



4 May 2018

Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

By email: migration@aph.gov.au

Dear Committee Secretary,

Submission to Joint Standing Committee on Migration inquiry into review processes associated with visa cancellations made on criminal grounds

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to the Joint Standing Committee on Migration inquiry into review processes associated with visa cancellations made on criminal grounds.

Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom would be unable to afford a lawyer without our assistance. In 2017, KLC provided 1594 advices and provided minor or ongoing assistance in 286 matters. Since 2011, KLC has provided visa cancellation advice to 71 clients and minor or ongoing assistance in 48 visa cancellation matters.

KLC provides advice and referral services to clients about visa cancellations made on criminal grounds within our catchment area, which includes the Long Bay Correctional Complex in Matraville. KLC has a specialist employment law service and a NSW-wide specialist discrimination law service. In addition, KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Our clients

Of all the clients that KLC advised in 2017, 56.3% stated they had no income or were low income earners. 27% of clients advised that the main language spoken

at home was not English, with many speaking little or no English. 6.4% of our clients identified as being either Aboriginal or Torres Strait Islander and 24.5% of clients had a disability.

Our submission

KLC is concerned that current review processes for visa cancellations made on criminal grounds provide insufficient oversight of government decision making. As set out below, KLC recommends that existing review processes be strengthened and expanded to improve the efficiency and fairness of the section 501 visa cancellation process under the *Migration Act 1958* (Cth) (**the Act**). KLC also recommends changes to the use of immigration detention in visa cancellation matters.

Recommendations

KLC recommends that Parliament amend the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) to:

1. Provide the right to apply for merits review for all visa cancellation decisions made on criminal grounds;
2. Require all visa cancellation decisions made on criminal grounds to be made in accordance with the principles of natural justice and ministerial directions for decision making;
3. Repeal sections 501A and 501B to remove the Minister's power to overrule visa cancellation decisions;
4. Extend the time limit for application for revocation of a mandatory visa cancellation decision from 28 days to 60 days, and for application for merits review of visa cancellation decisions from nine days to 30 days;
5. Repeal the mandatory detention provisions in the Act; and
6. Impose maximum time limits on immigration detention.

KLC recommends that the Minister amend the direction made under section 499 with respect to visa cancellations under section 501 to require decision-makers to consider Australia's international human rights law obligations as a primary consideration.

1. Efficiency of existing review processes as they relate to decisions made under section 501 of the Act

In KLC's experience, effective and efficient review processes are essential to ensure that just decisions are made under the visa cancellation system established by section 501 of the Act. The current system of visa cancellations under section 501 allows for a person's visa to be cancelled in several ways:

- a) an officer of the Department of Home Affairs (**the Department**) as a delegate of the Minister for Home Affairs (**the Minister**), may cancel a person's visa on the grounds that the person does not pass the character

test (which involves consideration of criminal and general conduct, among other things¹);²

- b) the Minister can exercise his/her personal power to cancel a person's visa on the grounds that the person does not pass the character test and if the Minister is satisfied the cancellation is "in the national interest";³ or
- c) if a person has a 'substantial criminal record' or has been convicted of a child sex offence, and is in prison, their visa will be mandatorily cancelled.⁴ A 'substantial criminal record' includes a sentence of a term of imprisonment of 12 months or more,⁵ or 2 or more terms of imprisonment where the total of those terms is 12 months or more.⁶ These terms are counted cumulatively even where the total time served in prison is less than 12 months.⁷

The consequences of a visa cancellation are serious for individuals and their families. When a person's visa is cancelled, they will be:

- a) detained in immigration detention while their visa cancellation decision is reviewed;⁸
- b) removed or deported from Australia;⁹
- c) barred from making an application for most other visas;¹⁰ and
- d) once they have left the migration zone, barred from returning to Australia in the future.¹¹

KLC is concerned that the current system does not provide sufficient oversight in light of the serious consequences of a section 501 decision.

Limited availability of merits review

Whether a person subject to a visa cancellation can apply for merits review at the Administrative Appeals Tribunal (AAT) depends on how the visa cancellation decision was made. Decisions made by a delegate of the Minister can be appealed to the AAT for merits review, that is, for a fresh decision to be made based on all relevant information, including any new information supplied by the applicant at the review stage.

If a person's visa is cancelled under section 501(3) or 501(3A) of the Act, the person may apply for revocation of the cancellation by the Minister personally (where the visa was cancelled by the Minister personally under section

¹ *Migration Act 1958* (Cth) s 501(6)

² *Migration Act 1958* (Cth) s 501(2).

³ *Migration Act 1958* (Cth) s 501(3).

⁴ *Migration Act 1958* (Cth) s 501(3A).

⁵ *Migration Act 1958* (Cth) s 501(7)(c).

⁶ *Migration Act 1958* (Cth) s 501(7)(d).

⁷ *Migration Act 1958* (Cth) s 501(7A).

⁸ *Migration Act 1958* (Cth) s 189.

⁹ *Migration Act 1958* (Cth) ss 198, 200.

¹⁰ *Migration Act 1958* (Cth) s 501E.

¹¹ See *Migration Act 1958* (Cth) s 46, *Migration Regulations 1994* (Cth) sch 2, 5.

501(3))¹² or by a delegate of the Minister (where the visa was mandatorily cancelled under section 501(3A)).¹³ Only the latter decision can be reviewed by the AAT.

The unavailability of merits review where the Minister exercises his/her personal discretion gives the Minister unjustifiably broad powers and denies individuals an opportunity to present their case in full.

Re-direction of appeals to judicial review

If a person does not have access to merits review, they are left with only one option – an application for judicial review to the Federal Court. Merits review processes are aimed at increasing time and cost efficiency, as well as providing individuals with a fair hearing of their case.¹⁴ Judicial processes do not have the same considerations and are restricted to reviewing the legality of an administrative decision on grounds which are limited and complex. The Federal Court cannot decide whether a visa should or should not have been cancelled or accept any new information about a person's circumstances. Going to court for judicial review requires detailed legal advice and representation. In general, court processes are more costly and time-consuming than merits review processes. In our view, diverting any part of the visa cancellation case load to the courts does not assist in the efficiency of the visa cancellation review process as a whole.

KLC recommends that the Act be amended to give all people whose visas are cancelled under section 501 the right to apply for merits review of that decision.

Limited application of the principles of natural justice and decision-making guidelines

Visa cancellation decisions made by the Minister personally or mandatorily are also exempt from the principles of natural justice.¹⁵ Natural justice is defined in the Act as the code of procedure set out in Subdivision AB of Division 3 of Part 2 of the Act.¹⁶

This means that there is no requirement for the Minister to, for example, consider all information in an application.¹⁷ In the case of mandatory cancellations, there is no consideration of any relevant factors beyond a person's criminal sentence before the cancellation takes effect, making the person subject to immigration detention. The mandatory cancellation process leads to inefficient decision-making as it impedes natural justice by not allowing

¹² *Migration Act 1958* (Cth) s 501C.

¹³ *Migration Act 1958* (Cth) s 501CA.

¹⁴ *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

¹⁵ *Migration Act 1958* (Cth) s 501(5).

¹⁶ *Migration Act 1958* (Cth) ss 51A – 64.

¹⁷ *Migration Act 1958* (Cth) s 54.

decision-makers to consider all relevant factors *before* the decision is made. This is highlighted in the case of *Eden v Minister for Immigration and Border Protection*,¹⁸ where the applicant's child's best interests and his low risk of re-offending were not considered at all before he was taken into immigration detention many years after serving his suspended sentence.

Similarly, the Minister is exempt from the decision-making guidelines applied to decisions of Departmental delegates and the AAT.¹⁹ The guidelines are contained in ministerial directions made under section 499 of the Act. The current document, Direction No. 65,²⁰ sets out primary and other considerations that must be taken into account when making a visa cancellation or revocation decision. This means that the Minister does not, for example, have to take into account the best interests of any children affected by the decision when deciding to personally cancel a visa.²¹

Case Study – importance of review guidelines and processes

John came to Australia from the Middle East with his family following religious persecution and was granted a humanitarian visa when he was 15. A little after his 18th birthday, he was convicted of a crime that meant he had a 'substantial criminal record' as defined in the Act and was issued with a notice of intention to cancel his visa.

With KLC's assistance, John asked for a review of this decision. When his case was reviewed in more detail, it became clear that there were many strong factors in favour of a decision not to cancel John's visa. John had been involved by some friends in committing a crime and showed great remorse for his actions. In fact, soon after the incident he admitted his involvement to the police and assisted in identifying the other perpetrators. John had good character references from employers and Church ministers. All John's family members had become Australian citizens and he would have been separated from his entire family if he had been deported back to the Middle East, including his sibling who was under 18 years old at the time.

When John's case was reconsidered in light of submissions from KLC and in accordance with the relevant Ministerial directions, it was decided that his visa would not be cancelled.

Note: this case occurred before the 2014 amendments to the Act. If John's situation occurred today, he would be subject to mandatory cancellation of his visa and would have to seek revocation of the decision within 28 days.

¹⁸ *Eden v Minister for Immigration and Border Protection* [2015] FCA 780 (24 July 2015).

¹⁹ *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 67 (27 April 2017).

²⁰ Minister for Immigration and Border Protection, *Direction [No 65] - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, 22 December 2014.

²¹ *Ibid* [9].

KLC recommends that all visa cancellation and cancellation revocation decisions be subjected to the rules of natural justice and to relevant ministerial directions for decision making.

Power of the Minister to set aside decisions

In addition to the limited availability of AAT review explained above, the Minister has a broad personal discretion to set aside an AAT decision (and Departmental decisions) about the cancellation of a person's visa and substitute his/her own decision.²² The Minister can set aside an adverse AAT decision without following the rules of natural justice and the decision is not subject to merits review.²³ This power undermines the value of merits review processes and the separation of powers.

KLC recommends that sections 501A and 501B of the Act be repealed.²⁴

Access to justice – time limits

The visa cancellation merits review process provides short timeframes within which people must seek legal advice and make applications. The time limit for requesting revocation of a mandatory visa cancellation is 28 days after the person has received the cancellation notice.²⁵ If a person is permitted to apply for merits review of a cancellation or revocation decision, they must do so within just nine days.²⁶

These time periods are unreasonably short. In KLC's experience with clients who have had their visas cancelled on criminal grounds, seeking legal advice from prison can be difficult and take time. Appointments for legal advice can be cancelled at the last minute due to lock-downs and similar actions taken by prison authorities for a wide range of reasons. Clients may be moved between prisons while on remand or between immigration detention centres after their sentence ends without much notice.

Case Study – Access to Legal Advice

Jane was detained in a correctional facility. Her visa was cancelled pursuant to section 501(3A), and she was given 28 days to lodge a request to the Minister to revoke that decision.

KLC met with Jane at the correctional facility to provide initial advice. We agreed to assist with her revocation request. However, a few days later Jane's non-parole period expired, and she was transferred to the Villawood Immigration Detention Centre. At Villawood, she did not have a mobile phone. We tried numerous times to contact her through the central telephone

²² Migration Act 1958 (Cth) ss 501A, 501B.

²³ Migration Act 1958 (Cth) ss 501A(4), 501A (7).

²⁴ Migration Act 1958 (Cth) ss 501A, 501B.

²⁵ Migration Regulations 1994 (Cth) r 2.53.

²⁶ Migration Act 1958 (Cth) s 500(6B).

number at Villawood. Each time, we were put on hold and eventually disconnected.

Eight days before Jane's revocation request was due, she was transferred again to the Christmas Island Immigration Detention Centre. We asked the Department of Immigration to defer the transfer so we could properly advise Jane and complete her revocation request. This request was refused. We were unable to contact Jane for four days whilst she was being transferred. As a result, we were not able to finalise Jane's representations to include with her revocation request.

Jane had no other avenues to have this decision reviewed.

KLC recommends that the time limit for applying for revocation of a mandatory visa cancellation be extended to 60 days, and the time limit for applying for merits review a visa cancellation or revocation decision be extended to 30 days.

Access to justice – cost of legal advice

In addition to time limits, the cost of obtaining legal advice is a barrier to submitting an application for review of a visa cancellation or revocation decision. Current Legal Aid NSW guidelines limit representation in visa cancellation matters to cases that have already reached the AAT or Federal Court, and only where there is a significant human rights issue involved.²⁷

KLC does not receive specific funding to advise or represent clients in visa cancellation matters. In our experience, if we are unable to assist a client due to our own resource restraints then it is very difficult to find an appropriate referral for people who cannot afford private lawyers. This is especially the case given the short timeframes detailed above.

Legal representation should be available to all, not just those who can afford a private lawyer. In addition, it can assist decision makers at the Departmental, AAT and Federal Court stages to have experienced lawyers and migration agents involved in preparing relevant information and submissions. In order to make the visa cancellation review process more efficient, we particularly recommend that there should be greater access to legal assistance at the Departmental and AAT review stages, as assistance at these stages can assist the preferable decision to be made as early as possible in the process.

KLC recommends that increased funding be provided to legal assistance services for visa cancellation matters.

²⁷ Legal Aid NSW, *Civil law matters – when legal aid is available* (22 August 2011) Legal Aid NSW, [6.18.3]

< <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.18.-migration-matters>>.

2. Present levels of duplication associated with the merits review process

As explained above, merits review is an essential part of the visa cancellation process, particularly given the difficulties of accessing legal assistance at the Departmental stage. KLC does not consider that appeal processes such as merits review constitute duplication and is not aware of any duplication in the present merits review process.

As above, KLC recommends that merits review be made available to all people whose visas are cancelled under section 501.

3. Scope of the Administrative Appeal Tribunal's jurisdiction to review ministerial decisions

It is important that our government and ministers are held to account for their decision making and that even personal ministerial powers be subject to oversight. For this reason, it is necessary to maintain the current scope of the AAT's jurisdiction to review visa cancellation and revocation decisions and to expand the jurisdiction to include review of all visa cancellation decisions.

KLC recommends that the scope of the AAT's jurisdiction be maintained and expanded to include review of all visa cancellation decisions.

4. Human rights concerns

The UN Special Rapporteur on the Human Rights of Migrants has expressed concern about the breadth of ministerial power under section 501 of the Act.²⁸ KLC is also concerned that failures to afford individuals the opportunity for merits review, procedural fairness and access to justice in the visa cancellation process increase the risk of breaches of Australia's obligations under international human rights law.

Right to family life/rights of children

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both treaties recognise the family as the fundamental unit of society and require the Australian Government to protect the family unit.²⁹ In addition, Australia's obligations under the Convention on the Rights of the Child (CRC)

²⁸ Francois Crepeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017).

²⁹ *International Convention on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17(1), 23(1); *International Convention on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10.

require the best interests of the child to be a primary consideration in all government action concerning children.³⁰

If a person's visa is cancelled without due consideration of a person's family life, the separation of that person from their family and children could constitute arbitrary interference with the family in contravention of Australia's obligations under the ICCPR and ICESCR. A failure to make the best interests of any child concerned a primary consideration in a visa cancellation decision is a breach of Australia's obligations under the CRC.

Right to be free from arbitrary detention

Article 7 of the ICCPR provides that no one should be subjected to cruel, inhuman or degrading treatment or punishment. Articles 9 and 10 of the ICCPR establish the right of every person to freedom from arbitrary detention and the right of all people deprived of their liberty to be treated with humanity and respect. Article 9 also states that no one shall be deprived of liberty except in accordance with procedures established by law.

Under the Australian policy of mandatory detention, people whose visas have been cancelled must be removed to an immigration detention facility once their criminal sentence is complete.³¹ If a person held a protection visa that has been cancelled, seeks refugee status during their sentence of imprisonment, or otherwise cannot be returned to their home country due to Australia's non-refoulement obligations,³² they face prolonged and indefinite detention.³³ Indefinite mandatory detention breaches Australia's obligations under Articles 7, 9 and 10 of the ICCPR.

In addition, cancellation of visas based on criminal record effectively imposes an additional punishment on people who have already been sentenced and punished according to Australian law. This additional punishment is imposed through deportation and additional periods of detention in immigration detention facilities. Punishment beyond Australia's criminal laws constitutes a breach of Article 9 of the ICCPR.

³⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

³¹ *Migration Act 1958* (Cth) s 189.

³² Australia's non-refoulement obligations arise from the ICCPR, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) and the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

³³ *Migration Act 1958* (Cth) s 196.

Case Study – non-refoulement obligations

Alan and his family fled Sudan due to the Sudanese civil war. His long-lost daughter had previously settled in Australia as a refugee. After they came into communication by chance, she assisted Alan and the rest of the family to receive visas to come to Australia. In Australia, Alan was sentenced to 12 months prison, but was released after 6 months. However, because of this sentence he was issued with a notice that his visa may be cancelled.

Alan's sentence just met the threshold for a 'substantial criminal record'. Alan is a Christian with ties to the Dinka tribe, which are both persecuted groups in Sudan. The ongoing tensions between Sudan and South Sudan have exacerbated this risk. There were also numerous reports that ethnic tension and violence was particularly serious in the border area near Alan's home town. Alan was especially vulnerable because he had no family in Sudan or South Sudan to return to – all his family who remained in Sudan were presumed dead. Given the circumstances in Sudan, visa cancellation and removal would have been a disproportionate consequence for his offence and would have risked Alan's life.

Note: this case occurred before the 2014 amendments to the Act. If Alan's situation occurred today, he would be subject to mandatory cancellation of his visa and would have to seek revocation of the decision within 28 days.

Right to adequate living standards

Article 11 of ICESCR establishes the right of individuals to an adequate standard of living for themselves and their families. If an individual has lived in Australia for a substantial portion of their lives before their visa is cancelled, they may not have any family or contacts in the country of their citizenship. They may not speak the language of the country of their citizenship and so will have difficulty finding employment. In many cases, there will be no access to welfare or social support once they arrive. If this is the case, it is likely that a person's right to an adequate standard of living will be violated by their deportation from Australia following a visa cancellation.

Right to health

Article 12 of ICESCR establishes the right of individuals to the highest attainable standard of physical and mental health.³⁴ If a person's country of citizenship does not have an adequate system of health care, or if a person is unable to access health care because they have not been living in the country and paying social security contributions, that person faces the likelihood of serious illness or death if they are deported from Australia. This would constitute a breach of Australia's obligations under ICESCR.

³⁴ ICESCR art 12(1).

KLC recommends that:

- the Minister make Australia's international human rights law obligations a primary consideration for visa cancellation decisions through a ministerial direction under section 499 of the Act;
- Parliament repeal the mandatory detention provisions in the Act; and
- Parliament impose maximum time limits on immigration detention.

Conclusion

The lack of comprehensive review processes for visa cancellations is unjust and risks violation of human rights. KLC believes that enhancement of review processes and legal assistance for visa holders will improve the efficiency and accuracy of the visa cancellation process.

Please do not hesitate to contact us on (02) 9385 9566 or at legal@unsw.edu.au if you wish to discuss our submission.

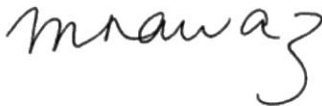
Yours faithfully,
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