LEGAL ADVICE

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1 December 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Immigration (Mass Arrivals) Amendment Bill

Purpose

1. We have considered whether the Immigration (Mass Arrivals) Amendment Bill **(**'the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 22498/3.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (right to be free from unreasonable search and seizure) and s 22 (right to be free from arbitrary detention). Our analysis is set out below.

The Bill

4. The Bill amends the Immigration Act 2009 ("the principal Act") to ensure that Immigration New Zealand is able to manage an irregular mass maritime arrival (a mass arrival) in an orderly and safe manner. [1]

5. The Bill:

   a. provides explicit confirmation that members of a mass arrival group are required to apply for a temporary entry class visa; and

   b. allows for an extension of the usual court process for determining warrants of commitment to detain members of a mass arrival group.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression and section 21 – Freedom from unreasonable search and seizure

6. Clause 6 of the Bill inserts new ss 103(1)(daa) and 103(2A) into the principal Act. These sections provide that a person who is a member of a mass arrival group, who is not the holder of a visa granted under the principal Act, must apply for a temporary entry visa, and if they do not they must be treated as if they had applied for a visa.

[1] A mass arrival is defined in s 9A of the principal Act as meaning a group of more than 30 people, who arrive on the same craft, or group of craft, without any visa or entry permission allowing them to lawfully enter New Zealand.

7. Applying for a temporary visa under the principal Act means that the applicant must comply with a number of requests that may be made by an immigration officer.

8. Among the obligations that an applicant may be required to comply with are:

    a. to submit to an interview by an immigration officer, to produce further information or evidence (including photographs) that the officer thinks necessary for him or her to determine the application, or to undergo a medical examination as set out in the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010; and

    b. to provide biometric information in accordance with s 111(1) of the principal Act.

9. Where these obligations are not complied with a person may be denied entry into New Zealand.

10. The requirements referred to above engage rights and freedoms affirmed under the Bill of Rights Act. Requiring a person to provide information engages the right to freedom of expression, which has been interpreted by the courts to include the right not to be compelled to say certain things or to provide certain information.[2] Requiring a person to provide biometric information and submit to a medical assessment amounts to a search of the person under s 21 of the Bill of Rights Act.

11. We will assess the consistency of these requirements with the Bill of Rights Act as a single piece of analysis, as they stem from the single action of requiring a person to apply for a temporary entry visa, or, if they refuse, of treating the person as if they had applied for an entry visa.

12. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable under s 5 of that Act.

13. The s 5 inquiry may be approached as follows:

    a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?

    b. if so, then:

        i. is the limit rationally connected with the objective?

        ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?

        iii. is the limit in due proportion to the importance of the objective?[3]

14. With respect to legislative provisions that engage s 21 of the Bill of Rights Act, the question is whether the search is reasonable. The Supreme Court has held that an unreasonable search or seizure cannot be demonstrably justified with reference to s 5.[4]

15. Requiring a person who enters New Zealand as part of a mass arrival group to be treated as if they have applied for a temporary entry visa, whether or not they agree to applying

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[2] See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).
[3] *Hansen v R* [2007] NZSC 7.
[4] *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

for that visa, serves the important objective of protecting New Zealand's security through ensuring safe and orderly management of the mass arrival. If a person arriving as part of a mass arrival were to be allowed to refuse to apply for a visa they would have no legal status for being in New Zealand. They could present a risk to New Zealand society, either in terms of security or as the carrier of a communicable disease, however, the government would not be able to assess this risk.

16. The obligations associated with the visa application process are rationally connected to ensuring that those who enter New Zealand as part of a mass arrival group are quickly processed, are not allowed to abscond, and are also supported on their arrival. The obligations materially assist Immigration New Zealand in determining the identity of arrivals, evaluating potential security risks associated with their arrival, and conducting needs assessments for health and other services.

17. The obligations being placed on mass arrivals are no different from the obligations on any other person who applies for a temporary visa. These obligations have been considered proportionate and justified in the processing of all other people on temporary visas. They are targeted at collecting the information necessary to determine whether a person should be allowed to enter New Zealand and on what immigration basis, and to enable immigration staff to manage support for the person on their arrival.

18. In the ordinary course, people arriving in New Zealand in a conventional manner choose to make an application for entry permission, and so can be taken to have consented to the requirements outlined above at paragraph 8. In the case of members of a mass arrival group, they will have been deemed to have made an application for entry and consent is less clear-cut. We have considered whether this affects the justification arguments. We have concluded that it does not, on the basis that the policy reasons for requiring people to seek entry permission apply regardless of how the person has arrived.

19. For these reasons, we conclude that any limits to the freedom of expression in the Bill are justified under s 5 of the Bill of Rights Act, and also that any searches carried out under the Bill are not unreasonable, and thus do not contravene s 21 of the Bill of Rights Act.

Section 22 – Right to be free from arbitrary detention

20. Section 22 of the Bill of Rights Act affirms the right to be free from arbitrary detention. Section 22 recognises that there are circumstances where it will be necessary for the state to detain individuals, but that there are limits on the legitimate use of state power for that purpose. The purpose of the right is the protection of human dignity, autonomy and liberty.[5]

21. There has been considerable discussion in domestic and international case law regarding the definitions and boundaries of arbitrary detention. The Court of Appeal has described a detention as being arbitrary "if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."[6] Similarly, the United Kingdom House of Lords has set out a two-step description of lawful detention, ruling that: [7]

    a. The detention must be for an authorised purpose (e.g. prior to deportation); and

[5] *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.
[6] *Neilsen v Attorney-General* [2001] 3 NZLR 433, 441.
[7] *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704, 706 [1984], 1 All ER 983, 985.

b. The detention must be limited to a period which is reasonably necessary for that purpose to be carried out.

22. These decisions indicate that it is not enough that detention is merely prescribed by law; it must also be for a proper purpose, for a reasonable period, and be appropriate and proportionate. Further, the Court of Appeal has held that an initially lawful detention can become arbitrary if the purpose of detention cannot be fulfilled.[8]

23. Finally, it should be noted that where an enactment is inconsistent with s 22, there can be no role for justification under s 5 of the Bill of Rights Act. The term "arbitrarily" is intended to provide a measure of the reasonableness of statutory powers,[9] as well as the exercise of those powers. There can be no detention that is both arbitrary and reasonable.

Detention within the Bill

24. Section 313 of the principal Act currently provides for a person who has arrived as part of a mass arrival to be detained for up to 96 hours. For detention to continue beyond this time, the principal Act currently provides that a District Court Judge must issue a warrant of commitment under s 317A of the Act authorising the further detention. A warrant of commitment under s 317A must be issued within the initial 96 hour period of warrantless detention. The warrant of commitment may have a maximum duration of 6 months.

25. Clause 8 of the Bill amends s 313 of the principal Act so that if an application for a warrant of commitment has been *lodged* within 96 hours, a person from a mass arrival group may continue to be detained (without a warrant) until the District Court makes a determination with regard to that warrant.

26. Clause 9 of the Bill inserts new s 317AB into the principal Act, providing that the application for the warrant of commitment must be heard by a District Court Judge as soon as reasonably practicable and, in any event, within 7 days of the application being lodged. Section 317AB(2)(a) provides for the hearing to be adjourned if the judge considers this necessary, but s 317AB(2)(b) provides that the maximum timeframe for a warrant to be determined is 28 days.

27. The existing provisions for detention in mass arrival situations were considered to be consistent with s 22 by the Attorney-General when they came into force in 2012. Key considerations in his discussion of this matter included:

a. the judicially controlled nature of the warrant application process, combined with the responsibility of the judiciary to apply law consistently with the Bill of Rights Act;

b. the ability of the judge to issue warrants with duration and conditions as they consider appropriate, which may differ from the particulars requested by the immigration application;

c. the power given to the judge to require an immigration officer to report on the necessity for continuing detention at specified periods throughout the duration of the warrant; and

[8] *Zaoui v Attorney-General [Habeas corpus]* [2005] 1 NZLR 577 (CA).
[9] Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [19.8.1].

d. the ability for the immigration officer to seek variation of the warrant from the court at any time.

28. These safeguards in the principal Act ensure that the judiciary maintain control of the detention process, that they may obtain the information necessary to rule on the necessity of continuing detention under the warrant, and that they have the flexibility to ensure that the detention goes on no longer than necessary to achieve its purpose.

29. However, the extension of detention provided for in the Bill may engage the right to be free from arbitrary detention in a different manner from the existing provisions. The risk of arbitrariness is engaged by the increased length of the period between the application for a warrant of commitment (which must occur within the first 96 hours of detention), and a judge making the decision to approve the warrant.

Justifiability of detention in the Bill

30. It is clearly accepted in domestic and international law that a range of purposes can justify detention. The United Nations Human Rights Committee have upheld the principle that detention of persons who have illegally entered a country can be justified.[10] The European Court of Human Rights has also held that detention of asylum seekers based on the policy necessity of processing a large volume of applications could be justified as a necessary measure to protect public safety.[11] In light of these cases, the Attorney-General accepted that the detention of mass arrival groups was legitimate in their assessment of the 2012 provisions. This purpose also justifies the Bill's proposed extension of these provisions.

31. The extension of the detention provisions within the Bill is rationally connected to the Bill's purpose of ensuring a safe and orderly processing of mass arrivals. This change is a response to the assessment that it will very likely be practically impossible to obtain warrants of commitment for all persons within 96 hours in the case of a mass arrival.

32. The key question to be decided in assessing whether the detention provided for in the Bill is arbitrary is whether appropriate procedure exists to constrain the duration of detention. While it is true that the length of detention now authorisable under the Bill is lengthened, we do not consider that this means that detentions under the Bill will be arbitrary.

33. Judicial oversight of detention has been held to be of high importance in considering whether detention is arbitrary.[12] The process of detention proposed under the Bill will be under judicial oversight and control, like the current provisions in the principal Act. This judicial control will occur from the point that an application for a warrant of commitment is made, which must occur within 96 hours of detention.

34. We would expect the courts to treat dealing with mass arrival warrants of commitment as a matter of very high priority, to ensure that they fulfil their responsibilities to prevent arbitrary detention. Section 317AB also requires that the hearing for a warrant of commitment must occur as soon as practicable, and s 313(2)(a) requires that a person detained under the section may be detained only as long as necessary to achieve the purpose of the detention.

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[10] *A v Australia* (1997) 4 BHRC 210 (HRC).
[11] *Saadi v United Kingdom* (2008) 47 EHRR 17(ECtHR, GC).
[12] Human Rights Committee. General Comment 35 UN Doc CCPR/C/GC/35 (16 December 2014) at [35].

35. These expectations are further backed up by the timeframes in the Bill, which ensure that an application for a warrant of commitment must be made within a maximum of 96 hours of the initial detention, be heard within 7 days of the application, and be determined within 28 days of application.

36. Finally, it is important to note that detainees themselves retain the use of existing statutory options to challenge their ongoing detention, given their rights under s 23 of the Bill of Rights Act. Under s 23(1) the detainee may apply for a writ of habeas corpus to determine the validity of their detention under the Habeas Corpus Act 2001. This has the effect of requiring a judge to give precedence to their application before all other matters before the court, unless they consider that the circumstances require otherwise.

37. We consider that these safeguards ensure that there are adequate barriers to detention being prolonged beyond what is necessary to deal with the circumstances of a mass arrival.

38. On this basis we consider that detentions provided for by the Bill are not arbitrary, and thus do not conflict with s 22 of the Bill of Rights Act

Conclusion

39. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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