Section 501 Visa Cancellation Process Submission

Oz Kiwi Association

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CONTACT DETAILS

Secretary	secretary@ozkiwi2001.org
Media enquiries	media@ozkiwi2001.org
Website	http://www.ozkiwi2001.org
Facebook	https://www.facebook.com/ozkiwi2001
Twitter	@ozkiwi2001

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1. INTRODUCTION

1.1 Oz Kiwi is the peak body for the issues affecting the rights of New Zealanders residing in Australia. Oz Kiwi thanks the Committee for the opportunity to make a submission to the inquiry into the review processes associated with visa cancellations made on criminal grounds.

1.2 This submission will focus on the Administrative Appeals Tribunal merit review process and the treatment of those New Zealand citizens who are detainees in immigration detention as a consequence of cancellation of visas pursuant to section 501 (3) of the Migration Act 1958 (Cth).

2. BACKGROUND

2.1 New Zealanders are allowed to reside in Australia on a 'Special Category Visa (SCV) that allows them to live and work here indefinitely.

2.2 Prior to 1 September 1994 New Zealanders were granted Permanent Residency (PR) upon arrival in Australia and could apply for citizenship after residing for two years, as could other PRs.

2.3 Between September 1994 and 26 February 2001 newly arrived New Zealanders were granted a 'Special Category Visa' (SCV). They were considered Permanent Residents while residing in Australia, and could apply for citizenship.

2.4 It is estimated that some 250,000 to 350,000 New Zealanders have arrived post 26 February 2001, many of whom have no pathway to PR or citizenship due to the 'temporary' nature of the SCV.

2.5 With the new status of SCV there became two interpretations of the visa - a 'protected' SCV (PSCV), for those who arrived prior to 26 February 2001; and the 'non-protected' SCV (NPSCV) for those who have arrived since that date.

2.6 The former group has all the rights and protections of a Permanent Resident and can apply for citizenship if they meet the February 2001 transitional arrangements. That is, they:

- were in Australia on 26 February 2001; or
- were in Australia for 12 months in the two years immediately before this date, or
- are assessed as a protected SCV holder before 26 February 2004.

3. LOW CITIZENSHIP TAKE UP RATE BY NEW ZEALANDERS SINCE 2001

3.1 Historically New Zealanders have had a far lower citizenship take-up rate compared to other migrant groups as citizenship had little effect on the rights of PSCVs. Academics Paul Hamer and Andrew Markus analysed Australian census data and found that of the 146,000 New Zealand-born migrants who arrived in Australia between 2002 and 2011, and still resident by 2016, only 8.4 percent had gained Australian citizenship. This compares to citizenship uptake rates of between 40 to 50 percent by 2016 for New Zealand-born people arriving in Australia between 1985 and 2000.

3.2 The researchers ascribe the low numbers to the restrictions imposed in February 2001, denying Kiwis arriving after that point from applying directly for citizenship, unless they first obtained a permanent visa such a skills-based visa.

3.3 Hamer says that in 2001 the Australian government considered about 40 percent of New Zealand settlers would qualify for a permanent visa and therefore be eligible for citizenship, however few have applied.

3.4 A new permanent visa, the Skilled Independent 189 (New Zealand) Stream became available from 1 July 2017 for some non-protected Special Category Visa-holders (SCV). To be eligible for the new visa, the primary applicant must:

- be a non-protected Special Category Visa-holder; and
- have started residing in Australia on or before 19 February 2016; and
- have resided in Australia for the last five years immediately prior to applying; and
- have earned at least the taxable income threshold in each of the last five financial years or qualify for an income exemption; and
- meet the standard health, character and security checks.

3.5 The effect of the immigration law concerning New Zealanders' visa status, and their lack of a pathway to PR, has impacted on the number of New Zealanders now being held immigration detention. Oz Kiwi notes that it is too early to see the bearing the new visa might have on the take up rate of PR by New Zealanders. However, it is unlikely to be an option for individuals impacted by s501 given they would not pass the character test.

4. RATES OF NEW ZEALANDERS IN AUSTRALIAN IMMIGRATION DETENTION

4.1 Since the s501 law change in December 2014 the number of New Zealanders held in Australian immigration detention has increased markedly to the point where New Zealanders have become the largest nationality group. Several factors have led to the increasing number of New Zealanders in immigration detention. They include the:

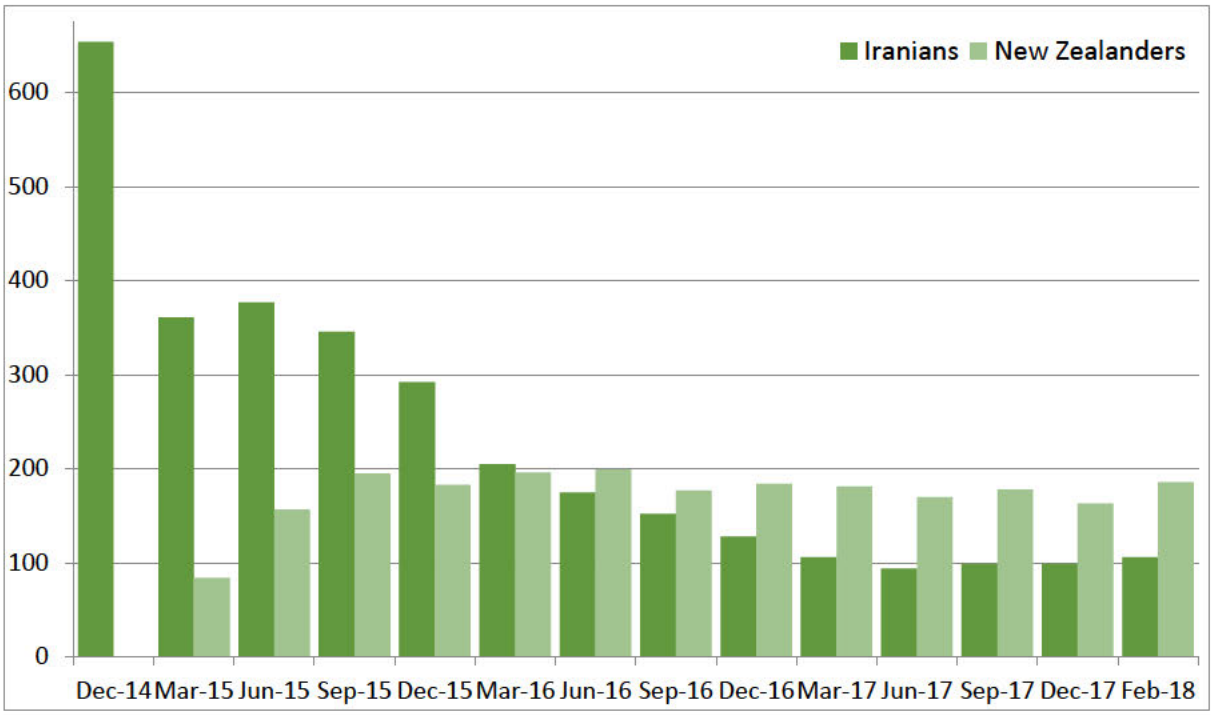
- removal of the ten-year residency protective factor meaning any individual who has resided for a decade is considered permanently settled; and
- retrospective application of the amendment so that any previous conviction can be considered; and
- cumulative application where shorter sentences can be collated to make 12 months; and
- reduction from 24 months to 12 months of sentencing fails the character test.

4.2 The lower take-up rate of citizenship, especially by long term New Zealand residents of Australia, means they are particularly vulnerable to the s501 amendment.

4.3 The number of New Zealanders being held in immigration detention was first recorded in March 2015. They were the fifth largest group by nationality at 4.5 per cent (78 men and 6 women). By August of 2015 New Zealanders were the second highest national population group with 184 (including 19 women) behind Iranians at 407 people.

4.4 In June 2016 New Zealanders became the largest population group in immigration detention at 12.6 per cent with 199 New Zealanders (183 men and 16 women). They have remained the largest group, as of February 2018 there were 186 New Zealanders or 13.9 per cent of detainees (169 men and 17 women). This figure contrasts with New Zealanders comprising approximately 2.5 per cent of the Australian population.

Comparison of Iranians & New Zealanders in Australian Immigration Detention



Statistics: Department of Home Affairs website.

4.5 The number of New Zealanders being deported from Australia is also disproportionate to their representation within the general population. Since s501 was amended in December 2014 1,200 New Zealanders have been deported. Visa cancellations have increased tenfold under the revised s501. Of the 2,850 people deported between July 2014 and June 2017, 51 per cent were New Zealanders (Gregoire and Nedim, 7 March 2018).

4.6 The Commonwealth Ombudsman's report from December 2016 illustrates the growth in deportation figures since 2015. Between 2006 and 2013 the annual figure fluctuated between 58 and 157. In 2014-15 it increased to 580 and doubled again in 2015-16 to 983. For the first two years following the s501 amendment 697 (57 per cent) of the 1,219 people deported were New Zealanders.

5. HUMAN RIGHTS BREACHES

5.1 One of the key concerns for Oz Kiwi is the separation of incarcerated parents from their children. The detainees' family relationships being arbitrarily and significantly interfered with, and detainees being geographically separated from their families for a non-disclosed period of time breaches Articles 17 and 23 respectively of the International Covenant on Civil and Political Rights (ICCPR).

5.2 The cases outlined below illustrate these breaches:

- AR was moved from Brisbane Immigration Detention Centre (IDC) to Wickham Point IDC, NT. It was very difficult for her children to visit her inter-state from Queensland.
- RF was detained in Villawood IDC. His partner of ten years had terminal lung cancer and he was her carer before he was sent to prison. She died while he was in detention.
- WR is currently detained in Yongah Hill IDC, WA. His has two children living in Australia.
- PLU is currently detained in Villawood IDC. He has been in immigration for 3 years. PLU has six young children who live in Sydney.
- RK has been detained at Villawood IDC and at Christmas Island IDC. He has 3 children living in New South Wales.

5.3 Additional case studies are provided in the Appendix – Case Studies of New Zealand s501 detainees.

5.4 AR, as noted above, has two children, aged 4 and 16 years. WR has two children, PLU has six young children and RK three children. All of these children are separated from one of their parents due to the detention of that parent.

5.5 We submit that in these cases, the best interests of the children have not been considered and therefore, the children's rights under Article 3 of CRC have been breached.

5.6 Further, we submit that Article 9 (1) of CRC has been contravened as the children have been separated from their parents against their will in a situation where separation is not necessary.

5.7 Detention in an IDC is not the only option for detention available to the Minister in these cases. The children's right under Article 9 (3) of CRC has also been breached as it is impossible for the child to maintain personal relations and direct contact on a regular basis with a parent who has been detained in immigration detention, particularly in the case of remote centres (as for AR, detained in Wickham Point IDC, NT and RK detained on Christmas Islands IDC).

5.8 The child's right to not have their family interfered under Article 16 of CRC has clearly been breached in these cases.

5.9 Finally, we submit that the child's right to be raised by both parents under Article 18 of CRC has been breached in these cases.

5.10 We further submit that AR's right to be visited by and correspond with members of her family has been breached. Due to the location of Wickham Point IDC it was very difficult for her young children to visit, and her lawyer was been unable to visit her. Furthermore, AR has not seen her two dependent children since being deported to New Zealand in 2016.

5.11 We submit that the detention of persons on Christmas Island is similarly a breach of Article 16 of CAT because of its extreme isolation. Further, we are informed that detainees regularly have their mobile phones and internet access removed from them and have to 'earn' credit for phone cards from the IDC managers.

6. CHRISTMAS ISLAND

6.1 Most Australians would be surprised to learn that any New Zealanders are being held in Australian Immigration detention. They would be even more surprised to learn that nearly 300 have been detained on Christmas Island (CI) since 2015. One New Zealander has been held on CI for two years while he appeals his deportation. This individual arrived as a six year old and has resided in Australia for 25 years never having returned to New Zealand in that time.

6.2 The Australian Government does not generally release information about detainees held on Christmas Island (CI). A Television New Zealand (TVNZ, April 2018) request for information in November 2017 under the Australian Freedom of Information process took five months to be answered. The data released stated there were 55 New Zealanders detained on CI from a total 313 men, as at November 2017. On average these individuals were held for 125 days while appealing their deportation or while waiting to be deported to New Zealand.

6.3 Christmas Island is located 2,600 kilometres from Australia and closer to Java than Perth. The cost of flights to the island makes it prohibitive for most meaning the detainees are isolated from families and legal support. Not being able to see their children or grandchildren, their partner or parents is a breach of their human rights. Article 3 of the Convention on the Rights of the Child (CRC, see references) states that the best interests of the child shall be a primary consideration in any court decision while Article 9 of CRC that a child should not be separated from a parent unless it is in the child's best interest.

6.4 Detainees on CI are often denied legal representation due to its extreme isolation. It is very difficult for detainees to appoint a lawyer to handle their case, for lawyers to support their clients and for detainees to attend any court case.

7. ADMINISTRATIVE APPEALS TRIBUNAL MERIT REVIEW PROCESS

7.1 The Administrative Appeals Tribunal (AAT) merit review process is essential for a number of reasons.

7.2 Firstly, the power that is exercised by the Department of Home Affairs pursuant to subsection 501CA(4) to not to revoke a decision to cancel a visa is one which in a material manner, adversely impacts the rights of an individual.

7.3 Not only does a decision taken by the Department not to revoke a decision to cancel visa impact adversely on the visa holder, but it impacts adversely on members of their immediate and extended families.

7.4 While the right to control migration, and in this case to be able to cancel the visa of a non-citizen is accepted as a proper matter for the Executive arm of government, the rule of law requires that such decisions, given the material impact on rights, should always be subject to independent scrutiny.

7.5 As Justice Deirdre O'Connor, a former President of the AAT noted in 2000; "The notion that administrative decisions affecting people's interests should, in general, be subject to external merits review is now accepted."

7.6 In 2006, speaking on the occasion of the 30th anniversary of the formation of the AAT former Chief Justice Murray Gleeson emphasised the danger of any government seeking to remove an independent check on its actions:

7.7 It would be dangerous for any modern government to disregard what some commentators, notably in Canada, have come to describe as the ethos or culture of justification which pervades modern liberal democracies. This has been identified as an aspect of the rule of law. The present Chief Justice of Canada, Chief Justice McLachlin, writing extra-judicially in 1998 on the role of administrative tribunals in that country said:

> *"Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law". (Emphasis in original)*

> *The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life. There are, of course, different techniques of justification, appropriate to different conditions and circumstances. Justification does not merely mean explanation. I have been at pains to reject any suggestion that I regard merits review of decision-making by the judicial method as the paradigm of public justification. It is appropriate in some circumstances, and not in others. My point is that unless both merits review, and judicial review, of administrative action are understood against the background of a culture of justification, they are not seen in their full context.*

7.8 While there have been some calls for removing the merits review role of the AAT in relation to section 501CA(4) decisions these calls are misplaced for the reasons noted above.

7.9 The great administrative lawyer William Wade once said that "to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power".

8. CONCLUSION

8.1 New Zealanders reside in Australia on an SCV with two interpretations of the visa - a 'protected' SCV (PSCV) for those who arrived on or before 26 February 2001; and the 'non-protected' SCV (NPSCV) for those who have arrived since that date.

8.2 Historically New Zealanders have had a far lower citizenship take-up rate compared to other migrant groups since citizenship had little effect on the rights of 'protected' SCVs. In contrast from 27 February 2001 the 'non-protected' SCV has been a temporary visa with fewer rights. An estimated 250,000 to 350,000 New Zealanders have no pathway to PR or citizenship. The new New Zealand stream 189 visa has only be available since July 2017, therefore, it is too soon to say how many 'non-protected' SCVs might take that pathway.

8.3 The impact of the s501 changes on New Zealanders has been significant. From early 2015 New Zealanders began to be recorded in immigration detention statistics, and since June 2016 they have remained the largest population group. As of February 2018 there were 186 New Zealanders or 13.9 per cent of detainees (169 men and 17 women) in immigration detention.

8.4 New Zealanders comprise approximately 2.5 per cent of the total Australian population yet since June 2016 they make up 12 to 14 per cent of the immigration detention population. Additionally, New Zealanders have made up half of all foreign nationals deported since December 2014.

8.5 Incarceration in immigration detention is not only detrimental to the individual but has a negative effect on their children, their partner and wider family group. The impact on children of being separated from a parent who is detained at a great distance is a breach of the child's human rights, particularly under UNCRC and ICCPR. Placing New Zealanders on Christmas Island is a breach of Article 16 of CAT because of its extreme isolation.

8.6 It is imperative that the independence of the Administrative Appeals Tribunal (AAT) be maintained so that decisions made by that body can be independently reviewed. Any attempt to remove the merits review role of the AAT would be misguided and detrimental to detainees' best interests.

9. REFERENCES

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Convention on the Rights of the Child (CRC)

Article 3

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9 (1) and (3)

(1) State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

(3) State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 16

(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Article 18

(1) State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 16

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.

International Covenant on Civil and Political Rights (ICCPR)

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 23

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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10. APPENDIX – CASE STUDIES OF NEW ZEALAND S501 DETAINEES

No	Duration	Deported (Y/N)	Charges/Sentence	Length of time in Australia	Family residing in Australia
1	12 months	Appealing	Aggregated assault, grievous bodily harm	18 years ago as a school child	Parents, three siblings, four children of his own. Extended family also in Australia.
2	2016	Deported	Criminal damage, theft, providing false details	Since 1982, aged 2	Parents, two siblings, two children, aunt and uncle plus cousins. Has no family in NZ
3	Since 2015	Appeal failed, volunteered to return to NZ and appeal from there.	Assault	Since 1985, aged 4	Mother, Australian partner and two children who are separated from him due to partner's health issues as she needs support of her family.
4	2015	Deported	12 month sentence for shoplifting	Since 1979 aged 6	Has a toddler child with current Australian partner. Also has three stepchildren with Australian partner. Has no family or connection to NZ.
5	Not available	Appealing	Juvenile gang member, drug addict, last sentenced in 2000. Served 4 years of 6.5 year sentence.	1982, aged 1	Australian wife helped him get clean from drugs, their newborn baby had died while he was in jail in 2004. He is very close to his nephews particularly and is the main male role model in their lives. Father, sisters, nieces and nephews live in Australia.
6	2016	Appealing	Theft, criminal damage, assault and drug possession related to his addiction	Mid 1980's, as an infant	Mother, aunt and uncle, siblings, cousins in Australia. Only elderly grandparents are in NZ.
7	2017	Appealing	14 months for assault (first offence)	Since 2006	Has an Australian partner and three young children.
8	2017	Appealing	2.5 years for possession of a gun. Juvenile offending including driving offences, breach of supervision order, one assault (only a fine) in New Zealand. Driving offences, one count of possession of a gun in WA.	Since 2007	Mother lives in Australia. Australian partner and toddler child also reside in WA.
9	2017	Deported	Numerous driving offences (fines) Drug possession dangerous weapon charge (18 months jail)	25 years ago	Mother, Australian partner and three Australian citizen children for whom he is sole carer. Was working in own business when arrested in 2016.

No	Duration	Deported (Y/N)	Charges/Sentence	Length of time in Australia	Family residing in Australia
10	2017	Appealing	Supply of prohibited drug - 3.5 years (first conviction)	Since 1988	Mother, siblings and nieces and nephews in Australia. Does not know NZ and has no family there.
11	2017	Appealing	Assault (family violence) 12 months - served one third of sentence	Since 1990	Parents, siblings and one niece in Australia. Does not know NZ and has no family there. Separated from his partner with whom he has two young children.
12	Not available	Appealing	Wilful damage and theft. First offence - 18 months fully suspended	Since 1988	Mother, siblings, Grandmother, aunts and uncles plus cousins in Australia. Extended family all here, no connection to NZ.
13	2016	Appealing	Assault (family violence) 18 months - fully suspended	Since 1998	Wife and nine children, ex-partner and one child, four grandchildren.
14	2016	Appealing	NZ: various minor offences - driving fines, common assault. One six month sentence for fraud - cheque forging in 1979. Aust: driving while disqualified, drink driving (fines)	Since 2010	Picked up at Customs when re-entering Australia in 2016. No convictions with jail sentences in Australia, only one jail sentence in NZ dating from 1979. Wife, children and grandchildren all reside in Australia.
15	Two years	Yes, can't afford to appeal the decision	4 years for drug offences and an action of attempt to maim injure or harm with a projectile	Arrived late 1990's, resided for 16 years.	Moved to Australia as a child with his parents and siblings who all still live in Australia. Has an Australian partner and young child.
16	Three years	Appealing deportation	Common assault, grievous bodily harm	Has lived in Australia for 22 years	Has six children with two partners. They are all Australian citizens.