Draft Practice Direction

Legal Aid NSW submission

to the

Refugee Review Tribunal

June 2013

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW has for many years provided legal services in the area of migration law. Services include advice and representation of clients in relation to visa applications lodged with the Department of Immigration and Citizenship (DIAC), review applications to the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), and judicial review proceedings following an adverse MRT or RRT decision. Currently Legal Aid NSW grants aid, subject to means, merit and legal aid guidelines pursuant to the terms of the Immigration Advice and Application Assistance Scheme (IAAAS).

There are six solicitors in the Government Law Unit of the Civil Law division who regularly assist with protection visa and review applications to the Refugee Review Tribunal (RRT). Legal Aid NSW also provides training and community legal education in migration law generally and refugee visas specifically.

The comments provided in this submission draw substantially on the practical experience of the Legal Aid NSW's lawyers in advocating on behalf of clients.

Introduction

We note that the draft Practice Direction (PD) is made pursuant to section 420A of the *Migration Act 1958*, which provides that directions "*may relate to the application of efficient processing practices to the conduct of reviews by the Tribunal*" (s420A(2)). It appears that paragraph 1 of the draft PD draws on this provision, stating that:

> The purpose of this Direction is to promote the efficient conduct of the review, for the benefit of the applicant and the tribunal. By following the requirements of the Direction, representatives can ensure efficient and comprehensive consideration of the applicant's claims.

It is the view of Legal Aid NSW that any directions proposed to be given by the Tribunal need to be read in the context of the statutory requirement that the Tribunal is to "*pursue the objective of providing a mechanism of review that is fair, just, economical, informal and*

quick" and "*is not bound by technicalities, legal forms or rules of evidence"* (see section 420 *Migration Act 1958*). Subsection 420A(1) provides that any directions given under that provision should not be inconsistent with the Migration Act or regulations.

While it may be helpful for practitioners to have guidance from the Tribunal as to how it prefers matters to be presented to it, in our view some of the proposed PDs do not promote the statutory objectives set out in section 420.

Reference will be made to specific draft directions below, but in general it appears that strict enforcement of the draft PD will reduce informality, add cost and add unnecessary technicality to the process of review without making the review process more just.

In assessing the draft PD, the characteristics of many applicants who appear before the Tribunal also need to be taken into account. The Tribunal will be acutely aware of the difficulties many applicants face, including a lack of English, poor literacy skills (even in their own language), anxiety, the effects of torture and trauma and inexperience in dealing with formal legal systems. The fact that they may have a representative does not detract from added difficulties the applicants have in interacting with the legal system in general and the Tribunal specifically.

Legal Aid NSW suggests that the draft PD would be better framed as a guide to practitioners appearing in the Tribunal rather than a practice direction setting out requirements and expectations. We note the existence of *Principal Member Direction 4. Efficient Conduct of RRT Reviews.* The stated purpose of that direction is to "*provide general guidance on the conduct of reviews"* (para 2). The Tribunal could expand the content of that document to provide practitioners with clear guidance as to how the Tribunal would like matters to proceed without the standing of formal PDs which prescribe certain requirements and may impose sanctions.

Comment on specific directions

> ***2. Non-compliance with this Direction may be reported to the Migration Agents Registration Authority, the Department of Immigration and Citizenship (the department), or other relevant regulatory bodies.***

In our view this direction is unnecessary. It is unclear whether the Tribunal will insist on strict compliance with the terms of the draft PD, and in what circumstances non-compliance will lead to a report to MARA. It is our experience that delays in submitting material to the Tribunal are often subject to factors outside the lawyer's control. As we will note below, we consider some practice directions to be unnecessary. It is difficult to see the reason for having an external compliance regime related to the practice directions of the Tribunal.

It may be appropriate in appropriate circumstances for the Tribunal to report an agent/lawyer to MARA if there is an alleged breach of the terms of the Code of Conduct for registered migration agents, but in our view non-compliance with a Tribunal PD of itself should not be considered an appropriate reason for reporting to MARA.

> ***4. The representative should ensure that a copy of the decision for review is attached to the application for review. The representative should also attach any new material not previously provided to the department on which the applicant proposes to rely.***

It is unclear why this direction has been included or what the possible consequences might be if the decision is not attached. It is unclear if the current system is unsatisfactory or contributing to delays, and if so in what way.

In the context of a review system which has short and inflexible appeal times, especially for those in immigration detention, requiring a representative to lodge the decision is unnecessary and only adds formality. The lawyer's professional obligation to the client is to ensure applications for review are filed within time and this may mean a copy of the decision cannot be included. While it may be desirable for the decision to be attached to the review application, this requirement should not be enshrined in a practice direction.

In relation to new material, it is highly unlikely that any new material will be available at the time the application for review is filed. In our view it is not efficient to also expect new material to be provided at that time, particularly when applicants may have to wait months for a hearing.

It is also unclear to us how the Tribunal sees the relationship between this draft PD and draft PD 6 regarding the provision and content of submissions (see especially draft PD 6(d)).

In our view draft PD 4 adds a level of formality which is unnecessary and which is inconsistent with an economical review.

6 All written submissions are to:

a. be given to the tribunal as early as possible and within such time as directed by the tribunal

It is unclear whether the words "*and within such time as directed by the tribunal"* contemplates a form of directions hearing taking place at which the Tribunal will set a timetable. This would add a level of formality which is inconsistent with the terms of section 420.

If a directions hearing is not contemplated, it is unclear on what basis the Tribunal would formulate a timetable to be followed by the representative. For example, will the Tribunal take account of a representative's availability or ability to meet a timetable unilaterally set by the RRT? What action is contemplated if the timetable is not met?

Overall we submit that this PD is unnecessary and does not appear to be a practical way to achieve "*efficient conduct of the review, for the benefit of the applicant and the tribuna*l", is not "*informal*" and has the potential to add "*technicalities and legal forms*".

Terms b-g of PD 6 which address the content of written submissions are not controversial, but appear to us to be better addressed by way of guidance to practitioners rather than formal PDs.

7. If a submission refers to a new or varied claim (a claim that was not made previously or that has changed or developed since it was last made), the submission must clearly identify it as a new or varied claim, and the representative must give the tribunal a written statement from the applicant in support of that claim.

We agree that new or varied claims should be identified, but we think that it is unnecessary

that the representative "*must give the tribunal a written statement from the applicant in support of that claim*" (emphasis added). A statement from the applicant may be the preferred way of providing this information, but in many instances it may not be practical and it adds significant cost for interpreters which may not be able to be borne by the applicant or IAAAS service provider.

Legal Aid NSW only represents protection visa applicants at primary and review stages using IAAAS funding, which provides a fixed sum of money for each case. The limited funding that we and other IAAAS service providers receive may not cover the additional costs of the work contemplated by this draft PD.

In our view, this requirement adds formality and takes away from the process being economical and quick.

Claims may change or vary because of new country information. In that situation a written statement from the applicant may not be necessary.

Finally, the PD is framed as mandatory (*must*). Is any sanction contemplated for non-compliance? If so we would strongly oppose such a move as constituting an unnecessary move towards legal formality which the Tribunal, as an inquisitorial body, should resist.

8 At least seven days before the first scheduled hearing, or as otherwise directed by the tribunal, the representative is to give the tribunal a written submission that clearly and concisely sets out all claims made and maintained by the applicant.

It is unclear how this draft PD relates to draft PD 4 and 6a. The three PDs appear to contemplate different times for the provision of material and submissions to the Tribunal. The concerns we have raised in relation to draft PD 6a also apply here.

In any event, if the applicant has been represented throughout from the DIAC application onwards and has already provided submissions to DIAC and any further material to the RRT, it is not fair to expect another submission. The wording of the draft PD is framed in mandatory terms (*is to give to the tribunal....)* which we think is not helpful and raises the question of possible sanctions if submissions are not provided as directed.

In any event there is Federal Court precedent (*Singh v MIMIA* (2001) 109 FCR 18, cited recently in *MIAC v SZQOY* (2012) 206 FCR 25) that all relevant evidence and material submitted prior to the decision being finally made may be taken into account by the Tribunal irrespective of when it is lodged.

While we agree that it is desirable to provide submissions as soon as possible, we consider it preferable to give guidance to practitioners as to how and when the Tribunal would like submissions to be lodged, given that in most cases it is unable to disregard relevant material lodged at any time before the decision is finally made.

9 The pre-hearing submission should be accompanied by a signed declaration from the applicant that the submission has been read or explained to them and that it accurately and completely presents their claims.

Legal Aid NSW opposes this draft PD. The requirement is unnecessarily onerous, especially in a jurisdiction where a significant number of applicants require an interpreter. The

proposed PD would add significant cost to the matter, and so detracts from a review system that is economical.

The limited funding that Legal Aid NSW and other IAAAS service providers receive is unlikely to cover the additional costs of this work. The difficulty is likely to be more acute for applicants in immigration detention, where migration agents have limited access to clients and there are additional costs associated with interpreters attending at an immigration detention centre.

Further, most protection visa applicants in the community are on low incomes, or have no income. Even those who are paying a migration agent will struggle to find funds to pay the additional costs of the work required. This may lead to an increase in the number of unrepresented applicants, whose applications will be less well prepared than if they were represented.

Finally, the proposed PD adds a level of formality which is not consistent with objectives of section 420.

Conclusion

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Bill Gerogiannis by or telephone (02) 9219 5903 or email at bill.gerogiannis@legalaid.nsw.gov.au.