



Pauline Cullen
Committee Secretary
Joint Standing Committee on Migration
Commonwealth Parliament of Australia
By Email: migration@aph.gov.au

26 April 2018

Dear Committee Secretary,

Introduction

1. On 28 March 2018, the writer was invited by the committee secretary of the Joint Standing Committee on Migration (JSCOM) to make a submission in relation to a new enquiry regarding review processes associated with visa cancellations on criminal grounds.
2. The writer is a practising barrister in Australia, a lecturer at Western Sydney University (WSU) in the School of Law, course convener of the Graduate Diploma in Australian Migration Law (GDAML) at WSU, an adjunct lecturer at the New South Wales College of Law and a Registered Migration Agent (RMA) (#1682742) in Australia.
3. The opinions expressed in these submissions are those of the writer and do not necessarily reflect the views of any institutions associated with the writer. The writer has considerable academic and practical experience in the statutory application of visa cancellation decisions made on criminal grounds pursuant to the Migration Act 1958 (Cth) (the Act), having acted as both a RMA and barrister in relation to this area of the law before the Department of Home Affairs

(DOHA), Administrative Appeals Tribunal (AAT) and the Federal Court of Australia (FCA). In an academic context, the writer has carried out substantial legal research on the topic related to visa cancellation decisions made on character grounds under the Act.¹

4. The writer systematically addresses the three broad categories in the terms of reference being investigated by the JSCOM. The writer also addresses the issue of whether the visa cancellation process and review mechanisms are open to exploitation from individuals who are actively trying to circumvent Australia's migration system.

The Efficiency of Existing Review Processes as they Relate to Decisions made under Section 501 of the Act (Terms of Reference 1)

Time in Immigration Detention

5. In my professional experience as a RMA, I have been asked to provide immigration assistance to a substantial number of non-citizens who have had their Australian visas cancelled under the mandatory cancellation provisions in section 501(3A) of the Act (mandatory cancellation decision).
6. Because of a mandatory cancellation decision, the non-citizen can make representations to have that decision revoked under section 501CA(4) of the Act (revocation application). Where a revocation application is made by a non-citizen in accordance with section 501CA(4) of the Act, either a delegate from the DOHA or the Minister for Home Affairs (acting personally) will decide

¹ Donnelly, J. (2018). Failure to Give Proper, Genuine and Realistic Consideration to the Merits of a Case: A Critique of Carrascalao. *April UNSW Law Journal Forum* 1. Donnelly, J. (2017). Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door. 24 *Australian Journal of Administrative Law* 99. Donnelly, J. (2017). Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values? *Victoria Law and Justice Journal*, (forthcoming).

whether the non-citizen passes the character test (as reflected in section 501 of the Act) and whether there is another reason why the mandatory cancellation decision should be revoked.

7. In my professional experience, the time taken for a delegate from the DOHA or the minister to resolve a revocation application under section 501CA(4) of the Act is unacceptable. Despite lodging a valid revocation application with the DOHA, the DOHA or minister have taken anywhere between six months to two years to decide on the revocation application.
8. Given the extensive delays in revocation applications being determined, non-citizens often spend substantial periods of time in immigration detention in Australia. Consequently, non-citizens faced with immigration detention are subject to the following adverse consequences:
 - Significant psychological disturbance due to not knowing when a decision will be made with respect to his or her revocation application
 - A hindrance to a non-citizen's rehabilitation prospects (given that the non-citizen cannot generally access rehabilitation institutions in the Australian community)
 - The non-citizen can only receive limited assistance from family and friends (given the non-citizen is forced to reside in immigration detention)
 - The inability to comply with parole conditions, given their status as unlawful non-citizens who are liable to be detained in immigration detention
 - The inability to contribute positively to the Australian community, given that the non-citizen is in immigration detention

- Non-citizens who are detained for a substantial period in immigration detention are at risk of becoming institutionalised (particularly given they have previously served a significant period in prison).
9. Beyond the adverse consequences for a non-citizen, there are other adverse and noteworthy consequences.
10. First, Australian citizens and permanent residents of Australia are liable to be significantly affected (i.e. both emotionally and financially) where a non-citizen remains in immigration detention for a lengthy period whilst his or her revocation application is being considered and ultimately determined.
11. Secondly, cl 6.2(2) of Direction no. 65 makes plain that decisions with respect to a revocation application should be decided in a 'timely manner'. The ultimate purpose of making 'timely decisions' with respect to a revocation application serves two broad purposes (see cl 6.2(2) of Direction no. 65):
- a. To maintain integrity and public confidence in the character assessment process; and
 - b. be beneficial to a non-citizen by providing 'certainty about the future'.
12. Considering the preceding information, where a revocation application is not decided in a timely manner (i.e. within three to six months), it is contended that the foregoing purposes to be served by timely decisions are plainly undermined. As outlined earlier, in my practical experience as a RMA, the DOHA or the minister often takes between six months to two years to resolve a revocation application.

13. Given the substantial delays in resolving revocation applications under section 501CA(4) of the Act, the DOHA and/or the minister are potentially undermining public confidence in the efficiency of the character assessment process and providing a lack of timely certainty for non-citizens who are waiting for a revocation application to be determined.

14. Considering the preceding, the writer makes the following recommendations:

Recommendation 1

- 1.1. In circumstances where a revocation application made under section 501CA(4) of the Act is not resolved within six months, the non-citizen should be released into the Australian community whilst the revocation application is being decided (assuming the non-citizen is otherwise eligible for parole).**
- 1.2. Should the non-citizen commit any criminal offences in immigration detention whilst awaiting a decision on their revocation application, they should not be released from immigration detention in accordance with paragraph [1.1] above.**

Government Funding for Immigration Assistance

15. Where a non-citizen fails the character test because of having a substantial criminal record under section 501 of the Act, the DOHA will write to that person to inform them that a mandatory cancellation decision has been made to cancel his or her visa. In accordance with the relevant provisions of the Act, the non-citizen is informed that he or she may make a revocation application.

16. Often the circumstances in relation to notification of the mandatory cancellation decision and legal rights regarding a prospective revocation application are less than ideal:

- The non-citizen is incarcerated in prison, often without sufficient intellectual competency to address complex matters related to sections 501 and 501CA(4) of the Act
- The non-citizen is given a copy of Direction no. 65 and informed of his or her legal rights to make a revocation application
- The non-citizen cannot afford the substantial fees for a RMA to provide immigration assistance with respect to a prospective revocation application
- The non-citizen lodges his or her revocation application, not fully appreciating the statutory operation of sections 501 and 501CA(4) of the Act and Direction no. 65
- Without the benefit of immigration assistance from a RMA, non-citizens often lodge a poor revocation application with the National Character Consideration Centre (being a section within the DOHA).

17. Considering the foregoing matters outlined in paragraph [16], it is not surprising that the non-citizen receives an unfavourable result in relation to his or her revocation application by a delegate from the DOHA or the minister acting personally.

18. Given the adverse legal significance for a non-citizen who is unsuccessful in having a mandatory cancellation decision revoked (i.e. exclusion from Australia), coupled with the complexity related to the application of sections 501 and 501CA (4) of the Act,² it is paramount that non-citizens have competent RMAs to provide them with immigration assistance in relation to their revocation

² A substantial number of cases have come before the Federal Court of Australia and Full Court of the Federal Court of Australia in relation to construing sections 501 and 501CA (4) of the Migration Act 1958 (Cth). See further Donnelly, J. (2017). Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door. 24 *Australian Journal of Administrative Law*, 99.

application. However, as outlined earlier, non-citizens are often in prison and not in a position financially to satisfy the legal fees of a RMA to provide them with immigration assistance in relation to their existing review rights under sections 501 and/or 501CA(4) of the Act.

19. Without adequate legal representation, the efficiency of the review processes under sections 501 and 501CA(4) of the Act are hindered. For example, non-citizens may continue to appeal an unfavourable decision made under section 501 of the Act (primarily because they have not had the benefit of immigration assistance to provide advice in relation to the matter). By way of further example, without immigration assistance from a RMA, the non-citizen is likely to make a decision-maker's statutory task more difficult (because the non-citizen is unlikely to produce the same level of competency in presenting evidence and submissions than a RMA).

20. Given the foregoing, the writer makes the following recommendations:

Recommendation 2

- 2.1. The Commonwealth should introduce an independent statutory panel (panel) of appointed RMAs to provide immigration assistance to non-citizens who engage the merits review processes under section 501 of the Act. The immigration assistance provided by RMAs on the panel will be funded by monies advanced from the Commonwealth.**
- 2.2. For a non-citizen to gain the benefit of a RMA on the proposed panel outlined in paragraph [2.1] above, that non-citizen must meet a carefully defined 'means test' that is analogous to that applied by Legal Aid in Australia.**

Present Levels of Duplication Associated with the Merits Review Process (Terms of Reference 2)

21. In accordance with sections 500(1)(b) and 500(1)(ba) of the Act, a non-citizen can make an application to the Administrative Appeals Tribunal (AAT) for review of a decision of a delegate of the minister under section 501, or a decision of a delegate of the minister not to revoke a mandatory cancellation decision. Accordingly, the current statutory regime mandated by the Act appears to provide for a somewhat duplicated level of merits review processes; first the non-citizen gets the benefit of a decision made by a delegate of the minister, and secondly, the non-citizen can subsequently review that section 501 or section 501CA(4) decision of the delegate before the AAT.

22. Despite the preceding, the review jurisdiction of the AAT in relation to section 501 and 501CA(4) decisions made by a delegate of the minister should not be characterised as a clear duplicated process. First, unlike decisions made by a delegate, the AAT is in a better position to test the evidence adduced by a non-citizen in support of his or her case (given that the evidence is given orally, witnesses are subject to cross-examination and there is the prospect of potential questioning from a tribunal member from the AAT). Secondly, the evidence and submissions relied upon in the first instance by a non-citizen may not necessarily be the material relied upon by a non-citizen before the AAT. Accordingly, the nature of issues requiring resolution may not be entirely the same as they were before the delegate applied the statutory power under sections 501 or 501CA(4) of the Act.

23. Ultimately, it is submitted that the AAT's statutory jurisdiction under sections 500(1)(b) and 500(1)(ba) of the Act should not be abolished or curtailed. There

are several reasons for arriving at this view.

24. First, should the AAT's statutory jurisdiction under section 500 of the Act be abrogated or curtailed, such a decision is likely to undermine public trust and confidence in the decision-making processes of the AAT (since the Commonwealth would have made a conscious decision to limit or withdraw the AAT's statutory jurisdiction in relation to the review of visa cancellation decisions made on character grounds). An available inference is that removing jurisdiction from the AAT may suggest a difficulty with the AAT itself.

25. Secondly, a restriction in the statutory jurisdiction of the AAT (regarding section 501 and section 501CA(4) matters) is likely to raise accountability questions for decisions made by delegates of the minister. In the report, *Accountability in the Commonwealth Public Sector*, accountability is described in the following terms:

Accountability is fundamental to good governance in modern, open societies. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration. Indeed, public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.³

26. If an unfavourable section 501 or section 501CA(4) decision made by a delegate of the minister is not reviewable before the AAT, fair-minded members of the public are more likely to challenge the legitimacy of the decision (since it has not been made by an independent decision-maker from outside the DOHA).

27. Thirdly, any abrogation or curtailment of the AAT's jurisdiction with respect to

³ Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector*, Report No. 11, AGPS, Canberra, 1993, p. 3.

section 501 or 501CA(4) matters is likely to undermine the fundamental objectives of that tribunal. As the Hon. Philip Ruddock MP (as he then was) said when speaking about the role of the AAT in 2004:

For close to thirty years, the tribunal has provided an avenue for people to seek review of the decisions of government that affect their lives. The tribunal has also played an essential role in improving the quality of administrative decision-making across the Australian government.⁴

28. Further limiting the AAT's statutory jurisdiction to deal with section 501 and section 501CA(4) matters may not only adversely hinder the ability of a non-citizen's current legal right to challenge a decision of the government but may otherwise affect the quality of administrative decision-making in Australia.

29. The existence of the AAT review system is likely to make delegates of the minister more careful to avoid errors in their decisions and stimulate administrative efficiency.⁵ The availability of administrative review before the AAT has led to increased awareness among delegates about the exercise of decision-making power within the terms of the authorising legislation, promoted the consistent application of the law by decision makers and led to improvements in the quality of primary decision making.⁶

30. By the 1970s the Commonwealth government had assumed a significant role

⁴ Cth, Parliamentary Debates, House of Representatives, 11 August 2004, p. 2006: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2004-08-11%2F0017%22>

⁵ Commonwealth Administrative Review Committee, p. 107 and 109.

⁶ Hon. Justice Deirdre O'Connor, Lessons from the Past/Challenges for the Future: Merits Review in the New Millennium. Paper presented at the 2000 National Administrative Law Forum - Sunrise or Sunset? Administrative Law in the New Millennium June 2000: <http://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-deirdre-oconnor-former-pr/lessons-from-the-past-challenges-for-the-future>

in civil regulation and the provision of services to the public.⁷ As the Kerr Committee noted, this involved ministers, public servants and statutory authorities making a vast and increasing range of decisions which affected individuals in many aspects of their daily lives.⁸ The means for testing the correctness and value of these decisions, however, were inadequate.⁹ In particular, judicial review was expensive, highly technical and did not give individuals affected by a decision what would be of most immediate benefit to them - a review of that decision on the merits.¹⁰

31. The fundamental objective behind the original establishment of the AAT has not changed; judicial review remains expensive and the law has developed in complexity. It follows that there is no compelling reason to either limit or withdraw a non-citizen's legal right to review the decision of a delegate regarding a section 501 or section 501CA(4) matter on the merits.

32. Fourthly, the proposition that a merits review adds value to society has not gone unchallenged since it was introduced. On occasions, commentators have questioned whether the costs of administrative review can justify any alleged benefits.¹¹ As Helen Murphy observed, this approach has centred on the rationalised use of resources, personnel and time and an overriding emphasis on strictly economic goals.¹²

⁷ Ibid.

⁸ Australia, Parliament 1971. *Commonwealth Administrative Review Committee - Report*, Parl, Paper 144, Canberra, p. 5.

⁹ The Hon. Justice Deirdre O'Connor, above n 6.

¹⁰ Ibid.

¹¹ Ibid.

¹² Murphy, H. (1998). Administrative Review Rights and Changes to Commonwealth Government Service Provision'. 2 *Flinders Journal of Law Reform* 235, p. 235.

33. Not surprisingly, ministers and public servants have become increasingly accountable for the cost-effective expenditure of public monies.¹³ Inevitably, in such a climate, less worth is attached to values that cannot be measured in terms of dollars, such as administrative justice for individuals, openness and transparency in decision-making or the normative effect of administrative review decisions, particularly when implementing such values costs money.¹⁴

34. It is submitted that the expenditure of public monies to fund the AAT's statutory jurisdiction to review decisions made under section 501 or section 501CA(4) of the Act is justified. Decisions made under section 501 and section 501CA(4) of the Act have significant consequences not only for the non-citizen involved, but often for the family and friends of the non-citizen living in Australia (many of whom are Australian citizens or permanent residents in Australia). In that context, a decision made under section 501 or section 501CA(4) of the Act often has wide-ranging consequences (i.e. emotional and financial) for various members of the Australian community.

35. By way of example, a non-citizen removed from Australia because of a mandatory cancellation decision may result in the non-citizen being separated from his or her Australian citizen wife and child. Alternatively, the impugned Australian citizen wife and child may follow the non-citizen to reside in a developing nation (without the economic and social opportunities provided in Australia). In those circumstances, as this example seeks to demonstrate, individualised justice and transparency in the decision-making process with

¹³ The Hon. Justice Deirdre O'Connor, above n 6.

¹⁴ Ibid.

respect to section 501 and section 501CA(4) matters are paramount.

36. For the foregoing reasons, the writer makes the following recommendation:

Recommendation 3

3.1. The AAT's statutory jurisdiction under section 500 of the Act should not be abolished or curtailed in relation to visa cancellation decisions made on criminal grounds.

The Scope of the AAT's Jurisdiction to Review Ministerial Decisions (Terms of Reference 3)

37. At paragraph [21] of these submissions, the writer explored the scope of the AAT's statutory jurisdiction to review ministerial decisions made under sections 501 and 501CA(4) of the Act. The legislative effect of section 500 of the Act prohibits the AAT from reviewing a decision made by the minister personally under sections 501 and 501CA(4) of the Act. Decisions made by the minister personally under the preceding statutory provisions are reviewable in the FCA because of jurisdictional error.

38. It is submitted that the AAT should have a statutory jurisdiction to review decisions made by the minister personally under sections 501 or 501CA(4) of the Act. There are two broad reasons in support of this recommendation.

39. First, where a minister personally exercises the statutory power under sections 501 or 501CA(4) of the Act, the minister is not subject to a mandatory parliamentary tabling obligation to notify both Houses of Parliament about the making of the decision. For example, under section 502(3) of the Act:

If the minister decides under subsection (1), the minister must cause notice of the making of the decision to be laid before each House of Parliament within

15 sitting days of that house after the day on which the decision was made.

40. Given that a parliamentary tabling obligation does not apply to all decisions made by the minister personally under section 501 or section 501CA(4) of the Act, decisions made by the minister in these circumstances may be subject to less political accountability (which otherwise is sought to be invoked by the utilisation of the parliamentary tabling obligation).

41. Secondly, there is an odd anomaly that decisions made by the minister personally (with respect to visa cancellation decisions made on criminal grounds) are not subject to review before the AAT in circumstances where the AAT is otherwise able to review decisions made by the minister personally to refuse a non-citizen's application for Australian citizenship or revoke Australian citizenship given to a person.¹⁵

42. For example, in the case of Egan and the Minister for Immigration and Border Protection (Citizenship) [2017] AATA 2705, the applicant was granted Australian citizenship. Subsequently, the applicant was later convicted of serious sexual offences, and his Australian citizenship was revoked by the Minister for Immigration and Border Protection under section 34(2) of the Australian Citizenship Act 2007 (ACA 07 Act). In setting aside the decision of the minister, Deputy President Stevenson concluded that 'it would not be contrary to the public interest that the applicant retain his Australian citizenship'.

43. The decision of Egan demonstrates that decisions made by the minister (acting personally) under the ACA 07 Act (with respect to criminal related matters) is

¹⁵ Australian Citizenship Act 2007 (Cth), s 52.

not beyond the purview of the AAT's jurisdiction. It is logical to extend the AAT's jurisdiction to deal with decisions made by the minister personally regarding visa cancellations on criminal grounds.

Recommendation 4

- 4.1. Decisions made by the minister (acting personally) under sections 501 or 501CA(4) of the Act should be the subject of merits review before the AAT under section 500 of the Act.**
- 4.2. Notwithstanding paragraph [4.1] above, a decision made under section 501(3) of the Act should not be reviewable before the AAT (given that the exercise of that statutory power by the minister includes satisfaction of a specific 'national interest' criterion).**

44. In accordance with section 500(6B) of the Act:

If a decision under section 501 of this Act, or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the tribunal for a review of the decision must be lodged with the tribunal within nine days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the Administrative Appeals Tribunal Act 1975 do not apply to the application.

45. Consequently, the legal effect of section 500(6B) of the Act does not permit the AAT to review a decision made under sections 501 or 501CA(4) of the Act in circumstances where the:

- non-citizen has purported to lodge an appeal against the decision of the delegate with the AAT; and
- the purported appeal was lodged beyond nine days from when the non-citizen is taken to have been notified of the delegate's decision.

46. It is submitted that the strict nine-day period in which to appeal a decision of a delegate made under sections 501 or 501CA(4) of the Act to the AAT is unreasonable.

47. First, given the fundamental significance of a visa cancellation decisions on criminal grounds (i.e. exclusion from Australia), the non-citizen should be given at least 28 days in which to appeal a decision of the delegate under section 500 of the Act. For example, under sections 44(1) and 44(2A) of the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act 75), a party to a proceeding before the AAT may appeal to the FCA on a question of law from any decision of the AAT no later than 28 days after the date on which that person received the document setting out the terms of the AAT decision.

48. As Smith FM said in *Nguyen v Minister for Immigration & Anor* [2006] FMCA 1495 [26]:

'If I could consult my own experience as an administrative lawyer and judge, I would be far from persuaded that a period of 28 days, with a possible extension for a further 56 days, would not usually provide a sufficient and reasonable period for a client affected by a migration decision to instruct a lawyer in time to allow the lawyer to commence proceedings... administrative law for many decades has been familiar with 28-day time limits...

49. Secondly, the prescribed nine-day appeal period is likely to discriminate against those non-citizens who have a low intellectual competency and who are not otherwise represented by a RMA. It is arguable that, in these circumstances, non-citizens are unable to fully appreciate the statutory significance of the prescribed nine-day period in which to appeal the decision of the delegate to the AAT under either section 501 or section 501CA(4); this is especially so in circumstances where the non-citizen is in prison, without easy access to computers or the administrative tools to process appeal documentation with the AAT.

50. Thirdly, the legal effect of section 500(6B) of the Act undermines the general

statutory discretion which the AAT otherwise enjoys under section 29(7) of the AAT Act 75, which allows the AAT to extend the time to make an application to the AAT for review of a decision. In other words, section 500(6B) of the Act appears to ignore that there may be compassionate and/or compelling reasons why a non-citizen failed to lodge an appeal with the AAT within the prescribed mandatory nine-day appeal period.

51. In a civilised country like Australia, individualised justice should be given every opportunity to crystallise (and not otherwise potentially be usurped because of unreasonable appeal time limitations that oust the jurisdiction of an independent statutory review body such as the AAT). It follows that not only should a non-citizen be given a prescribed time of 28 days in which to appeal a decision of a delegate under sections 501 or 501CA(4) of the Act to the AAT, but the AAT should be permitted to entertain applications for review beyond the prescribed 28-day time limit in circumstances where it is reasonable to do so (see sections 29(7) and 29(8) of the AAT Act 75).

Recommendation 5

5.1. Section 500(6B) of the Act should be amended as follows:

(6B) If a decision under section 501 of this Act, or a decision under subsection 501CA (4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the tribunal for a review of the decision must be lodged with the tribunal within 9 28 days after the day on which the person was notified of the decision in accordance with subsection 501G (1). Accordingly, ~~paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the Administrative Appeals Tribunal Act 1975 do not apply to the application.~~

52. Pursuant to section 500(6H) of the Act:

If:

- (a) an application is made to the tribunal for review of a decision under section 501 or a decision under subsection 501CA(4) not to revoke a decision to cancel a visa; and
- (b) the decision relates to a person in the migration zone;

the tribunal must not have regard to any information presented orally in support of the person's case unless the information is set out in a written statement given to the minister at least two business days before the tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

53. In the High Court of Australia decision in *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 (*Ueese*), section 500(6H) of the Act was construed in the following terms by French CJ, Kiefel, Bell and Keane J:

- As a matter of ordinary usage, the phrase 'presented ... in support of the [applicant's] case' is apt to describe the active presentation of the case propounded by an applicant for review; but it is not at all apt as a description of the process of eliciting information under cross-examination. One would not ordinarily describe an answer given in response to a question posed on behalf of the minister during cross-examination as 'information presented orally in support of the [applicant's] case'. It is distinctly to strain the language of section 500(6H) to say that 'information presented orally' in support of the case made by an applicant for review includes information elicited by the minister's representative or by the tribunal itself during cross-examination of a witness called by the applicant¹⁶
- The apparent purpose of section 500(6H) was to prevent applicants from manipulating the system to delay deportation¹⁷
- The purpose of ensuring the expeditious determination of applications for review under section 500 of the Act by requiring that the minister be given 'an opportunity to answer the case to be put by the applicant for

¹⁶ *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 217.

¹⁷ *Ibid* 220.

review without the necessity of an adjournment of the hearing',¹⁸ which might result from a late change to the applicant's case, is not compromised by accepting that the preclusory effect of section 500(6H) is confined to information presented by or on behalf of the applicant for review in support of his or her case. Where information is adduced in cross-examination by the minister or in response to inquiry by the tribunal itself, it is inherently unlikely that the information is provided as part of an attempt to manipulate or delay the review process¹⁹

- Section 500(6H) does not, on any view of its language, deny an applicant an 'entitlement' to rely upon evidence adduced by the minister or elicited by the tribunal itself, if that evidence happens to be supportive of the applicant's case.²⁰

54. The explanatory memorandum to the bill that led to the enactment of sections 500(6A)-(6L) of the Act stated that:

These amendments are necessary to expedite review of decisions made by a delegate of the minister under the new character provisions. The amendments balance the government's concern to expedite review of character decisions against the need to ensure that the [tribunal] has relevant information and sufficient time to properly review a decision to refuse to grant or to cancel a visa based on a person's character.²¹

55. Accordingly, the statutory effect of section 500(6H) of the Act ousts the jurisdiction of the AAT from having regard to information presented orally in support of a non-citizen's case under sections 501 or 501CA(4) of the Act in the following circumstances:

- a. The non-citizen or a person called in support of a non-citizen's case adduces evidence orally;

¹⁸ *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378 [25].

¹⁹ *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 220.

²⁰ *Ibid* 223.

²¹ Australian Senate, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998. Explanatory Memorandum at 9, Item 21; *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 220.

- b. The oral evidence is adduced by examination-in-chief of the non-citizen's case; and
- c. The oral evidence is not reflected in a written statement given to the minister at least two business days before the AAT review hearing.

56. It is submitted that section 500(6H) of the Act should not apply if the AAT is otherwise satisfied that the following two conditions are met:

- a. The non-citizen was not provided with immigration assistance (from a RMA) in preparation of his or her case before the AAT; and
- b. Having regard to the circumstances of the case and the oral evidence adduced, it is otherwise in the interests of justice for the evidence to be considered.

57. Where a non-citizen has not had the benefit of a RMA to assist in the preparation of his or her case before the AAT, it is likely that the non-citizen (or a witness called in support of his or her case) will adduce oral evidence (in the examination-in-chief process) that is not in their written statement.

58. First, without affirmative evidence to the contrary, it is inherently unlikely that the impugned oral evidence adduced has been provided to manipulate or delay the review process. A more logical inference is that without the benefit and expertise of a RMA to assist in the preparation of the written evidence in support of a non-citizen's case before the AAT, the non-citizen (not being professionally trained in this area) has not taken a proper proof of written evidence in support of the case on review.

59. Secondly, the recommendation reflected in paragraph [56] does not necessarily undermine the expeditious review of a delegate's decision (under section 501

or section 501CA(4) of the Act) before the AAT. The admission of the impugned evidence adduced orally can be considered by the AAT, and the minister can cross-examine the relevant witness in relation to the new information. A competent advocate should be able to indulge a level of flexibility and invoke expertise pertinent to cross-examine on evidence adduced that was not otherwise reflected in a written statement of the relevant witness.

60. Thirdly, the intention behind the recommendation reflected in paragraph [56] is not designed to advance manipulation of the administrative review system to delay deportation from Australia of a non-citizen. On the contrary, the recommendation seeks to rectify a shortcoming in the statutory operation of section 500(6H) of the Act; namely, without the benefit of a RMA assisting in the preparation of a non-citizen's case in review proceedings before the AAT, the written material submitted in support of a non-citizen's case concerning visa cancellation on criminal grounds is likely to be less than optimal and satisfactory.

Recommendation 6

- 6.1. Section 500(6H) of the Act should not apply if the AAT is otherwise satisfied that the following two conditions are met:**
- a. The non-citizen was not provided with immigration assistance (from a RMA) in preparation of his or her case before the AAT; and**
 - b. Having regard to the circumstances of the case and the impugned oral evidence adduced, it is otherwise in the interests of justice for the evidence to be considered.**

61. In accordance with section 500(6J) of the Act:

If:

- (a) an application is made to the tribunal for a review of a decision under section 501 or a decision under subsection 501CA(4) not to revoke a decision to cancel a visa; and
- (b) the decision relates to a person in the migration zone;

the tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the minister at least two business days before the tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or tribunal under subsection 501G(2) or subsection (6F) of this section.

62. Consequently, a non-citizen is not permitted to adduce any document in proceedings before the AAT (related to a review of a decision made under either sections 501 or 501CA(4) of the Act) in circumstances where a copy of the document was not given to the minister at least two business days before the review hearing in the AAT. However, documents given to the non-citizen or AAT under sections 501G(2) or 500(6F) do not fall within the prohibition mandated by section 500(6J) of the Act.

63. The statutory ambit of section 500(6J) performs a similar purpose to section 500(6H) of the Act²² explored earlier at paragraphs [52]-[60] of these submissions. As Nettle J made plain in the case of Uelese:

Read in context, the expression 'information presented orally in support of the person's case' in s500(6H) will be seen to be aimed at achieving the same result in relation to oral evidence as the expression 'document submitted in support of the person's case' in s500(6J) is designed to achieve in relation to written evidence. The natural and ordinary meaning of 'document submitted in support of the person's case' in s500(6J) is of documentary evidence tendered by an applicant. It would be a most unusual use of language for it to extend to a document which counsel for the minister might tender during cross-examination of an applicant or one of the applicant's witnesses.²³

²² Uelese v Minister for Immigration and Border Protection (2015) 256 CLR 203, 206.

²³ Ibid 232.

64. In the case of Goldie,²⁴ Gray J determined that the purpose of sections 500(6J) and 500(6H) of the Act is to give the minister an opportunity to answer the case put by a non-citizen for review before the AAT without need for an adjournment of the hearing; more precisely, to prevent a non-citizen for review from being able to change the nature of his or her case, thus catching the minister by surprise and forcing the AAT into granting one or more adjournments to enable the minister to meet the new case put.²⁵ His Honour added that if that were not sufficiently apparent from the terms of the legislation, it was clear from the Second Reading Speech in relation to the Bill by which the provisions were introduced.²⁶

65. Given that sections 500(6H) and 500(6J) of the Act appear to have been enacted to serve the same essential object, and otherwise adopting the reasoning reflected earlier in support of Recommendation six, the writer recommends the following:

Recommendation 7

- 7.1. Section 500(6J) of the Act should not apply if the AAT is otherwise satisfied that the following two conditions are met:**
- a. The non-citizen was not provided with immigration assistance (from a RMA) in preparation of his or her case before the AAT; and**
 - b. Having regard to the circumstances of the case and the impugned documentary evidence adduced, it is otherwise in the interests of justice for the evidence to be considered.**

²⁴ Goldie v Minister for Immigration and Multicultural Affairs (2001) 111 FCR 378, 390 [25].

²⁵ Ibid 390 [25].

²⁶ Australia, House of Representatives, Parliamentary Debates (Hansard), 2 December 1998, p. 1232. See also Australia, Senate, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998*, Explanatory Memorandum, p 3.

Whether the Visa Cancellation Process and Review Mechanisms are open to Exploitation from Individuals who are Actively Trying to Circumvent Australia's Migration System

66. In the cover letter to the writer (dated 28 March 2018), it was indicated that the:

committee will examine whether the visa cancellation process and review mechanisms are open to exploitation from individuals who are actively trying to circumvent Australia's migration system.

67. The writer notes that the preceding issue outlined at paragraph [66] above does not appear to be expressly encapsulated by the terms of reference. For example, none of the three bullet points refer to the question of potential exploitation by individuals who are actively trying to circumvent Australia's migration system in relation to the visa cancellation process and review mechanisms. The terms of reference otherwise outline that the JSCOM will examine 'the review processes associated with visa cancellations made on criminal grounds'.

68. Despite the preceding, given that the cover letter indicated that the JSCOM would be investigating issues of the potential abuse of the process of Australia's migration system by non-citizens, the writer wishes to make the following observations in relation to this issue.

69. First, it would be relatively difficult to conclude that instituting review proceedings in the AAT against a decision of the delegate made under section 501 or section 501CA(4) of the Act could be characterised as a non-citizen actively trying to circumvent Australia's migration system. The merits review process provided by the AAT allows for an accessible, fair, just, economical,

informal and quick resolution of review proceedings related to visa cancellation decisions made on criminal grounds.²⁷

70. Secondly, given the scope for more considerable discretion in the merits review process than in the judicial review proceedings, it is generally more challenging to assess the prospects of success in proceedings before the AAT than in the judicial review proceedings. Unlike in the judicial review proceedings, the merits review process includes an active balancing of a broad range of competing considerations.

71. Thirdly, it is submitted that the current statutory framework provides Chapter III Courts with sufficient legal mechanisms to address any potential exploitation by non-citizens who are actively trying to circumvent Australia's migration system.

72. For example, under section 31A(2) of the Federal Court of Australia Act 1976 (Cth) (FCOA Act 76), the FCA can summarily dismiss judicial review proceedings instituted by a non-citizen in relation to an appeal related to section 501 or section 501CA(4) of the Act (in circumstances where that party has no reasonable prospects of successfully prosecuting the appeal proceedings). Furthermore, under rule 26.01(1) of the Federal Court Rules 2011 (Cth), a party may apply to the FCA for an order that a judgement be given against a party because:

- (a) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or
- (b) the proceeding is frivolous or vexatious; or
- (c) no reasonable cause of action is disclosed; or

²⁷ See Administrative Appeals Tribunal Act 1975 (Cth), s 2A.

(d) the proceeding is an abuse of the process of the court; or

73. Accordingly, the current statutory power of the FCA to grant summary judgment provides a sufficient legal mechanism to prohibit the exploitation of judicial review proceedings being brought by non-citizens in relation to visa cancellation matters made on criminal grounds.

74. By way of further example, under section 43(1) of the FCOA Act 76, the FCA has a statutory power to award costs against a non-citizen who has been unsuccessful in relation to prosecuting his or her judicial review proceedings. The prospect of an adverse costs order may potentially act as a deterrent against non-citizens who are actively trying to circumvent Australia's migration system (i.e. delaying his or her removal from Australia on criminal grounds).

75. Should a non-citizen not satisfy an adverse costs order made in judicial review proceedings, that non-citizen will be subject to Public Interest Criteria (PIC) 4004: 'The applicant does not have outstanding debts to the Commonwealth unless the minister is satisfied that appropriate arrangements have been made for payment.' The legal effect of PIC 4004 in Schedule 4 of the Migration Regulations 1994 (Cth) would otherwise prohibit a non-citizen removed from Australia from returning, unless he or she was able to meet any outstanding debts to the Commonwealth. Accordingly, the legal effect of PIC 4004 also acts as a significant deterrent to non-citizens seeking to exploit review mechanisms associated with visa cancellation decisions made on criminal grounds (given the adverse consequences for a non-citizen who cannot satisfy PIC 4004).

Closing Words

76. The writer wishes to thank the committee secretary for the invitation to make a submission in relation to the new enquiry associated with visa cancellations made on criminal grounds. Should it be necessary, the writer would welcome the opportunity to expand upon his written submissions by appearing in person before a public hearing conducted by the JSCOM.

JASON DONNELLY

Barrister-at-Law
Adjunct Lecturer (NSW College of Law)
Lecturer (WSU)
Course Convenor of Graduate Diploma in Australian Migration Law (WSU)
Registered Migration Agent (#1682742)
E: J.Donnelly@westernsydney.edu.au
W: <https://www.jdbarrister.com.au/>