

Level 5, 362 Kent Street, Sydney NSW 2000 Australia
PO Box Q1283, Queen Victoria Building NSW 1230

t +61 2 8234 0700 (*Admin Line 9-5pm*)
+61 2 8234 0799 (*Advice Line Tues & Thurs 2-4pm*)
f +61 2 9299 8467
e iarc@iarc.asn.au
w www.iarc.asn.au

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

BY EMAIL: migration@aph.gov.au

Dear Committee Secretary,

Re: Review processes associated with visa cancellations made on criminal grounds

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public. Our clients are low or nil income earners, frequently with other disadvantages including low level English language skills, disabilities, past torture and trauma experiences and domestic violence survivors.

IARC welcomes the opportunity to comment on the committee's inquiry into the review processes associated with visa cancellations made on criminal grounds. The committee has indicated that its inquiry will focus on:

- The scope of the Administrative Appeals Tribunal's (**AAT** or **Tribunal**) jurisdiction to review ministerial decisions; and
- The efficiency of existing review processes as they relate to decisions made under s 501 of the Migration Act 1958 (Cth) (**Act**); and
- Present levels of duplication associated with the merits review process;

We address each of these matters in turn.

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1. Summary of IARC's position

The *Migration Amendment (Character and General Visa Cancellation) Bill* 2014 and, in particular, the introduction of s 501(3A) of the *Migration Act* 1958 (**Act**) has seen a significant increase in the number of visas that have been cancelled in recent years. The report by the Commonwealth Ombudsman on '*The Department of Immigration and Border Protection – The Administration of Section 501 of the Migration Act 1958*'¹ identified that the number of visas that were cancelled under s 501 of the *Act* increased from 76 in 2013-14 to 983 in 2015-16. Likewise, the AAT's annual report for 2016-17 showed that character-related visa decisions rose from 77 in 2015-16 to 183 in 2016-17².

The decision to cancel a person's visa and the deportation that inevitably follows will have a significant impact on the life of the individual and also on their family and community. The visa cancellation process can be traumatic for all involved, including victims, and can result in the separation of families and breaches to Australia's international obligations. It is IARC's view that decisions of this magnitude must continue to be reviewable. It is also IARC view and experience that the AAT plays an instrumental role in offering a review process that is fair; economical; quick and one that promotes public trust and confidence in the determination of visa cancellation matters.

2. Visa cancellation powers on character grounds

The power to cancel a visa on character grounds is found under s 501 of the *Act*. It includes:

S 501(2) of the *Act* which gives the Minister (or a delegate) a discretion to cancel a visa that has been granted to a person if:

- (a) *the Minister reasonably suspects that the person does not pass the character test; and*
- (b) *the person does not satisfy the Minister that the person passes the character test.*

S 501(3)(b) of the *Act* gives the Minister a personal discretion to cancel a visa that has been granted to a person if:

- (a) *the Minister reasonably suspects that the person does not pass the character test; and*

¹ Available at <http://www.ombudsman.gov.au/publications/investigation-reports>

² Those matters related to decisions to refuse or cancel a visa under s 501 of the *Act*; decisions under s 501CA of the *Act* not to revoke a mandatory cancellation under s 501(3A) and decisions to refuse or cancel a protection visa relying on sections 5H(2), 36(1C) or 36(2C)(a) or (b) of the *Act*.

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(b) the Minister is satisfied that cancellation is in the national interest.

S 501(3A) of the *Act* requires the Minister to cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because they have a substantial criminal record (sentenced to death, life imprisonment or to a term of imprisonment of 12 months or more) or because of sexually based offences involving a child; and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

S 501CA(4) of the *Act* then gives the Minister a discretion to revoke the original decision under s 501(3A) of the *Act* if the person makes representations in accordance with the invitation and the Minister is satisfied that the person passes the character test or there is another reason why the original decision should be revoked.

Relevantly, the circumstances in which a person would fail the 'character test' are set out under s 501(6) and the term 'substantial criminal record' is defined in s 501(7) of the *Act*.

3. The jurisdiction of the AAT to review ministerial decisions

The AAT has jurisdiction to review decisions of a delegate of the Minister to cancel a visa under s 501 of the *Act* or a decision of a delegate of the Minister under s 501CA(4) of the *Act* not to revoke a decision to cancel a visa. The AAT cannot review decisions that are made by the Minister personally.

The AAT is required to follow any direction that is issued by the Minister under s 499 of the *Migration Act 1958* (Cth). In character cancellation matters the Tribunal is required to follow 'Direction no 65, Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA³. The purpose of Direction no. 65 is to guide decision-makers performing functions or exercising powers under section 501⁴. It requires decision makers to be informed of certain principles and to give relevant weight to 'primary' and 'other' considerations in the review process.

³ See <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf>

⁴ See paragraph 6.1(4)

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With respect to the Tribunal's powers, subsection 43(1) of the *Administrative Appeals Tribunal Act* 1975 provides that the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

- (a) *Affirming the decision under review;*
- (b) *Varying the decision under review; or*
- (c) *Setting aside the decision under review and;*
 - i) *making a decision in substitution for the decision to set aside; or*
 - ii) *remitting the matter for reconsideration in accordance with any direction or recommendation of the Tribunal.*

It becomes apparent that the role of the AAT in visa cancellation matters is to engage in a *de novo* review. It is not for the Tribunal to examine the original decision and discern whether a mistake was made in the facts or reasoning – rather the task is to give appropriate consideration and weight to the matters set out in Direction no. 65, to consider the evidence and material that has been presented to it and to reach its own view as to the correct or preferable decision in the particular matter⁵.

4. The efficiency of existing review processes as they relate to decisions made under section 501 of the Act

It is IARC's experience that the AAT carries out its review of visa cancellation matters in a manner that is efficient and consistent with the Tribunal's stated objectives under the *Administrative Appeals Tribunal Act* 1975. Those objectives are set out under section 2A and require the Tribunal to pursue the objective of providing a mechanism of review that:

- a) *is accessible; and*
- b) *is fair, just, economical, informal and quick; and*
- c) *is proportionate to the importance and complexity of the matter; and*
- d) *promotes public trust and confidence in the decision making process.*

There are a number of features of the Tribunal's review process that are directed at ensuring efficiency. For example, applications for review must be made within a short period of time after the

⁵ See *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690 at [49]; *Re Slee and Australian Prudential Regulation Authority* [2006] AATA 206 at [4]-[5]

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delegate has made a decision⁶. Further, the AAT is unable to have regard to information/document presented by an applicant unless it was given to the Minister at least two business days before the hearing⁷ with “*the apparent purpose being to prevent applicants from manipulating the system in an attempt to delay deportation*”⁸. Finally, if the AAT does not make a decision in relation to a review of a cancellation under 501 of the Act or s 501CA(4) of the Act within 84 days, the decision of the Minister’s delegate is taken to have been affirmed⁹.

The AAT’s review process usually involves an initial telephone directions hearing followed by a final hearing which is usually set down for two days, but can be more, depending on the number of witnesses and the complexity of the matter. The Minister, who will be legally represented, will be required to provide the AAT and the applicant with a copy of the relevant documents. Parties will have an opportunity to make written submissions, ask questions of witnesses and make oral submissions at the hearing with the Tribunal making a written decision shortly after the hearing.

5. Present level of duplication associated with the merits review process

The role of the AAT in visa cancellation matters is to engage in independent merits review. While the Tribunal will apply the same law and follow the same directions/policies as the Minister’s delegate it will generally arrive at its decision through a process that is to be considered to be fairer, better informed and one that promotes public trust and confidence in the outcome. This view is advanced for a number of reasons:

- First, and perhaps of most importance, the Tribunal is entirely independent to the Minister and the Minister’s department;
- Second, the parties (the applicant and the Minister) will be given an opportunity to appear before the Tribunal to present evidence and make submissions about the issues that are relevant to the review;
- Thirdly, the parties and the Tribunal will also have an opportunity test any evidence that is presented;
- Finally, the procedures that the Tribunal follows ensures that review applicants are dealt with in a manner that is quick, economical and just.

⁶ Section 500(6B) of the Act provides a time limit of 9 days

⁷ Sections 500(6H) and 500(6J) of the Act

⁸ See *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15 at [58]

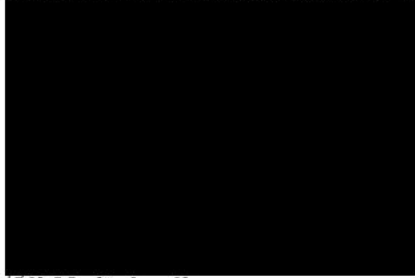
⁹ Section 500(6L) of the Act

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We thank you for the opportunity to comment and reiterate our view that the Tribunal plays a most important role in ensuring that decisions to cancel visas on character grounds are made in a manner which instils fairness in the process and confidence in the outcome.

Yours sincerely,

IMMIGRATION ADVICE AND RIGHTS CENTRE Inc.



Ali Mojtahedi

Principal Solicitor