Submission by Michael Chalmers

I am a retired solicitor who specialized in criminal law practice in NSW.

I belong to a voluntary community group who visits Villawood Immigration Detention Centre (VIDC) weekly to see asylum seekers and refugees. I have been visiting Villawood for 3 years. These submissions are made in relation to asylum seekers and refugees.

PART 1 BEING CHARGED WITH A CRIMINAL OFFENCE AND LOSING BRIDGING VISA AND THE RIGHT TO APPEAL TO THE ADMINSRATIVE APPEALS TRIBUNAL

Before I address Section 501 matters and appeal rights it is necessary to explain why I was so shocked when I visited VIDC so far as the interplay of criminal law and immigration law is concerned. Of particular concern was and is that a person on a bridging visa can have that visa revoked if they are charged with as opposed to a criminal offence. Thus an asylum seeker who is an "unauthorized maritime arrival" who is waiting for a substantial visa and is in the community on a bridging visa can find themselves in detention at a Detention Centre because the Minister or their delegate determines that they have breached their undertakings of good behaviour (Regulation 8564 and 8566) and revokes their bridging visa if they are charged with a criminal offence. This is pursuant to Section 116(1)g of The Migration Act and Regulations 2.43 1 p or q There is a Direction under section 499 of the Act being direction No 63 setting out the matters to be considered by a delegate.

It must be appreciated these persons have already been given bail by police or the courts on their criminal charges and that prosecuting authorities in federal and state jurisdictions have the right to appeal bail determinations and have not done so or lost such a review. The charges can be minimal, and examples I have come across include having possession of a prescribed drug without a script which would not lead a jail sentence, and first time High Range Drink Driving offences which would rarely lead to jail time. These are actual instances of offences that have led to people spending, long periods, even years in Detention.

Then if they are found not guilty they are not released immediately or at all. Often it takes 3-6 months for them to be released after being found not guilty and it seems the Minister or their delegate through Department internal committees re examines the Court findings to see if they believe the finding of not guilty are reasonable. More recently it seems to me detainees are kept in detention until their substantial visa applications are determined under the Fast Track System It is crucial to understand that Immigration Detention Centres are jails. I have visited many NSW jails as a lawyer and there is no difference.

The right of appeal to The Administrative Appeals Tribunal This is allowed on a merit review if the decision to revoke the bridging visa is made by a delegate of the Minister and not by the Minister. However the time to appeal for people in Detention is only 48 business hours. Two typical scenarios that are often played out is firstly a person leaves court on bail, and some days, weeks later is then summoned to an Immigration Meeting without knowing the reason. The second is having been granted bail and while literally leaving court the person is taken to the Department They do not know they are going into detention until at that meeting and because they have no idea of their fate they often have partners, mothers waiting for them outside the interview or at court to take them home When they are detained they are given a paper which informs them of this right to appeal to the AAT but they are given many lengthy complex and legalistic documents at the same time.

The asylum seekers are in shock at finding themselves in Detention Centre after receiving bail from Court, often they can speak little or no English and in 48 hours they have to work out what to do. This means while they are settling into detention they have to understand they need to appeal access a form (M2) from the Dept website, have it translated, complete it meaningfully and fax it to the AAT within 48 business hours. I can say where I have come across someone within that crucial48 hours in VIDC they have no understanding of their right to appeal, the importance of the appeal, the time constraint of the appeal how to download a form from the website and how to complete it. The exception is for those lucky detainees who have an ongoing migration agent or solicitor. It is also relevant to note asylum seekers who came by boat are not allowed to possess phones in detention

The appeal is in so many senses tokenistic and impractible for many detainees.

SUGGESTED RECOMMENDATIONS

1. Abolish the provision that allows the Department to cancel bridging visas when those on bridging visas are charged with a criminal offence. They are often found not guilty by the courts, or because the criminal charges are not the most serious are usually not given jail sentences. If someone has a trial they can wait 1-2 years before the trial and even if found not guilty and even if released from Immigration Detention they have completed in effect a 2 year jail sentence or more.
2. In the alternative, if this type of provision is kept, only have this provision for serious criminal offences and where there is a strong Crown case. Remember, these people have been given bail by police and or the Courts so The Minister is overruling the bail decisions of the Court/ Police.
3. Provide legal aid immediately after they are detained and within the appeal period. Asylum Seekers are given a written list of migration agents and or lawyers at the meeting but they rarely have funds to instruct them.
4. EXTEND THE APPEAL TIME 48 business hours is not enough. They should have at least 28 days. They should also be given the appeal form M2 translated into their language with the email and fax number attached. of the AAT
5. Where a detainee is found not guilty or the charges dropped they should be released immediately.
6. Where a detainee is found guilty/ pleaded guilty and the penalty by the Court is a non prison term they should be released immediately
7. People affected should have the right to be heard at the AAT even when the decision was made personally by Minister

PART 2 SECTION 501 OF THE MIGRATION ACT,

Sections 500-503A deal with adverse character grounds that could lead to deportation.

I have read the submission by the NSW Council for Civil Liberties and endorse their submissions

What is striking about Section 501 is the width of discretion the Minister and his delegates have, I would ask members of the Committee to read Section 501(6) in full however I attach parts of section 501 (6) (c) and (d)to show the depth of the subjective decision making of the Minister or his delegate in determining who is not of good character.

(c) having regard to **either** or both of the following:

(i) the person's past and present criminal conduct;

(ii) **the person's past and present general conduct**

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

I can only hope all factional opponents and opposition members of any Minister from time to time have resolved their citizenship issues because they may find "their past and present conduct" being examined if the Minister does not look kindly upon them.

With the Minister or his delegate having such a wide discretion clearly the appeal to the AAT allowed in 501 (1) and (2) must continue for both the decisions of the Minister or his delegate.

Section 501(3) precludes any appeal to the AAT where the Minister refuses to grant a visa or cancels a visa on national interest. This decision can only be made by the Minister personally. The question is what is the national interest and the answer is whatever the Minister of the time thinks it is. What must be borne in mind is the wide powers in section501 (6) including ASIO assessments (g) or subject to an Interpol Notice (h). Any national interest concerns would be referable to other provisions of section 501(6) so this blank cheque provision is not needed.

This provision could be used where a Minister has failed judicially under other sections of 501 to find a detainee not meeting character grounds and has used this provision to so find without review. It is oppressive. If it stays there must be a right to go to the AAT. Without mentioning any specific Minister such a provision over time without review will inevitably lead to subjective and speculative determinations if it has not already done so.

Section 501 (6) 3A This makes it mandatory for the Minister to cancel a visa on a person having a substantial criminal record or committing sexually based offences involving a child and the person is in full time custody doing a jail sentence. There is no review to the AAT allowed on this.501 (5)

In relation to substantial criminal record this is defined as serving 12 months or more jail. However as I understand it this can involve parole which in NSW where special circumstances are found the sentence could be 6 months jail and 6 months parole. Surely this does not necessarily involve a crime so grave that protection rights of a refugee should be lost without merit review. Concurrent jail terms are added up so for example 4 possess Indian hemp charges where 3 months jail is given for each concurrently would meet the 12 months. Once again should a refugee on a protection or humanitarian visa lose that right without a merits review on these charges?

In relation to sexual assaults on children these are serious but could include an indecent assault by an 18 year old on a seventeen year victim, say for a female victim having her breasts touched. Should not this be reviewable by the AAT on merits remembering the repurcussions of losing a protection visa and that the assailant is young and would be on parole with supervision after having served his jail sentence.

Although the theory behind section 501 is to refuse visas or take away visas for character consideration so the persons can be deported this is far from always happening. Sometimes where they have protection or humanitarian visas or would otherwise be entitled to such visas they cannot be deported because of refoulement obligations and complementary protection obligations Australia has. These people languish in Detention Centres in indeterminate detention. The Iranian Government will not accept Iranians who refuse to return voluntarily and so some Iranians who have been found not to meet 501 character assessments are also in indeterminate detention because of fear of returning to Iran. There are a number of them in Villawood Detention Centre. Lastly a stateless person, (for example a Palestinian refugee) will end up indeterminately in detention. Given the consequences of a character refusal in my submission for any refusal on character grounds there should always be a merits review at the AAT.

In regards to 501A the Minister should not have a right to overrule a judicial determination by the AAT as is allowed in 501A(3). Once again the justification is the nebulous concept of national interest.

Can any of us imagine taking a valid and legal judicial action against the Crown and after winning have the Crown void the decision and enter judgement in its favour? This is not an issue about damages, this is a fundamental claim to be found a refugee and not be returned to a place of danger Only in the Migration Act can fundamental rights and the rule of law be so completely repudiated..

Lastly section 501B refers to where a delegate refuses a visa or does not grant one. Here the Minister can set aside the decision of the delegate, and make the same decision in his personal capacity The justification is national interest but the reason I assume is to avoid merit review. This section should be repealed.

I support all the recommendations made in the NSW Council for Liberties recommendations

CONCLUSION The right to attend the AAT for all decisions under section501 whether made by a delegate or The Minister should be uniform. A merits review is a small bulwark against the Minister’s powers but for the asylum seeker and refugee it allows an independent umpire to hear their claims. For many asylum seekers and refugees their lives before they arrived in Australia have been subject to arbitary and capricious powers. Without checks and balances in The Migration Act they will never experience the rule of law.