

Submission by the New South Wales Council for Civil Liberties to the Joint Standing Committee on Migration inquiry into review processes associated with visa cancellations on criminal grounds.

The New South Wales Council for Civil Liberties (NSWCCL) is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. The New South Wales Council for Civil Liberties is now, and has been since its foundation in 1963, vitally concerned with protecting and extending the legal support for human rights and civil liberties.

We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities. NSWCCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

In view of the severe consequences that can follow visa cancellation, NSWCCL seeks the opportunity to present material to the Migration Committee directly.

Summary

Efficiency is relative to purpose. The purpose of reviews of Ministerial decisions is the just treatment of those affected. The efficiency of the review process is determined, first, by well it produces just outcomes.

Section 501 can only be understood in connection with sections 500-503A. Together, they set up a regime by which anybody who is in Australia by virtue of their having a visa can be held to have failed a character test, and have the visa cancelled. People who have been in Australia from infancy have been declared to have failed the test, and deported. People who have been found to be refugees now languish in detention centres indefinitely, having been found to have failed the test.

Section 501 of the Migration Act, with the 17 associated sections 500–503A form an embarrassing piece of legislation whereby Australia shirks its clear responsibilities, imposes burdens on foreign countries including its close allies, and imposes undeserved extra penalties on people who have already felt the full force of the law. The details of the legislation and the practice it has permitted are contrary to basic democratic values and to the rule of law—those values that people are beginning to call “Australian”.

At the very least, sections 500—503A should be amended as follows.

The Minister's powers to personally cancel or refuse a visa without the opportunity for an appeal on the merits should be removed.

Decisions to cancel a visa or refuse a visa should be able to be appealed on their merits.

The power of the Minister to overturn a decision by the Administrative Appeals Tribunal (AAT) should be removed, as it is contrary to basic democratic values, and seriously unfair.

There should be no power to cancel visas of people who have lived in Australia for a long time, or came here as children, or who only became criminals after arriving in Australia.

There should be a universal guarantee of legal representation for persons whose visas are to be cancelled at all stages of the process.

In particular, legal representation should be made available for all appeals to the AAT.

Six anomalies and absurdities should be corrected.

But ideally, the whole of the character test powers would be repealed.

Efficiency

Efficiency is relative to purpose. The arrangements for financial advisors at the AMP and the Commonwealth Bank was efficient for maximising the organisation's profits, but not for the interests of customers.

So, to determine the *efficiency* of the reviews by the Administrative Appeals Tribunal (AAT) of determinations under section 501 of the Migration Act, it is necessary for the Migration Committee, and for CCL, to look at the purposes for which the Tribunal was set up.

Sir Anthony Mason is reported as identifying five features of administrative decision-making *by ministers and public servants in their departments* which fall short of the judicial model of decision-making. These deficiencies were the reason he, and Sir Nigel Bowen (then Attorney-General) sought and achieved the creation of the AAT.

The deficiencies were:

It lacks the independence of the judicial process. The administrative decision-maker is more susceptible to political, ministerial and bureaucratic influence than is a judge.

Some administrative decisions are made in the open, but most are not.

Unless a statute declares otherwise, the administrator does not have to give reasons for a decision.

Administrators do not always observe the standards of natural justice and procedural fairness. They are not trained to do so.

Administrators are inclined to subordinate the claims of justice of the individual to the more general demands of public policy and sometimes to adventitious political and bureaucratic processes.

By contrast, the senior members of the AAT must be judges, thus secure in their tenure under section 72 of the Constitution.

The efficiency of the AAT review process, then, is determined in the first instance by how well it produces just outcomes.

It is in this light that the efficiency of review processes under section 501 of the Migration Act must be viewed.

It is perhaps also in this light that the Minister's boasts that more visas have been cancelled in twelve months than were cancelled in six years under the Last Labor Government.¹ If, as the Minister avers, 'visa cancellation numbers are now at about 3,400, the highest number in this federation'², there is reason to be concerned that it is AMP efficiency rather than the interests of justice that may be at work.

The arguments

¹ Interview with Ray Hadley, <http://minister.homeaffairs.gov.au/peterdutton/Pages/Had-Inf.aspx>

² <https://startsat60.com/news/crime/david-degning-grandpa-deported-back-to-britain>

1. The Minister's power to cancel visas under s501(3) on criminal grounds should be repealed.

Visa cancellation decisions have severe consequences. Under section 503, the consequences that follow the decision of the Minister that a person fails the character test are that the person is not entitled to enter Australia, or to remain here. The person is detained and then deported, or if that is not possible (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless), may be kept in detention for long periods, or even for life.³

Such momentous decisions should be subject to full merits review. It is wrong that a single man should be able to condemn a person to life in a detention centre, when no one can do anything about it.

However, there is no such appeal from decisions made under subsection 501(3)—subsection 501CA(7) prohibits appeals against those decisions.⁴ Moreover, subsection 501(5) denies a visa applicant natural justice.

There is no legitimate justification for allowing the Minister to be able to exercise such dictatorial powers.

The situation is similarly intolerable with sections 501A and 501B—those sections also exclude appeals on the merits to the AAT, and deny natural justice.

The Minister routinely exercises these powers personally, apparently to avoid merits review in the AAT. But it is completely unrealistic to think that the Minister's workload allows a proper personal scrutiny—especially after the recent reorganisation of Federal Departments.

These powers should be stripped from the Minister, leaving only those provided in subsections (1) and (2), so that appeals to the AAT are always available.

2. The power of the Minister to overturn a decision made by the AAT should be removed.

At present, decisions made by the Minister or his delegates under subsections 501(1) and (2) can be appealed to the Administrative Appeals Committee. But under s.501A the Minister can overturn a decision by the AAT to grant a visa, and rescind the visa. Under section 501J, the Minister can also overturn an AAT decision, to refuse a visa or to grant one, and provide an outcome more favourable to the visa applicant. There is no appeal on the merits against these new decisions.⁵

These powers set the Minister above the law—they are contrary to the rule of law; and so to the basic values of any democratic society.

A clear example of misuse of this power is as follows:

Jagdeep Singh was a taxi driver, who was convicted of indecent assault of an adult female. He was not given a sentence of imprisonment, but an eighteen month corrections order, indicating that the magistrate did not consider him a danger to the community, and that the offence, though serious, did not warrant a jail sentence.

³ It should not be forgotten that indefinite detention leads to mental illness and suicide attempts.

⁴ This provision thus differs from the previous two.

⁵ See subsection 501A(7).

Nevertheless, his visa was cancelled by a delegate of the Minister. Justice Logan of the AAT overruled that decision, on the grounds that Mr. Singh needed only six weeks to get his affairs in order—arrangements for his children, to sell his unit, collect papers from a university and so forth—matters his wife could not handle owing to her working full-time. Mr. Singh, moreover, had already started to prepare for his return to India.

The affair was the subject of near adverse comment in certain sections of the media. Then the Minister got involved, and overrode the decision of the AAT.

It is hard to fathom what motivated him that would in any way do him credit. There is no necessary connection between a person committing a crime and a requirement that he be deported. There was no benefit to Australian society. Any deterrent effect was already considered by the magistrate.

No breach of Australia's borders was involved. And there is absolutely no connection between the Minister's decision and discouraging people from getting on boats and risking drowning.

At best this was a mindless, fundamentalist, adherence to an unjustifiable policy—beyond its intended bounds. At worst, it was motivated by a desire to “get back”—vindictive vengeance.

There are reasons for the rule of law. Ministers are prone to making wrong decisions, especially where public opinion has been aroused. They are subject to pressures. They can be ill-informed. They can be overly sure of their own wisdom, or that of their advisors. And of course, Ministers can act corruptly.

The temptation of a Minister or his or her advisors to use the character test for purposes other than keeping notorious criminals out of Australia in the first place was made plain by the Haneef case.⁶ It is precisely to balance these concerns that judges are appointed with protected tenure and given the power to overturn biased and prejudiced decisions.

Individual Ministers, suffering from none of these defects, may chafe at the restrictions placed by the rule of law on what they believe to be the best course of action. But even if the courts and tribunals sometimes get it wrong too, justice, fairness and the public good are best served by a system which places curbs on executive power.

3. The power to cancel a visa on character grounds should be wound back significantly, so that it is not available in the case of persons who have been absorbed into the Australian community even though they have not formally taken citizenship.

There are three reasons for this.

i. If a person becomes a criminal after a significant period on Australia, it is Australia's obligation to deal with the matter. For we have allowed the person to become a criminal—there has been a

⁶ The then Minister for Immigration was wrong. Those officers of the Australian Federal Police who advised him were wrong. The members of the then Department of Immigration who advised him were either wrong, or acceded to his demands without managing to show him we was wrong. None of them knew what every regular shopper in a supermarket knew, that SIM cards were widely and cheaply available. And when these things were pointed out to the Minister and a court granted Dr. Haneef bail, the Minister used the character test in s. 501 to wreck his reputation and have him deported. That is, the minister refused to admit, or could not be persuaded, that he was wrong.

failure of our education system, of the processes of support for immigrants, or those of support for families.⁷

Under paragraphs 501(6)(a) and 501(7)(c), a person may have been convicted of several minor crimes; but the sentences add up to a year. In that case, there has been a failure of our criminal justice system, too. For it is its function to ensure, as far as possible, that a criminal does not reoffend.

ii. It is quite unjust for another country to be required to deal with the consequences of our own failures.

CCL has a current matter involving cancellation of a visa for a 57 year old who came to Australia as a 7 year old child, and has not been out of the country since then. There have been other extraordinary cases. For example, Robert Jovicic lived in Australia since he was two years old. After living here for 36 years, and in the latter part of that being repeatedly convicted of crimes related to his heroin addiction, he was deported to Serbia even though he could not speak Serbo-Croat, and had no means of support there. He became destitute. Stefan Nystrom, who had lived in Australia since he was 27 days old, was deported to Sweden after committing serious offences, many of them as a minor. Sending such people out of the country is absurd. And wrong.

One might ask, what had Sweden and Serbia done, to be required to accept people who only became criminals in Australia? Why is New Zealand treated so badly by being forced to accept Jacob Symonds, who lived in Australia since he was one, or Alex Viane, who never set foot in New Zealand? It is on our watch that these people became criminals. We have an obligation to deal with such cases ourselves.

iii. The habit of deporting people to other countries when they have become criminals in Australia is bad for international relations.

iv. When a person is convicted of a crime, the court passes sentence, taking into account of the relevant circumstances, the need for deterrence, the need to protect the community, the prospects of rehabilitation and so forth. The court metes out justice.

It follows: further action to punish the person by determination of the Minister is, of necessity, unjust.⁸

4. There should be a universal guarantee of legal representation for persons whose visas are to be cancelled.

The High Court held, in *Dietrich v The Queen*,⁹ that there is an entitlement to legal representation wherever a defendant has a serious case to answer and there is a reasonable chance of a not guilty verdict. According to the court, trial judges should use their power to adjourn cases until representation is provided—and this is in the interests of fairness.

Similarly, subsection 69(c) of the Judiciary Act 1903 guarantees to defendants the right of defence by legal counsel.

⁷ It is of note that support for people who have been found to be refugees is being cut back this month.

⁸ It could be seen as vindictive.

⁹ *Dietrich v The Queen* [1992] HCA 57

The decision to revoke a person's visa, with its consequences of detention and deportation, is at least as grave a matter as any criminal trial—more so than most such trials. The Migration Act is highly complex, and is not readily understood, especially by a person unfamiliar with Australia's laws and systems. A person who is subject to detention and deportation is entitled to raise such objections as are legally available, and accordingly, as a matter of fairness, to have professional advice as to how to proceed.

Above all, legal representation should be permitted in the AAT on merits appeals.

5. Further faults in section 501

i. Subsection 501(7) should be substantially modified. This subsection defines 'substantial criminal record', which is one of the grounds for visa cancellation.

It is to be remembered, first, that the court imposed sentences which are referred to, and which are used to justify the cancellation of a visa, include those passed by overseas courts. (Hence the reference to the death penalty, which has been abolished in Australia.) There is no requirement that the crime is one recognised in Australian legislation, nor that the penalty is commensurate with Australian penalties. Since people can be condemned to death for activities which are not crimes at all in Australia, such as homosexual activity, the subsection should be re-written.

ii. Paragraph 501(7)(c) provides that a person has a substantial criminal record if they have been sentenced to one year's imprisonment, and so fail the character test. Given that the year may be made up by several shorter sentences,¹⁰ this is much too short. A person may accrue such a sentence record from shoplifting, or a single graffiti offence, or driving while disqualified. Or if a state re-introduces a three-strike law, three utterly trivial offences may be enough to trigger the jail term. The period should be increased, at least to five years.

iii. No account is taken, in section 501, of the situation of a person who has received a suspended sentence. Accordingly, persons who have received such sentences are taken to have failed the character test, and have had their visas cancelled. This is anomalous, and should be corrected. In such cases the courts have decided that it is appropriate for the convicted persons to remain in the community. By what logic is it determined that they are not fit to stay in the country?

iv. The long subsection 501(6) also goes far too far. Subparagraph 501(6)(c)(ii) allows the cancellation of a visa 'having regard to...the person's past and present general conduct'. The expression is vague, and ambiguous. It allows a minister who has taken a set against a person to cancel the person's visa if he or she has, for example, become a political embarrassment. The subparagraph should be deleted.

v. Subparagraph 501(6)(d)(iii) combined with paragraph 501(11)(b) allow cancellation if a person merely threatens damage to another person's property. This criterion should be repealed.

vi. Subparagraph 501(6)(d)(iv) allows cancellation if there is a mere risk that the person would incite discord in the community. It may be that the insertion of the risk of inciting discord is meant to allow the Minister to prevent someone with repulsive views entering Australia—a strident holocaust denier, for example, or a militant racist, and not, a Yazidi person, whose religion is considered outrageous by some Muslims and some Christians.¹¹ If that is the reason, it should be

¹⁰ Because of subsection (d)

¹¹ They are supposed, falsely, to worship the devil.

specific: it should allow the Minister to prevent a person from entering the country, but it should not allow him to strip a visa from an asylum seeker or refugee already here.

6. Proving that a person passes the character test.

Subsections 501(1) and (2) allow a visa holder or applicant to attempt to satisfy the Minister that he or she passes the character test. But how are persons to prove that they do not have a criminal record in their countries of origin; that their past conduct does not show that their character is suspect, that they have no association with criminal groups, and that there is no significant risk that they will incite discord or threaten other people's property? In particular, how is a refugee to demonstrate these things in the face of hatred and lies from the authorities in their own countries, or refusal to provide documentation? Certainly persons subject to visa cancellation or denial should have the opportunity to demonstrate that the Minister is mistaken, both before he makes a decision and at the AAT. But what they have to prove must be achievable. Could any member of parliament prove all these things? Do they not all incite discord?

7. Ideally, the 18 sections should be repealed in their entirety.

As argued above,¹² the use of the character test, with its consequence that persons are deported or held in detention indefinitely is necessarily unjust.

However, if the test is to stay, all the above problems should be dealt with, and the decision as whether a person has failed the character test should not be able to be made by the Minister.

¹² In section 3.