Immigration Advice and Rights Centre

8 August 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Re: *Review into the Migration Amendment (Strengthening the Character Test) Bill 2019*

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public.

IARC welcomes the opportunity to comment on the Committee's review into the *Migration Amendment (Strengthening the Character Test) Bill 2019* (***Bill***). The *Bill* seeks to amend the *Migration Act* 1958 (Cth) (**Act**) to provide for additional grounds for non-citizens who have been convicted of a 'designated offence' to be considered for visa refusal or cancellation. Proposed s501(7AA) identifies that a 'designated offence' is an offence against a law in force in Australia, or a foreign country, in relations to which any of the following conditions are satisfied:

a) one of more of the physical elements of the offence involves:

- violence against a person;
- non-consensual conduct of a sexual nature;
- breaching an order made by a court by a court or tribunal for the personal protection of another person;
- using or possessing a weapon;
- ancillary offences in relation to a 'designated offence' referred to above including:

- aiding, abetting, counselling or procuring the commission of a 'designated offence';
- inducing the commission of a 'designated offence';
- being in any way (directly or indirectly) knowingly concerned in, or a party to, the commission of a 'designated offence';
- conspiring with others to commit an offence that is a 'designated offence'.

b) for an offence against a law in force in Australia that is punishable by imprisonment for life, imprisonment for a fixed term of not less than 2 years or imprisonment for a maximum term of not less than 2 years; or

c) for an offence against a law in force in a foreign country - if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory and would have been punishable under the laws of the Territory by imprisonment for life, imprisonment for a fixed term of not less than 2 years or imprisonment for a maximum term of not less than 2 years.

Under the proposed changes a non-citizen will fail the character test under the *Act* if they are convicted of a designated offence regardless of whether they have served a custodial sentence for the offence or, indeed, regardless of the circumstances leading to the offence or whether they pose a risk to the community.

Existing provisions

The outline to the Explanatory Memorandum to the Bill identifies that its purpose is "*to provide grounds for non-citizens who commit serious offences, and who pose a risk to the safety of the Australian community, to be appropriately considered for visa refusal or cancellation*". The Committee would be mindful that under existing provisions a person will fail the character test under s501(6) of the *Act* if they have a substantial criminal record, which includes a sentence to a term of imprisonment of 12 months or more[1], but they will also fail the character test if:

- the Minister reasonably suspects that the person has been associated with a group, organisation or person who has been involved in criminal conduct[2]; or
- having regard to their past and present criminal and general conduct the person is not of good character[3]; or

[1] See s501(6)(a) and s501(7) of the *Act.*
[2] See 501(6)(b) of the *Act.*
[3] See s501(6)(c) of the *Act.*

- there is a risk that the person would engage in criminal conduct in Australia or represent a danger to the Australian community or 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[4].

The Committee will further observe that while existing powers are adequate to refuse or cancel the visa of a non-citizen who has been convicted of a violent offence, the proposed amendments will see an increasing number of people automatically fail the character test without any consideration being given to the circumstances surrounding their conviction or the risk of harm that they may pose to the community. While it is true that there remains a discretion under the *Act* to refuse or cancel a non-citizen's visa, it is inevitable that the proposed amendments will result in more people having their visas cancelled/refused and, in turn, being deported from Australia. This is so, not only due to the discretion arising, but also because Direction 79, which decision makers must adhere to, makes that outcome more likely. For example, under the heading 'Principles', paragraph 6.3(3) of Direction 79 states that:

> "*The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere*".

Further to this, two of the three 'primary considerations' for visa refusal and cancellation[5], which Direction 79 states should generally be given greater weight than the 'other considerations' will almost always be adverse to a non-citizen[6]. While the 'best interests of a child' remains the third 'primary consideration' we note that a non-citizen's ties to the Australian community, the extent of impediments to their removal and Australia's non-refoulement obligations are all 'other considerations' and will generally be given less weight in the exercise of discretion[7].

Impact on the non-citizen, their family and community

The decision to cancel or refuse a person's visa under the character provisions and the deportation that inevitably follows can have devastating consequences for all involved including the non-citizen, their family, community and, in some cases, the victims. The decision will also result in the non-citizen's permanent exclusion from Australia and, in many cases, permanent separation from family

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[4] See s501(6)(d) of the *Act*.
[5] Being the 'Protection of the Australian community from criminal or other serious conduct' and the 'Expectation of the Australian community'.
[6] See for example *YNQY v Minister for Immigration and Border Protection [2017] FCA 1466 at [76].*
[7] See paragraph 8(4) of Direction 79.

and community[8]. IARC has assisted numerous people who have been deported following a decision under the character provisions and in many of those cases the deportation has left families broken and children without a parent.

Non-refoulement obligations

Where the power to cancel or refuse a visa is exercised in relation to a non-citizen who holds or has applied for a protection visa, the operation of s197C and s198 of the *Act* may see to their removal from Australia in breach of Australia's non-refoulement obligations[9]. The Statement of Compatibility with Human Rights accompanying the Bill provides:

> *"Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision whether to refuse or cancel a visa on character grounds. Anyone who is found to engage Australia's non-refoulement obligations during the refusal or cancellation decision or in subsequent visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations."*

This statement should offer little comfort to the Committee for two reasons. Firstly, there is no guarantee that a particular matter will be brought to the Minister's attention before a non-citizen is deported and there is also no guarantee that the Minister will exercise his or her discretion under section 195A of the *Act*. We note, with some concern, that the Minister's policy on his detention powers under section 195A of the *Act*[10] instructs that he would generally not expect the cases of people who have been refused or cancelled a visa under s501 of the *Act* to be brought to his attention[11]. Under the same policy the Minister writes:

> "*Section 198 of the Act imposes an obligation on my department to remove a person who is liable for removal as soon as reasonably practicable, even where the person has requested that I consider exercising my detention powers.*
>
> *A request for me to consider the use of my detention intervention powers is not an application for a visa and, as such, has no effect on the department's removal obligations*"

Secondly, in the event that the Minister does intervene is these matters, which may follow an extended period of time in immigration detention for the non-citizen, it is usually to grant them a

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[8] Their permanent exclusion arises from the operation of public interest criterion 4001 and special return criterion 5001 in the Migration Regulations 1994 (Cth). See also DND and Minister for Home Affairs [2018] AATA 2716 at [9].
[9] See also DMH16 v Minister for Immigration and Border Protection [2017] FCA 448.
[10] The Policy document is attached to these submissions. We note that the policy document is signed in November 2016, was reissued on 18 August 2017, however, is no longer publicly available and nor is any updated version.
[11] See part 4 of the policy.

temporary visa so they can return and continue living in the community. Being on a temporary visa, however, makes the non-citizen more vulnerable by denying them access to many essential services that they would have otherwise had access to. It is also not clear why a non-citizen poses an unacceptable risk to the community on a permanent visa but not so on a temporary visa.

Conclusion

No persuasive argument has been advanced as to why existing provisions are not sufficient to refuse or cancel the visa of a non-citizen who poses an unacceptable risk to the community. It is our view that the proposed amendments are not necessary and will result in the further breakdown of families and communities. The Committee should be mindful that it is no purpose of the character provisions to impose further punishment on a non-citizen who has been convicted of a criminal offence - however serious. What is relevant to the exercise of discretion is the protection of the Australian community and other legitimate objectives that arise from the *Act*. The *Bill* does not advance those objectives.

We would welcome the opportunity to expand on any aspect of our submission.

Kind regards,

Ali Mojtahedi
Principal Solicitor

Australian Government
Department of Immigration and Border Protection

PAM - Ministerial detention intervention power

Minister's detention intervention power

PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's detention intervention power

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Document is published as signed by the Minister

About this instruction

Contents

This instruction, which relates to s195A of the Act, encloses: Guidelines on Minister's detention intervention power (s195A of the Migration Act 1958).

Related instructions

Nil

Latest changes

Legislative

Nil.

Policy

This instruction, which is part of the centralised departmental instructions system (CDIS), was reissued on 18 August 2017 to update revised guidelines as signed by the Minister in November 2016

Owner

email

Document ID

BC-765

Guidelines on Minister's detention intervention power - section 195A of the Migration Act 1958

1. Purpose of these guidelines

The purpose of these guidelines is to:

- Explain the circumstances in which I may wish to consider exercising my power under s195A of the Migration Act 1958 (the Act) to grant a visa to a person in immigration detention under s189 of the Act.
- Explain when officers of the Department of Immigration and Border Protection (the Department) should refer a case to me so I can consider exercising my power under s195A of the Act.

In these guidelines, my power to grant a person in immigration detention a visa under s195A of the Act will be referred to as my detention intervention power.

2. My detention intervention power

If I consider it is in the public interest to do so under section 195A of the Act, I have the power to grant a visa of a particular class to a person who is in immigration detention under section 189 of the Act, whether or not the person has applied for the visa.

I may grant a substantive visa or a bridging visa (including a Removal Pending Bridging visa, if the person is in immigration detention, has no right to remain in Australia but removal is not reasonably practicable in the foreseeable future). In exercising my detention intervention power, I am not bound by Subdivision AA, AC or AF of Division 3 of the Act or by the regulations (section 195A(3)).

My detention intervention power is personal and non-compellable. This means that although the power is available to me under the Act, I am under no legal obligation to exercise or consider exercising that power in a particular case.

My detention intervention power is distinct from my Ministerial intervention powers under sections 351, 391, 417, 454 and 501J of the Act. The referral of a case under my detention intervention power should not prejudice referral of a case under any of my other Ministerial intervention powers.

If a visa, including a bridging visa, can be granted to a person through normal visa application processes or the use of my other Ministerial intervention powers, this is to be preferred over referral to me for consideration of my detention intervention power.

Where appropriate, cases that meet the criteria in these guidelines may be referred to the Assistant Minister.

3. Guidelines for referral of cases

Cases may be referred to me for consideration of my detention intervention power where a person is in immigration detention under section 189 of the Act and meets one or more of the criteria below:

- the person has individual needs that cannot be properly cared for in a secured immigration detention facility, as confirmed by an appropriately qualified professional treating the person or a person otherwise appointed by the Department.
- there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or permanent resident), or there is an impact on the best interests of a child in Australia.
- the person has no outstanding primary or merits review processes in relation to their claims to remain in Australia but removal is not reasonably practicable for reasons that may include, but are not limited to, cases where:
    - the person's identity or nationality has not been positively established despite the person's cooperation in trying to establish identity and/or nationality;
    - the person's country of origin refuses to recognise the person as a national;
    - the person's country of origin refuses to accept their return or to issue a travel document to facilitate their return;
    - it is not possible to return the person to their country of origin because of ongoing conflict and/or policy regarding involuntary removals.
- there are other compelling or compassionate circumstances which justify the consideration of the use of my public interest powers and there is no other intervention power available to grant a visa to the person.

When assessing cases that may be referred to me for consideration of my detention intervention power, I expect the Department to balance the above considerations against any adverse information about the

person arising, for example, from:

- whether the person poses a risk to another individual or group within Australia, including risks of a health or security nature.
- whether the person has a criminal history, both in Australia or offshore, including criminal charges and convictions.
- the person's behaviour in immigration detention and/or the community.
- where the person is the subject of a criminal or national security related allegation, I expect the Department will undertake appropriate enquiries in relation to that allegation, before referring the case to me for consideration.

4. Cases that should not be brought to my attention

I would generally not expect to have the following types of cases referred to me for my consideration of my detention intervention power:

- people in relation to whom ASIO has issued an assessment that "ASIO assesses [the person] to be directly or indirectly a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979".
- people whose visa has been refused or cancelled under section 501 of the Act.
- transitory persons, as defined under section 5(1) of the Act, who have been brought to Australia for temporary processes, including but not limited to medical treatment, legal proceedings or transit through Australia to a third country.
- people with no outstanding immigration matters who are not cooperating with efforts to effect their departure from Australia.
- people whom I have previously considered under any of my Ministerial intervention powers, or have previously been found not to meet any of my Ministerial intervention guidelines, and who have had no significant changes to their circumstances.
- people who wish to change or have changed their Temporary Protection visa application to a Safe Haven Enterprise visa, or vice versa.
- any other cohorts of people as directed by me.

5. Information to be presented to me

When referring cases to me, the Department should bring to my attention any information that they consider may be relevant to my consideration. This may include, but is not limited to:

- the person's immigration history, any ongoing processes and the Department's efforts to resolve the person's immigration status.
- details of known family members, their age, dependency on family members or others in the Australian community, in particular, if any children in Australia are involved in or impacted by the case.
- information about a person's history of compliance, and likelihood of future compliance, with Australian laws including:
- any offence or fraud against the migration or citizenship legislation;
- any failure to comply with the conditions of their visa;
- their history of cooperation and engagement with the Department to resolve their immigration status, particularly in relation to identity and travel documents.
- any significant health issues, including special requirements or management in relation to such health issues.
- whether there are character concerns in relation to the person, particularly concerns related to criminal conduct.
- whether the presence in the Australian community of the person or a member of their family would pose a threat to an individual in Australia, to Australian society or security, or may prejudice Australia's international relations.
- whether the person is available for removal from Australia and, if they are not available for removal, why this is the case.
- an assessment of a person's risk to the community.
- any reports provided to the Commonwealth Ombudsman under section 486N of the Act and any recommendations provided to me by the Commonwealth Ombudsman under section 486O of the Act.

Requests for the exercise of my detention intervention power

Requests that I consider exercising my detention intervention power may only be made and referred by the Department. Any requests must first be assessed by the Department against these guidelines and should only be referred to me if the case is assessed as having met these guidelines.

This means that, as this power is non-compellable, I will not consider exercising it when requested directly by individuals or their representatives.

If I have previously considered the exercise of my detention intervention power within the last three months in respect of that person, an officer of the Department is to assess the new request, and:

- only refer cases to me to consider that meet these guidelines and where new information is available or circumstances have changed.

6. Outcome of my consideration

If I choose to consider a case under my detention intervention power, I may ask for health, character or other assessments to be carried out, for an Assurance of Support to be arranged, or for further information to be provided before I determine whether I wish to exercise my detention intervention power to grant or not to grant a visa.

A person whose case is brought to my attention is to be advised of the outcome of my consideration in writing only if I decide to exercise my detention intervention power.

7. I am not bound by these guidelines

I am able to consider a case whether or not is has been brought to my attention under these guidelines. When I consider it appropriate, I will seek further information.

8. Removal Policy

Section 198 of the Act imposes an obligation on my department to remove a person who is liable for removal as soon as reasonably practicable, even where the person has requested that I consider exercising my detention intervention power.

A request for me to consider the use of my detention intervention power is not an application for a visa and, as such, has no effect on the department's removal obligations.

THE HON PETER DUTTON MP

Minister for Immigration and Border Protection

/ /2016

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