Australian Human Rights Commission

everyone, everywhere, everyday

Background paper: Immigration detention and visa cancellation under section 501 of the Migration Act

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1 Introduction

Under section 501 of the *Migration Act 1958* (Cth) (Migration Act), a non-citizen's visa may be cancelled if they do not satisfy the Minister for Immigration and Citizenship (the Minister) or the Minister's delegate that they pass the 'character test'.

Visa cancellation can have serious consequences including being placed in immigration detention, being removed from Australia, being prohibited from returning to Australia and being separated from family and friends.

The Australian Human Rights Commission (the Commission) is concerned about impacts on the human rights of people whose visas are cancelled under section 501, many of whom spend lengthy periods in immigration detention. These people (referred to in parts of this paper as 'section 501 detainees') are often long-term permanent residents of Australia.

This background paper sets out some basic information about the process of visa cancellation under section 501, and raises some human rights concerns about the process and its consequences.

For further information on immigration detention and human rights more generally, see the Commission's webpage on immigration detention and human rights.[1]

2 Who are section 501 detainees?

A section 501 detainee is a non-citizen being held in immigration detention because their visa has been cancelled on character grounds under section 501 of the Migration Act.

During the 2008-2009 financial year, 86 people had their visas cancelled on character grounds.[2] As of December 2009, there were 21 people in immigration detention whose visas had been cancelled under section 501.[3]

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[1] Available at http://humanrights.gov.au/human_rights/immigration/detention_rights.html.
[2] Department of Immigration and Citizenship, *Annual Report 2008-09* (2009), p 35. At http://www.immi.gov.au/about/reports/annual/2008-09/ (viewed 7 January 2010).

Often, a person's visa is cancelled under section 501 because they have been convicted of a criminal offence. In such cases, usually the person's visa is cancelled when they are near the end of serving their prison sentence. On completion of their prison sentence, they are placed in immigration detention. However, it is important to note that they are *not* placed in immigration detention because they have been convicted of an offence; they are placed in immigration detention because they no longer hold a valid visa.

Some section 501 detainees spend months, or even years, in immigration detention while they attempt to challenge the decision to cancel their visa, while travel documents are arranged, or while a claim for a protection visa is assessed. The Commonwealth Ombudsman has observed that it is not uncommon for section 501 detainees to spend more time in immigration detention than they did in prison.[4]

Many of these people are long-term permanent residents of Australia. Often they came to Australia as a child and lived here for many years before their visa was cancelled. They may have strong ties to the Australian community including family, friends, jobs and homes. Some of them have Australian partners or spouses, and some have children who are Australian citizens or were born in Australia.

For example, according to figures provided by the Minister to the Senate, of 25 people in immigration detention as of May 2008 whose visas had been cancelled under section 501, all but one of them had lived in Australia for more than 11 years. Seventeen of them had lived in Australia for more than 20 years. The majority of them were 15 years old or younger when they first arrived in Australia.[5]

3 When can a person's visa be cancelled under section 501?

3.1 Cancellation under section 501(2)

A person's visa may be cancelled under section 501(2) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test and
- the person does not satisfy the Minister that they pass the character test.

This power can be exercised by the Minister personally, or by a delegate of the Minister. In practice, certain DIAC officers act as the Minister's delegate in making such decisions.

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[3] Information provided by the Department of Immigration and Citizenship in January 2010 indicated that as of 4 December 2009, there were 21 people in immigration detention whose visas had been cancelled under section 501 of the Migration Act.
[4] Commonwealth and Immigration Ombudsman, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), p 11. At http://www.aph.gov.au/house/committee/mig/detention/subs/sub126.pdf (viewed 7 January 2010).
[5] Question 423, Senate Hansard (17 June 2008), pp 2625-2626. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (viewed 7 January 2010).

If the Minister – or a DIAC officer acting as the Minister's delegate – determines that a person does not pass the section 501 character test, the person's visa is not automatically cancelled. The Minister or the DIAC officer must first decide whether to exercise their discretion to cancel the person's visa.

The factors considered by DIAC officers in making those decisions are outlined in section 5 below. The exercise of the Minister's powers under section 501 is discussed in section 8.6 below.

3.2 Cancellation under section 501(3)

A person's visa may be cancelled under section 501(3) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test and
- the Minister is satisfied that the cancellation is in the national interest.

This power can only be exercised by the Minister personally. 'National interest' is not defined – it is a matter for the Minister to determine what constitutes the national interest in making a decision about whether to cancel a person's visa.

The exercise of the Minister's powers under section 501 is discussed further in section 8.6 below.

4 What is the character test?

Under section 501(6) of the Migration Act, a person does not pass the character test if they fall within any of the grounds specified in sub-sections 501(6) (a) to (d). These grounds can be grouped into four broad categories:

- substantial criminal record
- association with criminal conduct
- past and present criminal or general conduct
- significant risk of particular types of future conduct.[6]

Each of these categories is discussed briefly below. Further guidance on the interpretation and application of these grounds is contained in Ministerial Direction No. 41, which commenced on 15 June 2009.[7] This replaced Ministerial Direction No. 21, which had been in place since August 2001.[8]

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[6] *Migration Act 1958* (Cth), s 501(6).
[7] *Direction [no. 41] - Visa refusal and cancellation under s501*, given under section 499 of the *Migration Act 1958* (Cth) and signed on 3 June 2009. At http://www.immi.gov.au/media/fact-sheets/79-ministerial-direction-41.pdf (viewed 7 January 2010).
[8] *Direction No. 21: Visa Refusal and Cancellation under Section 501 of the Migration Act*, given under section 499 of the *Migration Act 1958* (Cth) and signed on 23 August 2001. At http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/BE93926FBFFD92BDCA257098001B54A2/$file/COPYDirection+21+(character).doc (viewed 7 January 2010).

Ministerial Direction No. 41 applies to visa cancellation decisions made by DIAC officers under section 501.[9] It does not apply to decisions made by the Minister personally – the Minister may refer to the Direction, but is not obliged to follow it.

4.1 Substantial criminal record

Under section 501(6)(a) of the Migration Act, a person does not pass the character test if they have a 'substantial criminal record' as defined in section 501(7). For the purposes of the character test, a person has a 'substantial criminal record' if they have been:

- sentenced to death or to imprisonment for life
- sentenced to imprisonment for 12 months or more
- sentenced to two or more terms of imprisonment where the total of these terms is two years or more
- acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result they have been detained in a facility or institution.[10]

Where a person has a 'substantial criminal record' as defined in section 501(7), they automatically fail the character test regardless of whether there are mitigating factors. However, mitigating factors may be taken into account when the decision-maker considers whether or not to exercise their discretion to cancel the person's visa, as discussed in section 5 below.

4.2 Association with criminal conduct

Under section 501(6)(b) of the Migration Act, a person does not pass the character test if the person 'has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'.[11]

Ministerial Direction No. 41 requires that, in establishing 'association' for the purposes of the character test, decision-makers are to consider:

- the nature of the association
- the degree and frequency of association the person had or has with the individual, group or organisation and
- the duration of the association.[12]

Ministerial Direction No. 41 also requires decision-makers to assess whether the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation. Mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association. The association must have some

[9] Ministerial Direction No. 41, note 7, para 4(1).
[10] *Migration Act 1958* (Cth), s 501(7).
[11] *Migration Act 1958* (Cth), s 501(6)(b).
[12] Ministerial Direction No. 41, note 7, para 7.2(2).

negative bearing upon the person's character in order for the person to fail the character test on this ground.[13]

4.3 Past and present criminal or general conduct

Under section 501(6)(c) of the Migration Act, a person does not pass the character test if, having regard to the person's past and present criminal conduct and/or their past and present general conduct, the person is 'not of good character'.

In considering whether a person is 'not of good character', Ministerial Direction No. 41 requires decision-makers to take into account 'all the relevant circumstances of the particular case', including 'evidence of rehabilitation and any recent good conduct'.[14] The Direction provides that 'both good and bad conduct must be taken into consideration in obtaining a complete picture of the person's character'.[15]

In determining whether a person's past or present *criminal conduct* means that they are 'not of good character', decision-makers are to consider:

- the nature, severity and frequency of the offence/s
- the period since the offence/s were committed
- where the offence/s were committed
- the person's record since the offence/s were committed (including any evidence of recidivism or continuing association with criminals; any pattern of similar offences; or any pattern of continued or blatant disregard or contempt for the law)
- any surrounding circumstances which may explain the conduct and
- any good acts of the person after their criminal conduct.[16]

In determining whether a person's past or present *general conduct* means that they are 'not of good character', decision-makers are to consider, amongst other things:

- whether the person has been involved in activities which show contempt or disregard for the law or human rights (which may include activities where a conviction was not recorded or where the person's conduct did not, strictly speaking, constitute an offence)
- whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal or deportation

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[13] Ministerial Direction No. 41, note 7, para 7.2(3). It should be noted that the 'association' test under Ministerial Direction No. 41 is significantly different to the test under the former Ministerial Direction No. 21, which was much broader. Ministerial Direction No. 21 was considered by the Full Federal Court of Australia in respect of the visa cancellation of Dr Mohamed Haneef in 2007. In the view of the Court, the guidance in Ministerial Direction No. 21 ran 'far too wide', particularly in respect of failing to require the establishment of sympathy, support for, or involvement in criminal activity. See *Minister for Immigration & Citizenship v Haneef* [2007] 163 FCR 414, [135].
[14] Ministerial Direction No. 41, note 7, para 7.3(2).
[15] Ministerial Direction No. 41, note 7, paras 7.3.1(1), 7.3.2(4).
[16] See further Ministerial Direction No. 41, note 7, para 7.3.1.

- whether the person has been dishonourably discharged or discharged prematurely from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct, that in Australia would be regarded as serious.[17]

4.4 Significant risk of particular types of future conduct

Under section 501(6)(d) of the Migration Act, a person does not pass the character test if there is a significant risk that, while in Australia, the person would:

- engage in criminal conduct
- harass, molest, intimidate or stalk another person
- vilify a segment of the Australian community
- incite discord in the Australian community or in a segment of the community or
- represent a danger to the Australian community or to a segment of the community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Ministerial Direction No. 41 provides that these 'significant risk' grounds are 'enlivened' if there is evidence suggesting that there is more than a minimal or trivial likelihood that the person would engage in such conduct.[18] It is not sufficient to find that the person has engaged in such conduct in the past – there must be a significant risk that the person would engage in such conduct in the future.[19]

Ministerial Direction No. 41 also states that the final three grounds set out above must be balanced against Australia's 'well established tradition of free expression'. The Direction states that these grounds are not intended to be used in order to deny entry or continued stay of persons merely because they hold and are likely to express unpopular opinions, even if those opinions may attract strong expressions of disagreement and condemnation from some elements of the Australian community.[20]

5 What does DIAC consider before cancelling a visa?

If a DIAC officer determines that a person does not pass the section 501 character test, the person's visa is not automatically cancelled. The DIAC officer must first decide whether to exercise their discretion under section 501 to cancel the person's visa.

[17] See further Ministerial Direction No. 41, note 7, para 7.3.2. Conduct considered to be serious in Australia is set out in paragraph 10.1.1 of the Direction.
[18] Ministerial Direction No. 41, note 7, para 7.4(2).
[19] Ministerial Direction No. 41, note 7, para 7.4(3). See further paras 7.4.1-7.4.3.
[20] Ministerial Direction No. 41, note 7, para 7.4.3(2).

In making that decision, the DIAC officer is required to consider a number of factors, as set out in Ministerial Direction No. 41.[21] The Ministerial Direction includes a range of primary considerations which must be taken into account in every case.[22] It also includes a range of other considerations, which should be taken into account where relevant.[23] An overview of these considerations is provided below.

As noted above, the Ministerial Direction applies to visa cancellation decisions made by DIAC officers under section 501. It does not apply to decisions made by the Minister personally – the Minister may refer to the Direction, but is not obliged to follow it.

5.1 Primary considerations

Ministerial Direction No. 41 provides that, in deciding whether to cancel a person's visa under section 501, the following primary considerations must be taken into account:[24]

- the protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence[25]
- whether the person was a minor when they began living in Australia[26]
- the length of time the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct[27]
- relevant international obligations, including but not limited to:
    - the best interests of the child, as described in the Convention on the Rights of the Child[28]
    - the *non-refoulement* obligations contained in the Convention and the Protocol Relating to the Status of Refugees,[29] the International

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[21] Ministerial Direction No. 41, note 7, Part B. Ministerial Direction No. 41 replaced Ministerial Direction No. 21, which had been in place since August 2001. See Ministerial Direction No. 21, note 8.
[22] Ministerial Direction No. 41, note 7, paras 9(1), 10.
[23] Ministerial Direction No. 41, note 7, paras 9(1), 11.
[24] Ministerial Direction No. 41, note 7, para 10(1).
[25] Further guidance on assessing the level of risk of harm to the community is provided in Ministerial Direction No. 41, note 7, paras 10.1, 10.1.1 and 10.1.2. This includes assessing the seriousness and nature of the relevant conduct, and the risk that the conduct may be repeated.
[26] See further Ministerial Direction No. 41, note 7, para 10.2.
[27] See further Ministerial Direction No. 41, note 7, para 10.3. This paragraph includes a note stating that a period of more than ten years of residence in Australia prior to a person engaging in criminal activity or activity which bears negatively on the person's character would be 'an important consideration'.
[28] *Convention on the Rights of the Child* (CRC) (1989). At http://www2.ohchr.org/english/law/crc.htm (viewed 8 January 2010). See further Ministerial Direction No. 41, note 7, para 10.4.1 (for further guidance on considerations relating to the best interests of the child).
[29] *Convention relating to the Status of Refugees* (1951), at http://www2.ohchr.org/english/law/refugees.htm (viewed 8 January 2010); *Protocol relating to the Status of Refugees* (1967), at http://www2.ohchr.org/english/law/protocolrefugees.htm (viewed 8 January 2010). See further Ministerial Direction No. 41, note 7, para 10.4.2 (for further guidance on considerations relating to the Refugee Convention).

Covenant on Civil and Political Rights[30] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[31]

5.2 Other considerations

Ministerial Direction No. 41 sets out a range of other considerations that may be relevant and, if so, must be taken into account in determining whether to cancel a person's visa under section 501.[32] These considerations are generally to be given less weight than the primary considerations set out above.[33]

These other considerations include:

- family ties, and the nature and extent of any relationships[34]
- the person's age[35]
- the person's health[36]
- any links to the country to which they would be removed[37]
- hardship likely to be experienced by the person or their immediate family members lawfully resident in Australia[38]
- the person's level of education[39]
- whether the person has been formally advised in the past by DIAC about conduct that brought the person within the deportation or character provisions of the Migration Act.[40]

Paragraph 11(3) of Ministerial Direction No. 41 sets out further details about each of these 'other considerations'.

6 What are the consequences of visa cancellation?

When a person's visa is cancelled under section 501 of the Migration Act:

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[30] *International Covenant on Civil and Political Rights* (ICCPR) (1966). At http://www2.ohchr.org/english/law/ccpr.htm (viewed 8 January 2010). See further Ministerial Direction No. 41, note 7, para 10.4.3 (for further guidance on considerations relating to *non-refoulement* obligations under the ICCPR).
[31] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (1984). At http://www2.ohchr.org/english/law/cat.htm (viewed 8 January 2010). See further Ministerial Direction No. 41, note 7, para 10.4.3 (for further guidance on considerations relating to *non-refoulement* obligations under the CAT).
[32] Ministerial Direction No. 41, note 7, paras 11(1) and 11(3). See also para 9(1).
[33] Ministerial Direction No. 41, note 7, para 11(2).
[34] See further Ministerial Direction No. 41, note 7, para 11(3)(a).
[35] See further Ministerial Direction No. 41, note 7, para 11(3)(b).
[36] See further Ministerial Direction No. 41, note 7, para 11(3)(c).
[37] See further Ministerial Direction No. 41, note 7, para 11(3)(d).
[38] See further Ministerial Direction No. 41, note 7, para 11(3)(e).
[39] See further Ministerial Direction No. 41, note 7, para 11(3)(f).
[40] See further Ministerial Direction No. 41, note 7, para 11(3)(g).

- if they do not hold another visa, they become an unlawful non-citizen[41]
- if they do hold another visa, that visa will be deemed to be cancelled (unless it is a protection visa or another type of visa specified in the Migration Regulations), in which case the person becomes an unlawful non-citizen.[42]

Under the Migration Act, as an unlawful non-citizen, the person must be taken into immigration detention and be detained until they are either granted a visa or removed from Australia.[43]

During the 2007-2008 financial year, 65 people were removed from Australia after their visa was refused or cancelled under section 501.[44] As of December 2009, there were 21 people in immigration detention whose visas had been cancelled under section 501.[45]

In addition to being detained and possibly removed from Australia, a person whose visa is cancelled under section 501 is subject to:

- a ban on applying for another visa (other than a protection visa or a removal pending bridging visa) while in Australia[46]
- permanent exclusion from Australia if their visa was cancelled because of a substantial criminal record, past and present criminal conduct, or a combination of past and present criminal and general conduct.[47]

7 Can a person seek review of their visa cancellation?

The extent to which a person can seek review of a decision to cancel their visa under section 501 depends on whether the decision was made by DIAC or by the Minister.

7.1 Merits review

A decision made by a DIAC officer to cancel a person's visa under section 501 is subject to merits review by the Administrative Appeals Tribunal (AAT), while a decision made by the Minister personally is not.[48]

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[41] *Migration Act 1958* (Cth), ss 13,14.
[42] *Migration Act 1958* (Cth), ss 13,14, 501F(3).
[43] *Migration Act 1958* (Cth), ss 189(1), 196(1).
[44] Department of Immigration and Citizenship, *Annual Report 2007-08* (2008), p 31. At http://www.immi.gov.au/about/reports/annual/2007-08/ (viewed 8 January 2010).
[45] Information provided by the Department of Immigration and Citizenship in January 2010 indicated that as of 4 December 2009, there were 21 people in immigration detention whose visas had been cancelled under section 501 of the Migration Act.
[46] *Migration Act 1958* (Cth), s 501E. Under s 501E(2), a person may still apply for a protection visa or a visa specified in the Migration Regulations. At the time of writing, the only visa specified in the Regulations was the subclass 070 Bridging (Removal Pending) visa.
[47] *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c).
[48] *Migration Act 1958* (Cth), s 500(1)(b).

When conducting a merits review, the AAT reviews the original DIAC decision and determines if it is the correct or preferable decision. The AAT can affirm, overturn or vary the original decision.[49]

However, if the AAT decides not to exercise the power to cancel a person's visa, in certain circumstances the Minister may set that decision aside and cancel the person's visa.[50]

The Minister also has the power, in certain circumstances, to set aside an original DIAC decision to cancel a person's visa,[51] or an original DIAC decision to refrain from cancelling a person's visa.[52] The Minister can then substitute the original decision with his or her own decision to cancel the person's visa. The Minister can do this even if the person has applied to the AAT for review of the original DIAC decision to cancel their visa.[53]

As noted above, if the Minister personally decides to cancel a person's visa, the Minister's decision is not subject to review by the AAT.

7.2 Judicial review

Judicial review is restricted to reviewing the lawfulness of an administrative decision, rather than considering whether it was the correct decision (unless the decision was so unreasonable that no reasonable person could have made it).

All decisions to cancel a person's visa under section 501, whether made by a DIAC officer or by the Minister personally, may be subject to judicial review by the Federal Court or the High Court of Australia.

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[49] *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).
[50] *Migration Act 1958 (Cth)*, ss 501A(1)(b), 501A(1)(d), 501A(2), 501A(3). Under section 501A(2), the Minister may set aside the AAT's decision and cancel the person's visa if: the Minister reasonably suspects that the person does not pass the section 501 character test; the person does not satisfy the Minister that they pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest. Under section 501A(3), the Minister may set aside the AAT's decision and cancel the person's visa if: the Minister reasonably suspects that the person does not pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest.
[51] *Migration Act 1958 (Cth)*, ss 501B(1), 501B(2). Under section 501B the Minister may set aside a DIAC decision to cancel a person's visa under section 501(2) and substitute it with his or her own decision to cancel the person's visa if: the Minister reasonably suspects that the person does not pass the section 501 character test; the person does not satisfy the Minister that they pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest.
[52] *Migration Act 1958 (Cth)*, ss 501A(1)(a), 501A(1)(d), 501A(2), 501A(3). Under section 501A the Minister may set aside a DIAC decision to refrain from exercising the power to cancel a person's visa under section 501(2) and substitute it with his or her own decision to cancel the person's visa. The Minister may do so under section 501A(2) if: the Minister reasonably suspects that the person does not pass the section 501 character test; the person does not satisfy the Minister that they pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest. Alternatively, the Minister may do so under section 501A(3) if: the Minister reasonably suspects that the person does not pass the section 501 character test; and the Minister is satisfied that the cancellation is in the national interest.
[53] *Migration Act 1958 (Cth)*, s 501B(5).

The privative clause in section 474(1) of the Migration Act, however, significantly restricts the availability of judicial review in respect of decisions made under the Act. The effect of the privative clause is that judicial review is only available in respect of decisions that may be affected by 'jurisdictional error'.[54] For example, this might be the case if the decision-maker relied on irrelevant material or ignored relevant material.

If a court finds that a visa cancellation decision was tainted by jurisdictional error, the court can set aside the original decision and return the case to the decision-maker to be reconsidered.

8 Human rights issues raised by section 501 visa cancellation

The Commission has a range of concerns about impacts on the human rights of people whose visas are cancelled under section 501 of the Migration Act. In many cases, these people were long-term permanent residents of Australia prior to their visa being cancelled. Often, they spend lengthy periods in immigration detention after their visa cancellation.

While some people have their visa cancelled because of a serious criminal conviction, they are entitled – like anyone else in Australia – to have their human rights protected.

The Commission's major concerns are outlined in the sub-sections below. These concerns relate to the following issues:

- the impact of visa cancellation on long-term permanent residents
- compliance with Australia's *non-refoulement* obligations under international law
- the obligation to treat the best interests of the child as a primary consideration in all actions concerning the child
- the right to respect for privacy, family and home life
- prolonged and indefinite detention
- the broad nature of the Minister's powers under section 501 and limited review of the Minister's decisions
- people acquitted of an offence on the grounds of unsoundness of mind or insanity.

8.1 Impact of visa cancellation on long-term permanent residents

Section 501 of the Migration Act has increasingly been used to cancel the visas of long-term permanent residents – that is, people who have lived in Australia for more

[54] *Plaintiff S157/2002 v Godwin* (2003) 211 CLR 476 at 506.

than ten years.[55] For example, of 25 people in immigration detention as of May 2008 whose visas had been cancelled under section 501, all but one of them had lived in Australia for more than 11 years. Seventeen of them had lived in Australia for more than 20 years. The majority of them were 15 years old or younger when they first arrived in Australia.[56]

Long-term permanent residents who have their visas cancelled may be removed from Australia and sent to a country where they have hardly ever, or never, lived; where they do not speak the language; and where they have few or no social or family connections. They may also face separation from their children, family and friends in Australia.

The Commonwealth Ombudsman has suggested that the use of section 501 to cancel the visas of long-term permanent residents goes beyond the original intention of the provision.[57] Nevertheless, since 1998, section 501 has been used to cancel the visas of residents of more than ten years. These are two examples:

Example 1: Mr J had lived in Australia for 36 years, since the age of two. He had an Australian de facto wife and a sister who was an Australian citizen. However, after going to prison for a number of burglaries, the then Immigration Minister cancelled his permanent resident visa and he was removed from Australia in June 2004 to Serbia – a country in which he had never lived, with a language he did not speak. He was not born in Serbia. The Serbian government refused to recognise him as a citizen, thereby leaving him stateless with no right to work or welfare. He was eventually allowed to return to Australia on compassionate grounds after camping outside the Australian embassy in Belgrade in winter, with no home and no job.[58]

Example 2: Mr X had lived in Australia for almost 30 years and had paranoid schizophrenia. After serving a seven year jail sentence, he was removed from Australia in 2003, despite the AAT setting aside the order for his removal on grounds of his medical history and mental health concerns.[59] His parents lived in Australia. He was removed from Australia to Turkey and became homeless on the streets of Ankara. He was eventually allowed to return to Australia after the Federal Court found that he held a valid resident visa and should be returned.[60]

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[55] Commonwealth Ombudsman, *Administration of s501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006 (2006), para 2.10. At http://www.ombudsman.gov.au/files/investigation_2006_01.pdf (viewed 8 January 2010).
[56] Question 423, Senate Hansard (17 June 2008), pp 2625-2626. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (viewed 7 January 2010).
[57] Commonwealth Ombudsman, note 55, para 2.10.
[58] See 'Plea for stateless brother', *The Sydney Morning Herald* (24 November 2005). At http://www.smh.com.au/articles/2005/11/24/1132703280426.html (viewed 8 January 2010). Mr J was initially granted a temporary special purpose visa, then finally granted a permanent resident visa in 2008. See Senator C Evans, Minister for Immigration and Citizenship, 'Permanent visa granted to Robert Jovicic' (Media Release, 23 February 2008). At http://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm (viewed 8 January 2010).
[59] *Tastan and Minister for Immigration and Multicultural Affairs* [1999] AATA 276 (23 April 1999).
[60] See ABC Radio National, The Law Report, *Deporting non-citizen criminals* (14 November 2006), at http://www.abc.net.au/rn/lawreport/stories/2006/1784837.htm (viewed 30 June 2009); J Topsfield,

Since Ministerial Direction No. 41 came into force in June 2009, the length of time a person has been ordinarily resident in Australia is now a primary consideration for DIAC when deciding whether to cancel the person's visa under section 501.[61] A further primary consideration is whether the person was a minor when they began living in Australia.[62] In addition, Ministerial Direction No. 41 acknowledges that:

> In some circumstances it may be appropriate for the Australian community to accept more risk where the person concerned has, in effect, become part of the Australian community owing to their having spent their formative years, or a major portion of their life, in Australia.[63]

This is an improvement compared to the previous Ministerial Direction No. 21, under which the length of time a person had lived in Australia was not specified as a consideration.[64] However, under the new Ministerial Direction No. 41, it is only the length of time the person resided in Australia *before* engaging in criminal activity or other relevant conduct that must be considered – not their total length of time in Australia.

Regardless of the improved Ministerial Direction No. 41, long-term permanent residents may still have their visas cancelled under section 501. While decision-makers are to give 'favourable consideration' to people who were minors on their arrival in Australia and to people who lived in Australia for a long time before engaging in criminal activity or activity that bears negatively on their character,[65] DIAC may still decide to cancel such a person's visa based on other considerations.[66] Further, the Minister is not bound to follow the requirements set out in Ministerial Direction No. 41 when making visa cancellation decisions personally.

The Commission raised concerns about the visa cancellation and immigration detention of long-term permanent residents in its 2008 submission to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia.[67] In that submission, the Commission recommended that the Australian Government should review the operation of section 501 as a matter of priority, with the aim of excluding long-term permanent residents from the provision.[68]

'Deportee left to wander the mean streets of Ankara', *The Age* (17 December 2005), at http://www.theage.com.au/news/national/deportee-left-to-wander-mean-streets-of-ankara/2005/12/16/1134703611353.html (viewed 30 June 2009).

[61] Ministerial Direction No. 41, note 7, paras 10(1)(c), 10.3.

[62] Ministerial Direction No. 41, note 7, para 10(1)(b), 10.2.

[63] Ministerial Direction No. 41, note 7, para 5.2(4).

[64] Ministerial Direction No. 21, note 8.

[65] Ministerial Direction No. 41, note 7, paras 10.2(1), 10.3(1).

[66] Ministerial Direction No. 41, note 7, Part B.

[67] Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into immigration detention in Australia* (2008), paras 60-68. At http://humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (viewed 8 January 2010).

[68] As above, para 68 (recommendation 5).

8.2 Non-refoulement obligations under international law

(a) Refugee Convention

As a party to the Refugee Convention, Australia is obliged not to *refoule* (that is, expel or return) a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.[69] However, this *non-refoulement* obligation does not apply to a refugee if there are reasonable grounds for regarding that person as a danger to Australia's security, or to a refugee who, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the Australian community.[70]

In some cases, the grounds under which a person may be excluded from the *non-refoulement* obligation under the Refugee Convention may overlap with the grounds under which a person will fail the section 501 character test under the Migration Act (for example, because they have a 'substantial criminal record'[71]).

However, some of the grounds under which a person will fail the section 501 character test are much broader than the grounds under which a person can be excluded from the *non-refoulement* obligation under the Refugee Convention. The exclusion grounds in the Refugee Convention require that a person be a danger to Australia's security or to the Australian community – whereas a person can fail the section 501 character test on grounds as general as being 'not of good character' having regard to their 'past or present general conduct'.[72]

This means that a person assessed by Australia as being a refugee could nonetheless fail the section 501 character test, leaving them open to the risk of visa cancellation and removal to a country where they could face persecution.

Under Ministerial Direction No. 41, the *non-refoulement* obligations in the Refugee Convention are a primary consideration for DIAC officers when deciding whether to cancel a person's visa under section 501.[73] These obligations must be considered where relevant.[74] This is an improvement on the former Ministerial Direction No. 21, under which *non-refoulement* obligations under the Refugee Convention were not a primary consideration.[75]

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[69] *Convention relating to the Status of Refugees*, note 29, art 33(1).
[70] *Convention relating to the Status of Refugees*, note 29, art 33(2).
[71] *Migration Act 1958* (Cth), s 501(6)(a).
[72] *Migration Act 1958* (Cth), s 501(6)(c).
[73] Ministerial Direction No. 41, note 7, para 10(1)(d)(ii).
[74] Ministerial Direction No. 41, note 7, paras 9(1), 10.4(2). See further para 10.4.2(1), under which issues of protection pursuant to the Refugee Convention must be given consideration if they are raised by the person or are clear from the facts of the case.
[75] Ministerial Direction No. 21, note 8. The three primary considerations were set out in paras 2.3-2.16. Protection issues under the Refugee Convention were not included in the primary considerations, but were one of a number of other considerations to be taken into account where relevant. See paras 2.18, 2.22-2.23.

However, a DIAC officer or the Minister may still cancel a person's visa under section 501, regardless of the *non-refoulement* obligations under the Refugee Convention. Ministerial Direction No. 41 notes this, stating:

> Notwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.[76]

(b) Other non-refoulement obligations

Australia also has *non-refoulement* obligations under the International Covenant on Civil and Political Rights (ICCPR),[77] the Convention on the Rights of the Child (CRC)[78] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[79]

These *non-refoulement* obligations mean that Australia must not return a person to a country where there are substantial grounds for believing that they face a real risk of death, torture or cruel, inhuman or degrading treatment. These obligations apply even if a person is not owed protection under the Refugee Convention.

Unlike the *non-refoulement* obligation under the Refugee Convention (discussed above), these *non-refoulement* obligations are absolute. That is, there are no situations in which the person's expulsion or removal can be justified if there are substantial grounds for believing that there is a real risk of these types of harms occurring.

Under the previous Ministerial Direction No. 21, DIAC was required to consider the *non-refoulement* obligations under the ICCPR and the CAT, where relevant, before cancelling a person's visa under section 501.[80] However, it is unclear to what extent DIAC considered these *non-refoulement* obligations in practice. For example, a 2006 report by the Commonwealth Ombudsman noted that in some of the cases investigated, the Issues Paper (which provides the basis for the DIAC decision) failed to adequately discuss the relevance of an international obligation.[81]

Under the new Ministerial Direction No. 41, relevant international obligations including Australia's *non-refoulement* obligations under the ICCPR and the CAT are a primary consideration for decision-makers in deciding whether to cancel a person's visa under section 501.[82] This places greater emphasis on the risk of *refoulement* than under the previous Ministerial Direction.

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[76] Ministerial Direction No. 41, note 7, note accompanying para 10.4. A similar statement was also included in Ministerial Direction No. 21. See Ministerial Direction No. 21, note 8, para 2.24.
[77] ICCPR, note 30, arts 6(1), 7; *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (1989), at http://www2.ohchr.org/english/law/ccpr-death.htm (viewed 11 January 2010).
[78] CRC, note 28, arts 6(1), 37(a).
[79] CAT, note 31, art 3(1).
[80] Ministerial Direction No. 21, note 8, paras 2.18-2.21, 2.24.
[81] Commonwealth Ombudsman, note 55, paras 3.41-3.45.
[82] Ministerial Direction No. 41, note 7, paras 10(1)(d), 10.4.

Ministerial Direction No. 41 acknowledges that the prohibition against *refoulement* in the ICCPR and CAT is absolute, such that:

> There is no balancing of other factors if the removal of a person from Australia, including if that removal followed as a consequence of the refusal or cancellation of a visa, would amount to refoulement under the ICCPR or the CAT.[83]

However, it also suggests that consideration of international obligations is subordinate to considerations of national interest, noting that:

> Notwithstanding international obligations, the power to refuse to grant a visa or cancel a visa must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister.[84]

8.3 The best interests of the child

Visa cancellation under section 501 may result in the separation of a parent and their child or children. If the parent's visa is cancelled, they may be taken into immigration detention and later removed from Australia. In some cases, such separation may lead to breaches of Australia's obligations under the CRC.

The CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration.[85] Further, under article 9(1) of the CRC:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Under Ministerial Direction No. 41, the best interests of the child are one of the primary considerations DIAC must take into account when deciding whether to cancel a person's visa under section 501.[86] This is positive, and in line with the CRC's requirement that the best interests of the child be a primary consideration in all actions concerning children.[87]

However, while the former Ministerial Direction No. 21 also included the best interests of the child as a primary consideration, a 2006 Commonwealth Ombudsman

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[83] Ministerial Direction No. 41, note 7, para 10.4.3(1)(c).
[84] Ministerial Direction No. 41, note 7, note accompanying para 10.4. A similar statement was also included in Ministerial Direction No. 21. See Ministerial Direction No. 21, note 8, para 2.24.
[85] Article 3(1) of the CRC states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.
[86] Ministerial Direction No. 41, note 7, paras 10(1)(d)(i), 10.4(1), 10.4.1. Note that this only applies to a child who is under 18 years of age at the time of the decision to cancel a person's visa. The best interests of a child who is 18 years or older are not a primary consideration, but may be taken into account along with other considerations.
[87] CRC, note 28, art 3(1).

report found that 'in many of the cases reviewed, assessment of the best interests of the child is characterised by a paucity of evidence and failure to determine what those best interests might be'.[88] The Ombudsman noted that, in one case reviewed, while the Minister was advised that it was open to the Minister to find that cancellation may have a detrimental effect on the person's children, the Minister nevertheless cancelled the person's visa.[89]

Example: Best interests of the child

The following example is taken from a 2006 Commonwealth Ombudsman report:

Ms NJ was born in England in 1960 and entered Australia in 1977. She had lived continuously in Australia since then, apart from six months in 1979. She has two children, who were aged nine and twelve when her visa was considered for cancellation. The Issues Paper noted that she is a sole parent, is extremely close to her children and had been in constant contact with them while in prison. The Issues Paper also noted that, although the children had spent their entire lives in Australia, health and education services in England are comparable to those in Australia, and the children would face no language and very few cultural difficulties if they were to return to England with their mother upon her removal. The Issues Paper concluded it was open to the Minister to find that cancellation may have a detrimental effect on the children. The Minister decided to cancel Ms NJ's visa.

The Commonwealth Ombudsman stated the following about this case: 'It is difficult to see how the best interests of the children have been treated as a primary consideration in the Issues Paper. There appears to have been no assessment of what the best interests of the children might be. No reference is made to the hardship resulting from separation from their father and grandparents.'[90]

8.4 Right to respect for privacy, family and home life

Under the ICCPR, all people have the right to be free from 'arbitrary or unlawful interference' with their 'privacy, family, home or correspondence'.[91] In some circumstances, a person's visa cancellation and subsequent removal from Australia could result in that right being breached.[92]

Often, people whose visas are cancelled under section 501 moved to Australia as a child and lived here for many years prior to their visa cancellation.[93] Many of them

[88] Ministerial Direction No. 21, note 8, paras 2.3(c), 2.13-2.16; Commonwealth Ombudsman, note 55, para 3.31.
[89] Commonwealth Ombudsman, note 55, para 3.35.
[90] Commonwealth Ombudsman, note 55, paras 3.35-3.36.
[91] ICCPR, note 30, art 17(1).
[92] For a relevant international example, see the judgment of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* [2008] ECHR 1638/03 (23 June 2008). There, the Court held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his family and private life.
[93] For example, according to figures provided by the Minister to the Senate, of 25 people in immigration detention as of May 2008 whose visas had been cancelled under section 501, all but one

have family members in Australia, some of whom may be long-term permanent residents or Australian citizens.

The removal of a person from Australia after their visa cancellation could result in separation from their family members who remain in the country. Alternatively, it could result in significant upheaval for family members if they leave Australia with the person whose visa has been cancelled.

A person's visa cancellation and subsequent removal may also lead to their permanent exclusion from Australia, which may prevent them from returning to visit family members who remain in the country.[94]

Cancelling a person's visa and removing them from Australia can therefore impact not only their personal right to respect for family life, but also the right to family life of their spouse, children or other dependants.

Under Ministerial Direction No. 41, family ties are a consideration that must, if relevant, be taken into account by DIAC when considering whether to cancel a person's visa under section 501.[95] Hardship likely to be experienced by the person or their immediate family members is also a consideration – this includes, among other things, whether the family members are able to travel overseas to visit the person.[96]

However, these factors are not included in the list of primary considerations in Ministerial Direction No. 41 and, according to the Direction, should generally be given less weight.[97] This could mean that a person with strong family ties in Australia nevertheless has their visa cancelled and is removed, due to conflicting or overriding considerations.[98]

8.5 Prolonged and indefinite detention

As outlined in section 6 above, a person whose visa is cancelled under section 501 becomes an unlawful non-citizen (unless they also hold a protection visa or another type of visa specified in the Migration Regulations).[99] Under the Migration Act, as an unlawful non-citizen, the person must be taken into immigration detention and be detained until they are either granted a new visa or removed from Australia.[100]

Some section 501 detainees spend months, or even years, in immigration detention while they seek review of the decision to cancel their visa, while travel documents are

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of them had lived in Australia for more than 11 years. Seventeen of them had lived in Australia for more than 20 years. The majority of them were 15 years old or younger when they first arrived in Australia. See note 5.

[94] A person whose visa is cancelled under section 501 on the grounds of either a substantial criminal record or past and present criminal conduct is permanently excluded from Australia. See *Migration Regulations 1994* (Cth), Schedule 5.

[95] Ministerial Direction No. 41, note 7, paras 11(3)(a) and 11(1).

[96] Ministerial Direction No. 41, note 7, paras 11(3)(e) and 11(1).

[97] Ministerial Direction No. 41, note 7, para 11(2).

[98] See Ministerial Direction No. 41, note 7, para 10 for the primary considerations.

[99] *Migration Act 1958* (Cth), ss 13,14, 501F(3).

[100] *Migration Act 1958* (Cth), ss 189(1), 196(1).

arranged, or while a claim for a protection visa is assessed. For example, in May 2008, of 25 people in immigration detention whose visas had been cancelled under section 501, all but one had been in detention for more than 100 days; eight had been in detention for more than 300 days; and one had been in detention for more than 1000 days.[101]

In some cases, section 501 detainees effectively become locked in limbo in detention. This may be the case where they cannot be returned to their country of origin because that country refuses to accept them, or they face a risk of danger on return. For example, during the Commission's 2008 immigration detention inspections, the Commission interviewed a section 501 detainee who had been in immigration detention for two years. He could not be returned to his country of origin because there was a risk he could face the death penalty upon return.

Holding people in immigration detention for prolonged and indefinite periods can lead to breaches of Australia's international obligations. In the past, where complaints have been submitted by individuals who have been held in detention, the Commission has found that prolonged and indefinite detention constituted arbitrary detention, in breach of article 9(1) of the ICCPR.[102]

The Commission has consistently called for an end to Australia's system of mandatory immigration detention because it leads to breaches of Australia's international human rights obligations.[103]

In July 2008, the Minister announced 'New Directions' for Australia's immigration detention system.[104] In June 2009, the Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth) was introduced into Parliament. The stated purpose of the Bill is to 'give legislative effect to the Government's New Directions in Detention policy'.[105] As of March 2010, the Bill had not been passed.

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[101] Question 423, Senate Hansard (17 June 2008), p 2626. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (viewed 7 January 2010).

[102] See, for example Human Rights and Equal Opportunity Commission, *Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights (Report No. 13)* (2001). At http://humanrights.gov.au/legal/humanrightsreports/hrc_report_13.html (viewed 13 January 2010). This view has also been held by the United Nations Human Rights Committee in a number of cases. See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997). At http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument (viewed 13 January 2010).

[103] See, for example Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004), at http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 15 January 2010); Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at http://humanrights.gov.au/human_rights/immigration/seas.html (viewed 15 January 2010).

[104] See C Evans, *New Directions in Detention – Restoring Integrity to Australia's Immigration System* (Speech delivered at the Centre for International and Public Law Seminar, Australian National University, Canberra, 29 July 2008). At http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm (viewed 15 January 2010).

[105] Commonwealth, *Parliamentary Debates*, Senate, 25 June 2009, p 4264 (The Hon Penny Wong MP, Minister for Climate Change and Water).

In a submission to the Senate Standing Committee on Legal and Constitutional Affairs, the Commission welcomed the Bill as a positive step.[106] However, the Commission expressed concern that the Bill did not go far enough towards implementing the New Directions, and raised concerns about the Bill's treatment of people whose visas have been cancelled under section 501.[107]

While the Bill is positive in moving away from the mandatory detention of *all* unlawful non-citizens, it retains mandatory detention for certain broad groups, including people whose visas have been cancelled under section 501. Those people will automatically be deemed to present an 'unacceptable risk to the Australian community', and as such, will continue to be subject to mandatory detention.[108] Further, the Bill does not provide for review by a court of the decision to detain a person, or impose any set time limits on detention.[109]

The Commission is concerned that a blanket policy of mandatory detention for all people whose visas are cancelled under section 501 may result in the detention of some individuals who do not, in fact, pose a significant risk to the Australian community. The lack of access to judicial review of the decision to detain a person and the failure to impose a set time limit on detention increase the risk that some individuals will be held in immigration detention for prolonged or indefinite periods, which could lead to breaches of Australia's international human rights obligations.

For further information about section 501 detainees in immigration detention, see the Commission's webpage on immigration detention and human rights.

8.6 The broad nature of the Minister's powers under section 501, and limited review of the Minister's decisions

Given the potentially serious impacts on a person's human rights if they are subjected to visa cancellation, immigration detention and removal from Australia, it is concerning that the Minister's discretionary powers under section 501 are very broad and that the Minister's decisions are subject to limited review.

As outlined in sections 3 and 7 above, the Minister's powers include the following:

- Under section 501, the Minister has the power to cancel a person's visa.[110]

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[106] Australian Human Rights Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Migration Amendment (Immigration Detention Reform) Bill 2009* (2009). At http://humanrights.gov.au/legal/submissions/2009/20090731_migration.html (viewed 15 January 2010).
[107] Australian Human Rights Commission, above, sections 3, 9.
[108] Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), para 9.
[109] The Bill proposes inserting a new provision into the Migration Act to affirm as a principle that if a non-citizen is to be detained, they must be detained for the shortest practicable time. See Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth), para 1. This is a positive step, but falls short of setting a concrete limit on the period of time an individual can be held in immigration detention.
[110] *Migration Act 1958 (Cth),* ss 501(2), 501(3).

- Under section 501A, if a DIAC officer or the AAT decides not to exercise the power to cancel a person's visa, in certain circumstances the Minister can set that decision aside and cancel the person's visa.[111] The Minister can do so even if the person satisfied the original decision-maker that they pass the section 501 character test.[112]
- Under section 501B, in certain circumstances the Minister can set aside a decision by a DIAC officer to cancel a person's visa, and substitute it with his or her own decision to cancel the person's visa.[113] The Minister can do so even if the person has applied to the AAT for merits review of the original DIAC decision.[114]

In making these decisions, the Minister is not bound to comply with the considerations set out in Ministerial Direction No. 41, and in some cases the Minister is not required to comply with the rules of natural justice.[115] The rules of natural justice are fundamental legal rules that require a decision-maker to act fairly; in good faith; without bias or conflict of interest; and to allow each party adequate opportunity to present their case and to respond to the case against them. A DIAC officer must comply with these rules when considering making a decision to cancel a person's visa under section 501.[116]

The broad nature of the Minister's powers under section 501 is particularly concerning because the Minister's decisions are subject to limited review. As discussed in section 7 above, a decision by the Minister to cancel a person's visa under section 501, or a decision by the Minister to substitute a decision of a DIAC officer or the AAT under section 501A or 501B, is not subject to merits review by the AAT and is only subject to judicial review by the courts if the decision may be affected by 'jurisdictional error'.

The Commission has raised concerns about the extent of Ministerial discretion under the Migration Act in parliamentary submissions.[117] In its 2008 submission to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia, the Commission recommended that the Minister's powers under section 501 should be reduced and measures should be put in place to provide for transparent and accountable decision-making processes which are subject to review.[118]

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[111] *Migration Act 1958 (Cth)*, ss 501A(1), 501A(2), 501A(3). See further notes 50 and 52.
[112] *Migration Act 1958 (Cth),* s 501A(1).
[113] *Migration Act 1958 (Cth)*, ss 501B(1), 501B(2). See further note 51.
[114] *Migration Act 1958 (Cth)*, s 501B(5).
[115] *Migration Act 1958* (Cth), ss 501(3), 501(5), 501A(3), 501A(4).
[116] *Migration Act 1958* (Cth), s 501(2).
[117] The Commission's submissions on immigration matters are available at http://humanrights.gov.au/legal/submissions/index.html#refugees.
[118] Human Rights and Equal Opportunity Commission, note 67, paras 104-107.

8.7 People acquitted of an offence on the grounds of unsoundness of mind or insanity

One of the grounds upon which a person will fail the section 501 character test is where they have a 'substantial criminal record'.[119] A person is considered to have a 'substantial criminal record' if, among other things, the person has been 'acquitted of an offence on the grounds of unsoundness of mind or insanity and as a result the person has been detained in a facility or institution'.[120]

This means that a person who has been acquitted of an offence due to a mental illness (and detained in a facility or institution as a result) automatically fails the section 501 character test, regardless of the nature or severity of the offence or other relevant circumstances. That person is then at risk of having their visa cancelled, being taken into immigration detention and being removed from Australia.

The Commission is concerned that this could result in persons with mental illness being placed in immigration detention, potentially for prolonged periods. The Commission has raised significant concerns in the past about the impacts of immigration detention on the mental health of detainees – particularly when their detention is for prolonged or indefinite periods.[121]

It could also lead to a person with a mental illness being removed from Australia to a country where they do not have access to the treatment they require to manage their condition, or being separated from their family members or support networks in Australia.

Under Ministerial Direction No. 41, when deciding whether to cancel a person's visa under section 501, one of the primary considerations for DIAC is the 'protection of the Australian community from serious criminal or other harmful conduct'.[122] In assessing the level of risk of harm to the community, decision-makers are required to consider the 'seriousness and nature of the relevant conduct'.[123] In the case of people who fail the character test due to an acquittal resulting from unsoundness of mind or insanity, the person's 'degree of recovery' is to be taken into consideration.[124]

In such cases, decision-makers are required to:

- obtain information through a mental health assessment and/or report compiled by an appropriately qualified professional that outlines the nature and extent of any mental impairment
- consider whether the person would have access to appropriate medication or treatment in the country to which they would be removed, noting the hardship

[119] *Migration Act 1958* (Cth), s 501(6)(a).
[120] *Migration Act 1958* (Cth), s 501(7)(e).
[121] See, for example A last resort, note 103, chapter 9.
[122] Ministerial Direction No. 41, note 7, para 10(1)(a).
[123] Ministerial Direction No. 41, note 7, paras 10.1(2)(a), 10.1.1.
[124] Ministerial Direction No. 41, note 7, para 10.1.1(5).

that they would face, and potential danger the person may represent, if this were not available to them and

- if the person continues to rely on medication to control their condition, consideration is to be given as to whether they can reasonably be considered to have fully recovered. The likely consequences of the person deliberately or accidentally not taking their medication must also be considered.[125]

The inclusion of the second consideration is positive, and an improvement on the situation under the previous Ministerial Direction No. 21.[126] However, this only applies as a primary consideration in decisions made by DIAC officers, as decisions made by the Minister personally need not comply with the Ministerial Direction.

Further, the Ministerial Direction does not clarify what the consequences should be if a decision-maker concludes that a person's 'degree of recovery' is low. Presumably, the implication is that a person who has not 'fully recovered' from their mental illness presents a higher risk to the Australian community and this should be counted in favour of cancelling their visa and removing them.

However, this could lead to the unfortunate consequence whereby a person with a serious mental illness, who relies on medication and is not considered to have 'fully recovered' is more susceptible to visa cancellation, immigration detention and removal from Australia – despite the fact that, due to their mental illness, they might be less able to cope with these consequences than a person whose 'degree of recovery' is considered to be much higher.

9 Links to further information

9.1 Commission projects and publications

The Commission has considered issues relating to the human rights of people impacted by section 501 visa cancellations in the following work:

- The Human Rights Commissioner's inspections of immigration detention facilities and reports on those inspections.[127]
- The Commission's 2009 submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009.[128]
- The Commission's 2008 submission to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia.[129]

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[125] Ministerial Direction No. 41, note 7, para 10.1.1(5).
[126] See Ministerial Direction No. 21, note 8, para 2.9.
[127] The Commission's reports on immigration detention inspections are available at http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html#9_3.
[128] Note 106.
[129] Note 67.

- The Commission's 2008 submission to the Clarke Inquiry on the case of Dr Mohamed Haneef.[130]

For further information, see the Commission's web pages on immigration, asylum seekers and refugees and immigration detention and human rights.[131]

9.2 Other useful links

- Department of Immigration and Citizenship factsheet, *The Character Requirement*
- Commonwealth Ombudsman report no. 1 (2006), *Administration of s501 of the Migration Act 1958 as it applies to long-term residents*
- Commonwealth Ombudsman report no. 10 (2007), *Report into referred immigration cases: other legal issues*
- Commonwealth Ombudsman, Immigration detention review reports (many of which relate to section 501 detainees)
- Joint Standing Committee on Migration, *Immigration detention in Australia: A new beginning*, First report of the inquiry into immigration detention in Australia
- Susan Harris Rimmer, *The Dangers of Character Tests: Dr Haneef and other cautionary tales*, The Australia Institute, Discussion Paper Number 101
- Refugee and Immigration Legal Service & Immigration Advice and Rights Centre, *Legal Information Kit: Visa Cancellation under s501 of the Migration Act*

[130] Human Rights and Equal Opportunity Commission, *Submission to the Clarke Inquiry on the Case of Dr Mohamed Haneef* (2008). At http://www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html (viewed 1 March 2010).
[131] Available at http://www.humanrights.gov.au/human_rights/immigration/index.html and http://www.humanrights.gov.au/human_rights/immigration/detention_rights.html.