JOINT STANDING COMMITTEE ON MIGRATION

Review processes associated with visa cancellations made on criminal grounds

The Chair, Mr Jason Wood MP, asked the following question at the hearing on 17 July 2018:

> CHAIR: Would the Human Rights Commission have any issues if the authority was given to the Administrative Appeals Tribunal to invite victims to come along to hearings to—if they want to—to give their version of events? Because you might have the applicant's legal team saying that the applicant is very remorseful for everything he's done and you have the victim come in showing in actual fact he's never apologised or never even admitted to the offence.
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> … Can you take that on notice for some consideration.

The answer to the Chair's question is as follows:

Taking into account impact on victims

The impact of criminal conduct on victims is something that can be taken into account when a person is sentenced for committing a criminal offence.

For example, in NSW someone who is a victim of a violent crime can make a victim impact statement after the offender has been convicted and before they are sentenced.[1] The prosecution can ask the court to take the victim impact statement into account when the offender is sentenced.[2]

It is clear from the statutory scheme that one of the main purposes of a victim impact statement is to provide information relevant to the determination of the appropriate punishment for the offence. For example, s 28(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) says:

> A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.

The effect of a victim impact statement may be that an offender is given a longer sentence than would otherwise be the case.

If an offender is sentenced to a term of imprisonment of 12 months or more, and is not an Australian citizen, this will have implications for their visa.

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[1] New South Wales Government, Justice – Victims Services, *Victim impact statement information package*, at https://www.victimsservices.justice.nsw.gov.au/Documents/BK03_VIS.pdf (viewed 20 July 2018); *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3, Div 2; Crimes (Sentencing Procedure) Regulation 2017 (NSW), Div 2.

[2] Crimes (Sentencing Procedure) Regulation 2017 (NSW), reg 12(1).

Judicial power

Under the Constitution, there is a separation of judicial power from executive and legislative power. In the case of *Chu Kheng Lim*, the High Court said:

> There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth.[3]

This means that courts are the only bodies with the power to impose punishment for a criminal offence. If a person is convicted of a crime, it is the court, and only the court, that determines what punishment should be imposed.

Visa cancellation decisions

The decision to cancel a person's visa is not made by a court. It is made either by a Minister, a delegate of the Minister or by the Administrative Appeals Tribunal. It is not the role of any of these individuals or bodies to punish people for committing a criminal offence.

The High Court recently heard a challenge to the provisions of the *Migration Act 1958* (Cth) dealing with the mandatory cancellation of visas on character grounds. The plaintiff alleged that the mandatory cancellation provisions were invalid because they punished the visa holder for having committed a criminal offence.

The High Court rejected that argument, saying:

> The exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power. …
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> The power to cancel a visa by reference to a person's character, informed by their prior offending, is not inherently judicial in character. It operates on the status of the person deriving from their conviction. By selecting the objective facts of conviction and imprisonment, Parliament does not seek to impose additional punishment.[4]

This was an important finding, because if the executive was purporting to punish people again by cancelling visas on criminal grounds, they would be exercising judicial power and the scheme would be unconstitutional.

If there were a change to the visa cancellation scheme to include an invitation for victims of an offence to attend and give evidence at hearings of the AAT dealing with whether an offender's visa should be cancelled, there is a risk that this may add a punitive element to the scheme which could be unconstitutional.

For example, rather than focusing on 'objective facts' such as whether a person had been convicted and sentenced to a particular term of imprisonment, decision makers

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[3] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

[4] *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2 at [47]-[48] (Kiefel CJ, Bell, Keane and Edelman JJ), see also at [89] (Gageler and Gordon JJ) and [96] (Nettle J).

may be asked to evaluate whether the gravity of the impact of an offence on the victim meant that the offender *should* no longer be entitled to hold a visa. That is a far more subjective decision and may raise real questions about whether such a decision involves either an additional penalty for the offence or an element of retribution in response to the impact of the offence on the victim.