



27 April 2018

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

Via email: migration@aph.gov.au

Inquiry into the review processes associated with visa cancellations made on criminal grounds

This is a submission of the Federation of Ethnic Communities' Councils of Australia (FECCA). FECCA is the national peak body representing Australia's culturally and linguistically diverse (CALD) communities and their organisations. FECCA provides advocacy, develops policy and promotes issues on behalf of its constituency to Government and the broader community. FECCA strives to ensure that the needs and aspirations of Australians from diverse cultural and linguistic backgrounds are given proper recognition in public policy.

FECCA supports multiculturalism, community harmony, social justice and the rejection of all forms of discrimination and racism so as to build a productive and culturally rich Australian society. FECCA's policies are developed around the concepts of empowerment and inclusion and are formulated with the common good of all Australians in mind.

FECCA would welcome the opportunity to expand on this submission to the Committee as required. For enquiries please contact the FECCA Chief Executive Officer, Dr Emma Campbell at emma@fecca.org.au or on (02) 6282 5755.

Discussion

The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act: impact of the current review process on members of the Australian community

FECCA is concerned that the existing review processes as they relate to decisions made under section 501 of the Migration Act may be inefficient and can lead to grave injustice and the eroding of individual human rights and freedoms. The current visa cancellation regime allows for the Minister to refuse or cancel a visa if a person fails a 'character test'. The grounds for doing this are numerous and some do not require *proof* of wrongdoing, only a

'reasonable suspicion' that an individual may be involved in certain *future* activities. An individual therefore risks having their visa cancelled even if they have never been convicted of a criminal offence.

FECCA is particularly concerned about the consequences of the current review process for refugees who have their visas refused or cancelled on character grounds and for long-term permanent residents of Australia who have their visas cancelled on character grounds¹. The removal of an individual from Australia – including some who have spent their whole lives in this country – can have a devastating impact on the individual, their family and community.

As the Australian Human Rights Commission (the Commission) have highlighted, an individual may be removed to a country the language of which they do not speak; where they have spent little time (or never lived); and where they have no familial, social or economic connections². FECCA is deeply concerned about the risk of separation of mothers and fathers from children, including dependent children, and other family members.

Further, those who are unable to be returned to their country of citizenship, for example refugees and stateless people, risk indefinite periods of arbitrary detention. FECCA endorses and refers the Committee to the section in the Refugee Council of Australia's (RCOA) submission to the Inquiry on the 'Particular effect on people [of the existing review process] on people in need of protection'³.

Duplication of the review process

FECCA endorses and refers the Committee to the section in RCOA's submission to the Inquiry on the 'Inefficiencies and duplication of the review process'⁴.

The Scope of the AAT's Jurisdiction to review ministerial decision

When considering the scope of the AAT's Jurisdiction to review ministerial decisions, it is suggested that the Committee consider the following:

- The importance of access to justice for a vulnerable section of Australia's community.
- The broad nature of the Minister's personal powers to refuse or cancel a visa on character grounds, and the very limited ability for an individual to request a review of that decision.
- The low threshold for cancelling a visa, including in cases where an individual has not been convicted of a crime and where the individual does not pose any harm to the community.
- The risk of arbitrary detention of an individual for prolonged or indefinite periods.
- The mandatory nature of some visa cancellations and the need to ensure review of these decisions based on an individual's circumstance.
- The risk of separation from children and other family members due to a person's detention and/or removal from Australia.
- Proposed legislation that will increase the period that Australian (permanent and temporary) residents are required to wait before being able to become a citizen of Australia during which they are subject to visa cancellation and removal from Australia on character grounds.

¹ See <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/background-paper-human-rights-issues-raised-visa>

² Ibid.

³ Refugee Council of Australia, Submission on Review Processes Associated with Visa Cancellations Made on Criminal Grounds, 2018, pg2.

⁴ Refugee Council of Australia, Submission on Review Processes Associated with Visa Cancellations Made on Criminal Grounds, 2018, pg6.

The AAT has been operating for over 40 years and is a well-established and trusted institution. The AAT reflects the consequential nature of administrative decision-making, and the view that this level of decision making should be made with a high level of fairness⁵ and avenues for review.

When reviewing a decision by the Executive – while courts are concerned with the lawfulness of a decision – the AAT reviews a decision on the merits in order to arrive at the most preferable outcome⁶. The power of the AAT to review all administrative decisions is crucial to a fair and transparent system of government and is a key part of the democratic model in place in Australia.

It is the belief of FECCA that the scope of the AAT's jurisdiction to review ministerial decisions is already substantially limited. While decisions made by a delegate of the Minister to refuse or cancel a visa on character grounds are reviewable by the AAT, decisions made personally by the Minister are **not** reviewable by the AAT. Further, the Minister can set aside a decision made by the AAT and replace it with their own decision to refuse or cancel a visa.

These are substantial and unchecked Executive powers. We agree with the assertion of RCOA who, in their submission to the Committee, argue that 'these extraordinary powers do not exist in any other area of administrative law and would not be accepted if exercised over Australian citizens'⁷.

It is FECCA's view that, given the non-reviewable nature of Ministerial decisions under s. 501 of the Migration Act, and the serious consequences for individuals and their families subject to these decision, the Minister's discretionary powers should be limited and that the transparency and accountability of decision-making processes be improved. It is also our view that consideration should be given to the extension of the AAT's jurisdiction to review personal Ministerial decisions under s. 501 of the Migration Act.

FECCA understands that the Migration and Refugee Division procedures of the AAT are designed to provide a review process which is fair, just, economical, informal and quick.⁸ As a tribunal rather than a court, the AAT can undertake the review process in a timely and efficient manner and at a lower cost, therefore promoting access to justice for applicants. The AAT is required to finalise its decision within 12 weeks after the day on which individuals have been notified of the Minister's decision to refuse, cancel or to not revoke the mandatory cancellation of a visa. This ensures that the process occurs in a reasonable timeframe.⁹

We note the volume of work undertaken by the AAT and urge proper resourcing and appointments to the Tribunal that are merit-based and free from party political considerations to ensure the independence, efficiency and effectiveness of the AAT.

It is also important to note that the availability of merits review of administrative decisions has significantly reduced demand on Australia's court system, and therefore plays a vital economic role in reducing the need for heavy resourcing to the courts. Notwithstanding, in accordance with general principles of administrative law, the courts must have jurisdiction to

⁵ See <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre-tribunals-in-australia-their-roles-and-responsib>.

⁶ See <http://www.aat.gov.au/about-the-aat/what-we-do>.

⁷ Refugee Council of Australia, Submission on Review Processes Associated with Visa Cancellations Made on Criminal Grounds, 2018, pg11.

⁸ See <http://www.aat.gov.au/migration-and-refugee-division/mrd-resources/legislation-policies-and-guidelines>.

⁹ See <http://www.aat.gov.au/AAT/media/AAT/Files/Fact%20Sheets/Fact-Sheet-for-Applicants-Expedited-review-of-s501-or-501CA-decisions.pdf>.

review decisions on the grounds of its lawfulness through judicial review under the Administrative Decision (Judicial Review) Act.

The ability of the Migration and Refugee Division of the AAT to review decisions made by the Executive is critical to ensure that CALD and migrant communities trust in Australian procedures and democratic institutions. Many people from CALD and migrant backgrounds have left countries where they have been subject to arbitrary, non-reviewable decisions of officials. Unchecked Executive power creates a climate of fear and opacity both for Australians with family members on visas and also for the broader community of migrants currently in Australia. It is also essential that all Australian residents, no matter their visa status, have equal protection under Australian law.

FECCA submits that the capacity of the AAT to review decisions under section 501 of the Migration Act is a critical aspect of a fair and democratic decision-making system, and a hallmark of Australia's traditionally inclusive and transparent migration system. The ability to review decisions made by the Executive is key to ensuring that Australia's values of the separation of powers and accessibility to justice are protected.