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30 April 2018

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

By email: migration@aph.gov.au

Dear Committee

Submission to the inquiry into review process associated with visa cancellations made on criminal grounds

Victoria Legal Aid (**VLA**) welcomes the opportunity to make a submission to the Joint Standing Committee on Migration's inquiry into review processes associated with visa cancellations made on criminal grounds.

Scope of our submission

We understand from the terms of reference that the Committee is considering the value of existing merits review processes in relation to decisions made under section 501. In summary, our submission demonstrates:

- the existing strengths and efficiency of the Administrative Appeals Tribunal (**AAT**) process; and
- the ongoing need to maintain merits review for decisions under section 501, including by reference to our practice experience of judicial review and its systemic inefficiency as a means for individuals to respond to decisions made personally by the Minister, for which no merits review is currently available.

Based on our practice experience, it is our strong view that merits review of s 501 decisions is an essential and efficient mechanism to provide the necessary oversight and correction of these high volume and undeniably complex decisions. Especially in the context of visa cancellation, the merits review process is qualitatively and procedurally different from the decision-making process which is undertaken by the primary decision-maker. Among other things, the merits review process overcomes many of the impediments to a visa holder or former visa holder being well positioned to 'make their case' which often exist before the primary decision maker. It is not mere duplication.

We consider that any reform which would further remove visa cancellation from the AAT merits review process is very likely to result in a range of systemic, and adverse, consequences. Specifically, as we illustrate below, any further attempt to reduce the merits review of s 501 decision is likely to result in:

- A greater number of incorrect decisions remaining in place, given the inherent likelihood of error in this high volume and complex decision-making regime.
- Great inefficiency across the Courts and the Department of Home Affairs as former visa holders seek judicial review of decisions and, if successful, await the reconsideration of the decision by the Minister or his delegates.
- Greater costs for the Commonwealth where matters proceed to judicial review because individuals are likely to pursue judicial review in the absence of any other option to challenge the merit of a s 501 decision.
- An increased burden on the already pressured Federal courts system and legal assistance sector as a result of increased judicial review proceedings, despite this option being a more expensive, less efficient and ill-suited mechanism to review the **merit** of a decision made under s 501.

VLA's migration practice

VLA conducts a large practice assisting clients seeking judicial review of visa cancellation decisions made under s 501 of the *Migration Act 1958* (Cth) (**the Act**). These judicial review proceedings may be in response to an AAT decision reviewing a decision of a delegate of the Minister, or to a decision of the Minister for Home Affairs or the Assistant Minister which is not amenable to review in the AAT. The focus on VLA's work in this area is on challenging the legality of these decisions in the Federal Court. We have led a number of significant test cases on behalf of clients and for the purpose of clarifying this complex area of law. In many cases a live issue in these matters is the quality of ministerial decision-making and risk assessment under section 501.[1]

The clients who we assist are often some of the most vulnerable, presenting complex cases for decision-making. Many clients have been living in Australia most of their lives and have extensive familial and community networks in Australia. Most have serious mental health concerns or disabilities. In many cases, our clients were resettled under Australia's refugee program and cannot be returned to their home countries, or they may be stateless - leaving them subject to prolonged immigration detention when their visa is cancelled.

In our conduct of matters in the courts we see the serious consequences of s 501 decisions for our clients' lives. As we discuss in more detail below, many of these decisions are **already** made outside the AAT and are not amenable to AAT review. Further, in our judicial review practice focused on these matters, we repeatedly witness the demand imposed on the Federal courts and the legal assistance sector where our clients attempt to remedy these decisions by way of judicial review in the absence of any alternative option.

[1] For example, *Cotterill v Minister for Immigration and Border Protection* [2016] FCAFC 61; *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; *ALN17 v Minister for Immigration and Border Protection* [2017] FCA 726.

Overarching observations on non-AAT decision-making under s 501

Before responding directly to the terms of reference, we respectfully raise an overarching observation about visa cancellation decision-making which occurs outside the AAT. In our practice, we often observe examples of objectively poor quality, rushed or 'template' decision-making by non-AAT decision-makers. When these matters go to judicial review, the Minister's legal representatives frequently agree during the preparation of the case for hearing that the decision is affected by a legal error, and as a consequence cease to defend the decisions and agree to enter into consent orders to have the decisions set aside. The effect is that the Court quashes the decisions and requires the decisions to be reconsidered. In other cases, the Federal Court finds jurisdictional error in the decisions under review. In these cases, too, the effect is that the decision is remitted for reconsideration.

We raise this matter at the outset as it informs our comments below, without an intention to be critical of the individual decision-makers concerned.

Term of reference 1: The efficiency of existing review processes as they relate to decisions made under s 501

In our view, the existing merits review processes under s 501 of the Migration Act are efficient and expedient. Further, as we set out below, as a result of the current drafting of s 501, the Minister and Assistant Minister already possess the ability to effectively remove a s 501 decision from merits review, or to overcome the effect of many AAT decisions, in a given case. We discuss the relevant decision-making powers under s 501 below, before turning to their operation in practice and to the operation of the AAT.

Decision-making powers under s 501 already exclude merits review in some circumstances

Various types of decisions may be made under s 501. Broadly, these encompass visa refusals, visa cancellations, mandatory visa cancellations, and revocations or non-revocations of mandatory visa cancellations. Decisions may be made by the Minister or the Assistant Minister, or by a delegate of the Minister. The specific powers are as follows:

- A discretionary power to refuse a visa application *with notice.*[2]
- A discretionary power to refuse a visa application *without notice* - which may be exercised by the Minister only.[3]
- A discretionary power to cancel visas *with notice.*[4]
- A discretionary power to cancel visas *without notice* - which may be exercised by the Minister only.[5]

[2] Section 501(1).
[3] Section 501(3).
[4] Section 501(2).
[5] Section 501(3).

- A mandatory visa cancellation provision, *without notice.*[6]

In addition, the Minister has the following non-delegable powers under s 501:

- The power to set aside and substitute a non-adverse decision made under s 501(1) or 501(2) with an adverse decision, with or without natural justice.[7] This can occur for example where a delegate or the AAT has made a decision which is favourable to an Applicant.
- The power to set aside and substitute a decision to revoke a visa cancellation made under s 501(3A) with a decision not to revoke, without natural justice.[8]
- The power to revoke a decision made under 501(3) or 501(3A) where the decision was made without natural justice.[9]

As the Committee may be aware, at present, if a decision is made by the Minister or Assistant Minister (rather than a delegate), it is not reviewable by the AAT.

As is evident from the above, the Act already allows for merits review to be avoided where the Minister makes the decision personally. This is because if the Minister or Assistant Minister determines to exercise their various powers under s 501 personally (rather than through a delegate), those decisions are not amenable to merits review in the AAT. Further, the Act also already permits the Minister to set aside and substitute the Minister's own decision in circumstances where a delegate or the AAT has made a decision which is favourable to a visa applicant (which the Minister does not wish to stand).

The AAT is efficient and plays a necessary and justifiable role in the migration system

In our view, the AAT is an extremely efficient body for reviewing decisions made under s 501. At present, it plays a justified and expedient role in terms of:

- the proper handling of the complex consideration of each matter; **and**
- as a central plank in a whole of system approach to reducing pressure on courts and the Executive where a person is unhappy with a decision made about them. Within the existing system, the AAT uniquely holds the appropriate expertise and resourcing to review such decisions.

Further, as a result of its statutory obligations, the AAT carries a greater guarantee of efficiency than any of the other administrative decision-makers exercising powers under s 501. Critically, **and unlike the Department of Home Affairs or the Minister**, at the AAT there is a statutory timeframe of 84 days for finalisation of matters.[10] Further, the AAT's statutory objective is to provide a mechanism of review that is accessible, fair, just, economical, informal

[6] Section 501(3A).
[7] Section 501A and Section 501B.
[8] Section 501BA.
[9] Section 501C.
[10] See s 501(6L)(c) of the Act, which provides that if the Tribunal has not made a decision within 84 days of notification by the applicant of the primary decision, the decision under review is taken to be affirmed.

and quick; that is proportionate to the importance and complexity of the matter; and promotes public trust and confidence in the decision-making of the Tribunal.[11]

We discuss the broader role of the AAT in the migration system, and the administrative law system more broadly, further below in response to your other terms of reference.

Term of reference 2: Present levels of duplication associated with the merits review process

The nature of merits review is substantively and procedurally different to the original decision-making process

The relevant term of reference suggests that merits review may be characterised as duplicative. At the outset we highlight that as a matter of law and practice, it is inaccurate to characterise merits review as mere duplication of primary decision-making. Further, in the context of decisions made under s 501, the task performed by the AAT on review is both procedurally and qualitatively very different from the decision-making process undertaken at first instance.

The purpose of merits review is to decide whether the decision which is being challenged is the correct and preferable decision. If not, a new decision can be substituted. Merits review does not duplicate the original decision-making process, but is a *de novo* review, where the Tribunal may have regard to new, fresh, additional or different evidence in reaching its own decision. Whilst it will be applying the same legal criteria as the primary decision-maker, the Tribunal may take an entirely different approach to the evidence before it. In *Drake v Minister for Immigration and Ethnic Affairs*, the High Court (Bowen CJ and Deane J) determined that when conducting a review:

> The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one *on the material before him* [or her]. The question for the determination of the Tribunal is whether that decision was the correct or preferable one *on the material before the Tribunal*.[12]

Further, in most cases relating to visa cancellations, the conduct of a review at the AAT will be substantially different from the primary decision-making stage, where an applicant commonly has had no interview or hearing. In the context of visa cancellation decisions made under s 501, the AAT will be the first time that such applicants will have had an in-person interaction with a decision-maker where they can advance their position and respond to any adverse information put to them.

As a result, this review process is both substantively and procedurally very different to the original decision-making process undertaken by a Ministerial delegate. It will also, as a result of the AAT's expertise, resources and engagement with an application be a decision which is

[11] *Administrative Appeals Tribunal Act* 1975 (Cth), s 2A.
[12] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

likely to be of a better quality, accurately reflect the relevant facts, and be more satisfactory to a person whose visa has been cancelled.

Merits review provides significant individual and structural benefits within the migration system

In our view, it is essential that merits review is maintained in this jurisdiction. Merits review provides a number of significant individual and structural benefits within the migration system. The removal of merits review from this jurisdiction would have several significant, adverse, consequences for individual clients and the orderly operation of the visa cancellation scheme.

First, merits review offers applicants the possibility of the remedy that they are actually seeking. In this context, this will be the reinstatement of their visa. In the 2016/2017 financial year, the Tribunal either varied or set aside over 25% of s 501 decisions that came before it.[13] If all such applicants were to instead be confronted with a single option to pursue judicial review, for those who were successful, their matters would be remitted to Minister or to a delegate for reconsideration. This scenario is itself inefficient.

Second, the merits review mechanism presently performs an important accountability and supervision function. As the Committee would be aware, there has been a continual increase in the inclusion of broadly framed executive powers in the migration jurisdiction. This is evident in relation to s 501 in particular. In this context it is fundamental to have checks in place to scrutinise the exercise of power by the executive, particularly where the potential detriment of an adverse decision to the applicant is so significant.

As a matter of policy, an administrative decision that will, or is likely to, adversely affect the interests of a person should be subject to merits review, unless it would be inappropriate or there are factors justifying the exclusion of merits review.[14] Merits review is directed to ensuring fair treatment of all persons affected by a decision and improving the quality and consistency of primary decision making.[15]

Third, merits review is well-established as an effective mechanism for affording procedural justice to aggrieved persons. It performs an important oversight and corrective function resolving disputes and preventing the burdening of ill-adapted entities (such as Courts) with individual merits disputes. Thus, merits review reduces an otherwise unmanageable pressure which would be placed on the Federal court system by individuals who seek some supervision and oversight of an adverse administrative decision.

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[13] This includes visa refusals, visa cancellations, and decisions in relation to the revocation of a mandatory visa cancellation. Applications to the AAT for review of decisions under sections 501 and 501CA of the *Migration Act* 1958. Data provided by the Strategy and Reporting division of the AAT to Victoria Legal Aid, 24 April 2018.
[14] Administrative Review Council, *What decisions should be subject to merits review?* (1999), cited in Australian Administrative Law Policy Guide, Attorney-General's Department, 2011.
[15] Administrative Review Council, *What decisions should be subject to merits review*? (1999), cited in Australian Administrative Law Policy Guide, Attorney-General's Department, 2011.

There is extensive evidence of the value of providing procedural justice, not just for affected persons but also in terms of building public confidence in government administration more broadly and contributing to the objective of maintaining government accountability and integrity.[16]

Term of reference 3: The scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions

We are informed by the Committee's Secretariat that 'ministerial' in this context is intended to refer to delegates of the Minister, not to decisions of the Minister or Assistant Minister, which are currently not reviewable by the AAT.

The AAT has jurisdiction to review any decision made under s 501 which is not made by the Minister or Assistant Minister. There are several reasons why it is essential to maintain the AAT's jurisdiction to review such decisions. We set these out below.

The volume and complexity of decisions under s 501 is likely to lead to higher levels of error in primary decision making

First, in our view and based on our experience, the AAT is uniquely equipped to undertake the high volume and complex decision-making which is required under s 501. In the 2017/2018 financial year as at 31 December 2017, the Department made 460 character cancellation and 222 character refusal decisions[17]. The volume of decision-making under s 501 significantly increased after the introduction of the mandatory visa cancellation regime in December 2014.[18] For example, in 2017, there were 794 revocation decisions made.[19]

The nature of the decision-making under s 501 is also complex and time-consuming. It is worth noting that in other similarly technical federal schemes such as social security, Freedom of Information and the National Disability Insurance Scheme, there are several tiers of internal or external merits review processes before matters reach the Federal Court.

In decisions made under section 501, decision-makers are required to balance multiple countervailing considerations. For example, in relation to a decision whether or not to revoke the cancellation of a person's visa, delegates are required to consider:

- The primary considerations under Ministerial Direction 65[20] including:
    - the protection of the Australian community from criminal or other serious conduct (which involves a consideration of the nature and seriousness of the conduct);

[16] Robert Creyke, 'Administrative Justice -Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 706, 722.
[17] Department of Home Affairs Key Visa Cancellation Statistics, at https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics [accessed 9 April 2018].
[18] On passage of the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).
[19] A person whose visa is mandatorily cancelled can seek to have the cancellation decision revoked. Of the 794 total decisions, 320 were revoked, 457 were not revoked, and 17 were invalid or withdrawn. Department of Home Affairs Key Visa Cancellation Statistics, at https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics [accessed 9 April 2018].
[20] Direction No 65, under section 499 of the *Migration Act* 1958 (Cth), Visa refusal and cancellation under section 501 and revocation of a mandatory cancelation of a visa under 501CA, 22 December 2014.

  - the best interests of minor children in Australia; and
  - the expectations of the Australian community.

- Secondary considerations including:
  - international non-refoulement obligations;
  - the strength and duration of the person's ties to Australia; and
  - the extent of impediments if the person was removed to their home country.

Decision-makers exercising powers under s 501 are therefore confronted with a complex and nuanced task. In the case of the clients we routinely assist, it will not be unusual for decision-makers to be required to balance the seriousness of a person's offending with a number of other countervailing factors including that the affected individuals have:

- been in Australia most of their lives;
- extensive family and community networks in Australia;
- arrived under Australia's refugee program and from countries still experiencing conflict and instability; or
- serious physical or mental health issues or disabilities.

Against this background, decision-makers must also conduct a forward-looking analysis of the risk to the Australian community should that person re-offend. In most cases this is itself difficult as applicants have commonly been in immigration detention for some time since their most recent offending, and as such their propensity to reoffend in the Australian community is considered 'untested'. In cases raising non-refoulement obligations, decision-makers must also conduct a forward-looking analysis of any impediments or risks the person may face if they were removed to their country of origin.

Further, applicants commonly submit extensive material in support of their requests for revocation including psychological assessments, health records, letters of support from family and friends, country information, certificates and other evidence of rehabilitation, family photos, and sentencing remarks. Decision makers must consider all evidence provided.

Given this volume and complexity, it must be recognised that errors in first instance decision-making will occur and are likely to occur more frequently than in more straightforward decision-making contexts. In response, merits review provides a singular and well-adapted response to the reality of error:

- acting as a quality control measure;
- proactively correcting errors made at the primary stage; and
- ensuring that individuals have available to them a relatively low-cost but sufficiently rigorous avenue to reach a reasonable state of satisfaction that the decision is objectively correct.

The importance of making the correct and preferable decision

There are several serious consequences flowing from the cancelation of a visa under section 501, beyond the cancellation of that person's visa. This further reinforces the importance of merits review as a method of creating greater certainty for former visa holders (and throughout the migration system) that the s 501 decision is correct. These include:

- all visas the person holds or has applied are deemed refused or cancelled;[21]

[21] Section 501(F).

- the person becomes unlawful and must be detained;[22]
- the person must be kept in immigration detention until they are removed from Australia or granted a visa;[23]
- the person may be removed from Australia, regardless of any non-refoulement obligations found to be owed to them;[24]
- the person is prevented from making an application for another visa, or entering Australia, in the future[25];
- there may be consequential cancellations of family members visas;
- family members may be ineligible for family visas under the person's sponsorship, even if the visa has already been applied for.

It is a requirement that a decision-maker consider all legal consequences flowing from their decision.[26] In our view, these consequences further strengthen the necessity of retaining and employing merits review as a responsible method of ensuring that, to the greatest degree possible, the correct decision is made when a power is exercised to cancel a visa or to refuse to revoke a cancellation decision under s 501.

Albert, Ibrahim, John and Ahmed's stories, which we detail below, illustrate:

- the complexity of s 501 decision-making about our clients;
- the significant consequences for vulnerable members of our community of erroneous s 501 decision-making where no merits review option is available; and
- the resulting inefficiency of forcing clients into a 'two-step' process involving judicial review and remittal for reconsideration, where the error could have been corrected more quickly in a one step process by the AAT.

[22] Section 189.
[23] Section 196.
[24] Sections 198 and 197C.
[25] Section 48A.
[26] *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38 at [9].

Albert's story

Albert's story illustrates the potential for delay and complexity where an applicant has access only to judicial review to remedy a decision affecting them.

Albert is a 74-year-old man who came to Australia from the United Kingdom aged seven with his family. He has never left Australia since his arrival. With him in Australia, Albert has an older sister, eight children and 26 grandchildren. He lives with his longstanding partner.

As of September 1994, by operation of law, Albert became the holder of an Absorbed Person Visa. Albert had been under a misapprehension that he was an Australian citizen because he was entitled to vote in State and Federal elections.

Aged 18, Albert was convicted of stealing and the illegal use of a car; and in 2012 he was convicted of a number of indecent assaults involving his children, the last of which were committed 38 years previously. He was sentenced in the Melbourne Magistrates' Court to 12 months imprisonment, which was partially suspended. He served three months.

Albert's visa was **first cancelled** by the Minister in April 2015 and he was placed in immigration detention. Albert's visa was later reinstated in April 2016 when the Full Federal Court found the Minister's decision was unlawful: *Cotterill v Minister for Immigration and Border Protection* [2016] FCAFC 61. The Court found the Minister had failed to consider the possibility that Albert would be indefinitely detained as a consequence of the cancellation and found aspects of the reasoning regarding risk unsatisfactory.

A **second notice** of intention to consider cancellation was later issued. Albert made submissions in relation to this, and provided an expert forensic psychological report addressing his risk of recidivism. The report found that in view of the length of time since his offending, his psychological characteristics and his age, the risk that he posed to the community was low.

Albert's visa was cancelled for a **second time** in August 2016. Albert again sought review of this decision in the Federal Court. Prior to the hearing the Minister acceded to the application, and in November 2017 the Court quashed the decision of the Minister.

Albert was later released from immigration detention. At that point he had spent about a year and three months in detention as a consequence of the two visa cancellations. Albert has found detention very difficult because of his physical infirmity and various health problems.

In December 2017 Albert received a **third notice** of intention to consider cancellation of his visa. There was no substantive new information to support this third consideration to cancel. A police summary of the original offending was provided. At this point Albert had not offended for over 42 years. Further information about Albert's declining health was provided to the Department, including regarding his cognitive decline.

Albert awaits the decision.

Ibrahim's story[27]

Ibrahim's story illustrates the complexity of s 501 decision-making and the significant consequences for our clients and their families.

Ibrahim is from a small ethnic and religious minority in Iraq. He left Iraq as a teenager and after several years living in a refugee camp with his wife and daughter in Syria, he was resettled to Australia under the Refugee and Humanitarian program. He had three more daughters, all born in Australia.

Ibrahim's refugee visa was cancelled under the mandatory cancellations provisions in 2015. He applied for revocation of this decision and waited over 12 months for a decision. The Assistant Minister refused his request for revocation. As a result of the Assistant Minister's personal decision to make a s 501 decision, the decision in Ibrahim's case was not amenable to merits review in the AAT. Instead, his only option was to apply to the Federal Court to challenge this decision. He waited five months for his hearing.

In June 2017, the Federal Court found that the Assistant Minister had misunderstood the legal effect of the relevant provisions of the Act, in relation to his ability to apply for a Protection Visa.[28] Ibrahim's case is now back before the Department for consideration.

Ibrahim has now been in immigration detention for nearly two and a half years. He has been moved between various detention centres, which makes it very difficult for him to see his family, who live in Melbourne.

[27] Not his real name.

[28] See *ALN17 v Minister for Immigration and Border Protection* [2017] FCA 726 at [25].

John's story[29]

John's story illustrates the complexity of s 501 decision-making, particularly in relation to Australia's obligations under international law.

John fled Sudan in 1990 at the age of three. He lived in a refugee camp in Kenya for 16 years and was resettled to Australia under the Refugee and Humanitarian program at the age of 19.

John's refugee visa was cancelled under the mandatory provisions in April 2015, and he applied for revocation.

The Department of Home Affairs arranged an International Treaties Obligations Assessment (ITOA) to determine whether Australia owed *non-refoulement* obligations to John. The ITOA was completed in August 2016 and found that John has a well-founded fear of persecution and cannot return to South Sudan.

As part of the process for requesting revocation, John was provided with Ministerial Direction by the Department. Direction 65 at clause 14.1(2) states that "Australia will not remove a non-citizen, as a consequence of the cancellation of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists".

Direction 65 is contrary to s 197C of the *Migration Act*, which permits removal regardless of non-refoulement obligations.

After two and half years of waiting, the Assistant Minister refused his request for revocation in October 2017, and he sought review of this decision in the Federal Court. He waited for four months for his hearing.

In written submissions to the Court, VLA submitted that John was not advised that the decision-maker might make a decision that would have the effect that he would be required to be refouled to South Sudan inconsistently with Australia's non-refoulement obligations. Through his VLA lawyers, John contended that had he been advised that the Minister might make a decision of the kind described above (and which the Minister made), he would have made a submission about that.

The Minister for Home Affairs conceded that the decision contained a jurisdictional error and withdrew from the proceedings. Specifically, the Minister conceded that John was denied natural justice because the Assistant Minister refused to revoke his visa cancellation without giving him the opportunity to make submissions on an unannounced and undisclosed consideration.

John remains in detention awaiting a new decision by the Minister.

[29] Not his real name.

Ahmed's story[30]

Ahmed's story illustrates the significant consequences of s 501 decision-making to some of the most vulnerable members of our community.

Ahmed was expelled from Iran to Iraq under Saddam Hussein's regime due to his Kurdish ethnicity. He lived as a refugee in Iran and later Indonesia, where he was recognised as a refugee by the United Nations High Commissioner for Refugees (UNHCR) and later resettled to Australia with his wife and children under the Refugee and Humanitarian program.

His refugee visa was cancelled under the mandatory cancellations provisions in 2015. He applied for revocation and waited nearly 18 months for his decision. The Assistant Minister refused his request for revocation and, in March 2017 he applied to the Federal Court to challenge this decision.

Leading up to the final hearing, VLA wrote to the lawyers acting for the Minister requesting that they withdraw from the proceedings on the basis that there was a jurisdictional error in the decision of the Assistant Minister. This invitation was declined by the Minister's lawyers. Two weeks before the final hearing, the Minister withdrew from the legal proceedings, conceding there was an error in the decision of the Assistant Minister.

Ahmed's is now back before the Minister for consideration. It has been over seven months since the judicial review proceedings were finalised. The Department of Home Affairs has accepted that he is stateless, and that there is currently no country to which he can be returned. He has now been in detention for nearly three years. He has various serious physical and mental illnesses including epilepsy, Post Traumatic Stress Disorder, opioid dependence, anxiety, depression and Hepatitis C.

Barriers to access to justice

Applicants whose visas have been cancelled face real barriers to putting forward relevant material in response to the proposed cancellation of their visa or in support of a request for the revocation of a visa cancellation. As a result of the context in which s 501 decisions are made, visa holders or applicants for revocation of a visa cancellation are:

- generally in prison or detention;
- commonly have low-level education and literacy;
- have difficulty understanding legal forms and processes;[31]
- more likely to speak a language other than English when ordinarily communicating;
- have limited or no financial means; and
- experience difficulties in obtaining legal representation.

[30] Not his real name.

[31] The Commonwealth Ombudsman report the Administration of Section 501 of the *Migration Act* 1958 noted that number of detainees interviewed struggled to understand the cancellation paperwork due to literacy problems and were not sure how to respond. VLA also receives many phone inquiries from such individuals. See the Department of Immigration and Border Protection, the Administration of Section 501 of the *Migration Act* 1958, December 2016, Report by the Commonwealth Ombudsman Colin Neave AM.

It will also often take a client (or a client's lawyer) months to obtain the relevant supporting documents through freedom of information (such as records of programs undertaken in prison), or access to medical records.

Because of these structural problems, the ability of many applicants to participate at the primary decision-making stage is often limited. These impediments are exacerbated by delay and confusion accompanying the provision of paperwork from the Department of Home Affairs to prisons, leading to clients either missing or nearly missing deadlines for the provision of supporting material, through no fault of their own. These issues do not typically attend the merits review process, which provides a corrective opportunity where these procedural issues have hampered the quality or accuracy of the original decision.

Curtailed procedural fairness at primary stage

As outlined above, there are several scenarios where a person's visa may be cancelled either without notice, or where a requirement to provide natural justice to a person does not apply. These decisions are normally made on the papers without an interview or a hearing.

Where merits review is available in relation to these decisions, it is essential that it remains available. As discussed above, for many individuals, a hearing at the AAT will be the first opportunity to advance their claims directly to a decision-maker. This is appropriate because it secures a baseline check on the correctness of decisions made in these relatively unique situations, and because it contributes to the acceptance of such a decision by the person affected and their families and community in Australia.

Real risk of applicants missing out on any review

If the right to merits review is removed, there is a real risk that those people who are already particularly disadvantaged or vulnerable within the visa cancellation scheme may be deprived of the opportunity to challenge decisions made about them. This is because for this small but significant cohort, it will be beyond their capacity to prepare a judicial review proceeding run for the purposes of:

- setting the original decision aside; and
- obtaining an order from the Court requiring the decision to be make again according to law.

Unlike the AAT, the Federal Court process is technical, legalistic and simply inaccessible for many clients. For example, to file an application for review a decision of the Minister to refuse a request for revocation of a mandatory visa cancellation, an applicant is required to file in the Federal Court three or four documents:

- an originating application,
- an affidavit,
- a form for waiver of court fees, and
- if applicable, an extension of time form (and related affidavit).

These forms need to be witnessed and lodged within 35 days of the date of the decision, regardless of when the person was notified of the decision. There are very few free services that will assist applicants with these forms. For applicants who are detained, the onus will fall on family members to lodge these forms for them.

Additional strain on Federal Court if judicial review used as substitute merits review

Where a person does not have access to merits review, the only option is judicial review litigation on the basis of alleged jurisdictional error in the decision. Whilst VLA values the important role of judicial review in the Federal Court, this mechanism and the Federal Courts systems is simply not an appropriate avenue for (*de-facto*) challenge to the merits of a decision.

Judicial review is highly technical, time-intensive, and expensive for all parties involved. The Kerr Report of 1971, which led to the establishment of the AAT, noted that costs, government secrecy, legal technicalities, and other factors combined to make judicial review a difficult and hazardous process.[32]

Any reform which sees the further removal of visa cancellation decisions from merits review would not increase overall efficiency in the visa cancellation system. Rather, it would incontrovertibly result in much higher numbers of judicial review applications (being the only option for review of ministerial decisions), in a sector which is already stretched. This will necessarily have the effect of creating substantial demand, which will be acutely felt in already overworked federal courts and on legal service providers such as VLA because individuals will pursue judicial review in an attempt to ventilate their grievances with the original decision, when other options are removed.

This phenomenon is already evident where full merits review has been removed from the making of some other migration decisions for certain cohorts of people (eg, the 'fast track cohort'). There can be no question that this change has seen substantially increased pressure on Australian courts. The current waiting time for a final hearing at the Federal Circuit Court for this cohort is on average two years from the lodgement of the application.

Unnecessary costs to the Commonwealth as a result of increased judicial review proceedings

Unnecessary judicial review litigation also involves significant cost for the Minister – both financial and reputational. In many judicial review cases in which VLA acts, the Minister withdraws from proceedings, conceding that there were errors in the decision under review. In other cases, the Federal Court finds that there were errors. In each case where the Minister is unsuccessful, the Minister will be required to pay not only the Minister's legal costs, but also the costs of applicant. In the Federal Court costs may be often be between $10,000 and $30,000, and in the High Court they are higher still. Even where the Minister may be successful, the recovery of costs is often difficult given the affected persons are detained and financially vulnerable.

For each of the reasons set out above, VLA strongly recommends that access to merits review of decisions made under s 501 be preserved. As we have outlined**,** merits review is an essential and efficient mechanism to provide the necessary oversight and correction of the high volume and undeniably complex decisions made under this section of the Act.

[32] *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 of 1971, ('Kerr Report'), CGPS 1971, paragraphs 20, 21, at 42-58.

Please do not hesitate to contact Sarah Fisher, Acting Program Manager, Migration on [redacted] if you wish to discuss our submission at all.

Yours faithfully

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