07 August 2019

Senate Legal and Constitutional Affairs Legislation Committee

Submission to the Inquiry Migration Amendment (Strengthening the Character Test) Bill 2019 [Provisions]

1. Existing character provisions

The current provisions of s 501 of the Migration Act 1958(Cth) provide reasons for mandatory and discretionary visa refusal and cancellation. The Minister must cancel a visa if a person has substantial criminal record (for mandatory visa cancellation this should include a death sentence, imprisonment for life, a term of imprisonment of 12 months or more, or two or more terms of imprisonment totaling two months or more), or was convicted of sexually based offences involving a child (regardless of the type of punishment), and is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against the law of the Commonwealth, a State or a Territory.[1] Both the Minister and the delegate also have discretionary powers to refuse or cancel a visa of a person who does not pass the character test.[2] These discretionary powers aim to target specific offences, such as offences committed in immigration detention or during escape, offences involving manufacturing or possession of weapons by detainees. However, departmental powers go further than considering the offences which have resulted in conviction of the non-citizen. Visa holders charged with (although not convicted) crime of genocide, crime against humanity, a war crime, a crime involving torture or slavery, a crime that is otherwise of international concern may also be considered not entitled to hold an Australian visa. Ministerial powers go even further than that and encompass the concept of 'reasonable suspicion'. These are used to target individuals who may potentially be involved in organized crime and gangs, people smuggling and crimes of serious international concern. Additionally, the Minister can cancel and refuse visas if they are not satisfied with the non-citizen's past and present criminal conduct and even past and present general conduct. A person can also be refused a visa in case the Minister sees some risk of their engagement in criminal conduct if they are granted a visa and come to Australia, vilify a segment of the Australian community or incite discord in the Australian community or in a segment of that community.[3] In the writer's opinion, these provisions are exhaustive and target any danger the Australian community can possibly face. Some of them are very specific and involve

[1] *Migration Act 1958* (Cth) s 501(3A).

[2] Ibid s 501(1-3).
[3] Ibid s 501(6)(d).

certain types of crime, whereas others are much broader and give the Minister power to cancel or refuse visas merely by not being satisfied by the general conduct of the person, thus targeting all possible types of crime and antisocial behavior. In the writer's opinion, there is no need for the Minister to have additional discretionary refusal and cancellation powers.

2. Disregard of individual circumstances by the new Bill

According to the Explanatory Memorandum, the Bill intends to provide clearer and more objective reasons for visa refusal and cancellation:

> While there is also a provision that allows consideration of refusal or cancellation of a visa based on a person's past and present criminal or general conduct, the amendments in this Bill provide a clearer and more objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk to the safety of law-abiding citizens and non-citizens.[4]

In the writer's opinion, the existing provisions have been clear enough as to detecting the non-citizens, who pose an unacceptable risk to the Australian community. Additional provisions which aim to catch non-citizens, whose behavior has not attracted sentencing to 12 months or more are anything but objective. Most types of crimes, falling under the 'designated offence' concept of the Bill, may, and most often will, after individual circumstances of the defendant are considered, result in non-custodial punishment, for instance, a fine. However, the proposed Bill intends to disregard the actual conviction, and seeks to apply the maximal sanction for the offence against the law in force.

Also, the Bill seeks to better address the circumstances of the crime, which gives rise to refusal and cancellation powers:

> The amendments expand the framework beyond a primarily sentence-based approach and instead allow the Minister or delegate to look at the individual circumstances of the offending and the severity of the conduct.[5]

Although the Bill declares the purpose to look at particular circumstances of the offence and the conduct of a particular offender, it, in fact, does the contrary. Instead of looking at the actual conviction in a particular case, the Bill intends to give powers of visa refusal and cancellation, where the offence can be punishable by a prison sentence of 2 years or more. Going beyond the sentence-based approach, the Bill actually undermines the existing

[4] Explanatory Memorandum to the Migration Amendment (Strengthening the Character Test) Bill 2019, The Parliament of the Commonwealth of Australia.
[5] Ibid.

essence of criminal justice. It seeks to disregard the decision made by the court, which has already considered the severity of the offence and the circumstances of the criminal, and aims to impose a new penalty, which is adversarial to the applicant and much harsher, then the one actually imposed by the court. As a result, the non-citizen will face two different penalties – one in the understanding of Criminal Law, and another one, in the understanding of Migration Law. It may also be argued that in this case, the non-citizen will be punished twice.

3. Violation of right to liberty

The Bill states the following:

> Decision-makers exercising the discretion to refuse or cancel a person's visa are guided by comprehensive policy guidelines and Ministerial Directions, and take into account the individual's circumstances and relevant international obligations. This means the visa decision, and any consequent detention or refusal, is a proportionate response to the individual circumstances of each case.[6]

It is true that Ministerial Directions give due regard to the circumstances of the individual whose visa is subject to refusal or cancellation. However, the writer has reasonable doubt about whether Australia's international obligations and basic human rights are properly considered in the shift from a sentence-based approach to the 'punishable' approach involving the maximum possible punishment, and not the actual conviction. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) asserts the right to liberty as a fundamental right of an individual:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[7]

The Explanatory Memorandum claims that there is complete compatibility of the new character provisions with the human rights provisions. In fact, there is no such compatibility. Arbitrary arrest and detention are prohibited by Article 9 of the ICCPR, however, should the current Bill become a law, non-citizens may be detained arbitrarily, as a result of visa cancellation, which would occur due to their involvement in a crime, which, because of its insignificance, was not punished by a prison term of a year or more, yet was 'caught' by the new provisions expanding beyond the actual sentence. This leads to an unfair and unreasonable situation, when the criminal will face the punishment they did not deserve. In

[6] Ibid.
[7] International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966, No 14668, registered ex officio on 23 March 1976.

the writer's opinion, the actual sentence is the only real reflection of the seriousness of the crime and the severity of the conduct. Had the Minister taken the actual sentence, as a demonstration of the degree of severity of the criminal deed into account, the non-citizen would not have faced visa cancellation and detention. Whenever departmental delegates rely on the maximum punishment for a specific type of crime and not on the court sentence, this leads to deprivation of the right to liberty as a result of arbitrary immigration detention.

The Explanatory Memorandum, at the same time, admits that there must be reason, and not only lawfulness, to arrest or detain an individual: 'The concept of arbitrariness goes beyond mere lawfulness and requires that the detention of the individual is reasonable, necessary and proportionate to achieve a legitimate aim.'[8] The aim of keeping the Australian community safe and protecting law-abiding citizens and non-citizens from criminal activity is certainly a legitimate one. However, detaining non-citizens for a crime, that has, in fact, attracted, for instance, a fine and not full-time custody, is not proportionate with the crime committed and adversarial to the individual. The new 'beyond sentence' provisions may become lawful, yet they will remain completely unreasonable, since people who engage in serious criminality will actually attract a minimum 12-month sentence and engage the mandatory cancellation provisions. The new provisions, in the writer's opinion, are thus a threat to the liberty of non-citizens. Furthermore, they incite discord in the society and create a divide between Australian citizens and non-citizen visa holders. A crime that would result in a fine for an Australian citizen may result in visa cancellation and immigration detention for a non-citizen. This would certainly pervert the concept of a fair and just society that Australia has always been.

4. 'Knowingly concerned'

While introducing the term 'designated offence', the Bill also suggests the actions that will form the physical element of the 'designated offence', which will be introduced in the new subparagraphs to the Migration Act. Among others, these will involve 'being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of an offence that is a designated offence'.[9] 'Knowingly concerned' is not a novel term in Australian legislation, however, it has mostly been used in statutory provisions as well as case law in Tax and Corporate Law, Competition and Consumer Law, Intellectual Property Law. 'Knowingly concerned' is a complex term which has been defined differently in case law. In *R v Tannous* the following interpretation was suggested:

[8] Ibid.
[9] Migration Amendment (Strengthening the Character Test) Bill 2019, The Parliament of the Commonwealth of Australia, s 501(7AA).

> 'In terms of being 'knowingly concerned' in some act, a person cannot become criminally involved in an act made unlawful by mere knowledge or inaction on his or her part – some act or conduct on his or her part is necessary.[10]

Conversely, in another case, *Yorke v Lucas*:

> The High Court has held that the words 'knowingly concerned' in s 75B of the *Trade Practices Act 1974* (Cth) required that the person charged must have knowledge of the essential elements constituting contravention of the Act.[11]

At the same time, the similarity in both interpretations is that both require the contravention of some Act.

> While the expression 'knowingly concerned' is not used to define criminal liability in the *Crimes Act 1900* or the *Drug Misuse and Trafficking Act 1985*, it is used in penal provisions of some regulatory legislation, for example, s 62 of the *Fair Trading Act 1987* and s 51 of the *Occupational Health and Safety Act 1983*.[12]

It is thus clear that 'knowingly concerned' has been routinely used only in the provisions of other Acts, the violation of the provisions of which can attract criminal liability. It is not clear in the present case, what provisions of what type of regulatory legislation the non-citizen would have to be aware of in Migration Law, if the Bill makes amendments to the *Migration Act 1958 (Cth).* Also, it is going to be extremely difficult to identify, whether or not the non-citizen had the 'knowledge of the essential elements' constituting the contravention, unless the judiciary suggests a different interpretation for the term in the context of migration cases. Even if this is done, the term will remain intricate and complex and can unnecessarily increase the number of individuals whose visas may be cancelled.

Conclusion

For the reasons provided above, it is the writer's opinion that the Bill does not serve its purpose. It does not have the objectivity that the Department of Home Affairs wants it to have, it suggests arbitrary provisions limiting the freedom of the individual and being contrary to Australia's international obligations, it unnecessarily takes some functions of criminal justice while actually undermining the credibility of criminal justice and the purpose of sentencing and punishments as such. Furthermore, it has a polarizing effect on the Australian community. It is the writer's opinion that the existing provisions are sufficient and

[10] *R v Tannous* (1987) 10 NSWLR 303; 32 A Crim R 301 at 308 (NSWLR) per Lee J (Street CJ and Finlay J agreeing).
[11] *Yorke v Lucas* (1985) 158 CLR 661; 59 ALJR 776;[1985] HCA 65.
[12] Criminal Law New South Wales, Legislation and Commentary, Meaning of particular terms in statutes.

effective to safeguard law-abiding citizens and non-citizens from the persons that are a threat to the Australian community.

Respectfully,

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