse to grant or to cancel a temporary safe haven visa is not an "MRT reviewable decision". That is, any decision to refuse to grant or to cancel a temporary safe haven visa is not reviewable by the Migration Review Tribunal ("MRT"). This item will commence immediately after the commencement of the MRT (clause 2(2)).

Item 12 After paragraph 475(2)(d)

28 Subsection 475(2) provides that certain decisions are not judicially reviewable. New subparagraph 475(2)(da) provides that a decision of the Minister not to exercise, or not to consider the exercise of his or her power to extend the visa period of a temporary safe haven visa under new subsection 37A(2) is not a judicially reviewable decision.

29 New subparagraph 475(2)(db) provides that a decision of the Minister to shorten the visa period of a temporary safe haven visa under new subsection 37A(3) is also not a judicially reviewable decision.

Item 13 Paragraph 475(2)(e)

30 This item provides that a decision of the Minister not to exercise, or not to consider the

exercise of his or her power under section 91L is also not a judicially reviewable decision.

Item 14 After section 500
New section 500A - Refusal or cancellation of temporary safe haven visas

31 This item inserts new section 500A into the Act to provide the Minister with additional powers to cancel a temporary safe haven visa or to refuse to grant a temporary safe haven visa on the grounds set out in that section.

32 The Minister can only exercise this power personally. If the Minister makes a decision to refuse to grant or cancel a temporary safe haven visa under new subsection 500A(1) or 500A(3), then the Minister must table that decision before Parliament, setting out the reasons for the decision (new subsection 500A(7)). The statement must not provide any information that could identify the person who is the subject of the determination or any other person in connection with that statement (new subsection 500A(8)). The statement must be tabled in Parliament within 15 Sittings days of the making of determination as set out in new subsection 500A(9).

33 If the Minister makes a decision under 500A(1) or 500A(3), the Minister must notify the person of the decision (new subsection 500A(10)). However, failure to notify a person does not affect the validity of the decision.

34 New subsection 500A(11) provides that the rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2 do not apply to a decision under subsection 500A(1) or 500A(3). For example, there is no requirement to give the visa holder of a temporary safe haven visa or a visa applicant for a temporary safe haven visa prior notice of the decision to cancel or to refuse to grant under subsection 500A(1) or 500A(3).

35 New subsection 500A(12) provides that if the Minister refuses to grant a person a temporary safe haven visa under subsection 500A(1) or 500A(3), then the Minister is also taken to have refused to grant a temporary safe haven visa to each member of the immediate family member of that person. The immediate family members need not be notified of the decision to refuse to grant.

36 New subsection 500A(13) provides that if a person's visa is cancelled under subsection 500A(1) or 500A(3), then visas held by members of that person's immediate family ("immediate family" is defined in the regulations) are also cancelled. The immediate family members need not be notified of the cancellation.

