Visa cancellation and refusal on character grounds
(including revocation of mandatory cancellation)

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Overview

The *Migration Act 1958* (the Act) provides special powers for the Minister to refuse or cancel visas on character grounds. In some circumstances where a visa is cancelled on character grounds, the Minister can revoke that cancellation decision.

These powers generally involve consideration of whether a person passes the character test, and if they do not, the exercise of a discretion about what decision should be made (whether the visa should be refused or cancelled, or whether the cancellation should be revoked).

The character test is set out in s 501(6) of the Act, which essentially deems individuals to be of bad character in the circumstances listed in that subsection.

This commentary focuses on the three types of visa decisions on character grounds which may be subject to review by the AAT: visa refusals under s 501(1), visa cancellations under s 501(2), and decisions under s 501CA not to revoke a mandatory cancellation.[1] It looks at the nature of each of these decision-making powers, the AAT's jurisdiction to review primary decisions, the application of the character test and the exercise of the discretion. It also looks at specific provisions governing the conduct of these reviews by the AAT and some common legal issues affecting decisions in this area.

The Powers

The character related visa powers are powers of the Minister under the Act. However, the powers are often exercised by officers in the Department of Home Affairs as delegates of the Minister under s 496 of the Act Unless otherwise indicated, references to the Minister in this commentary include the Minister's delegates.

[1] Other visa decisions on character grounds cannot be reviewed by the AAT – see for example the character-based powers in s 501A, 501B and 501BA. These are personal powers of the Minister and are not subject to AAT review.

Visa refusal under s 501(1) and cancellation under s 501(2)

Under s 501(1), the Minister may refuse to grant a visa if the person does not satisfy the Minister that the person passes the character test.[2] This special visa refusal power is related to the general power to grant or refuse to grant a visa in s 65 of the Act.[3]

Under s 501(2), a person's visa can be cancelled if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test.[4] If a person does not pass the character test, the decision-maker must then go on to consider the discretion to cancel or refuse the visa. Failure to pass the character test provides the occasion, but not the reason, for the exercise of that discretion. There is a need in each case to make an individual assessment of the visa application or cancellation.[5]

The discretion conferred by s 501(2) is a discretion to cancel; to approach it as a discretion *not to* cancel is a jurisdictional error.[6]

Although in their terms each of these powers may be exercised where the person does not satisfy the Minister that they *do* pass the character test, as explained below under 'The character test', in practice the powers operate when the Minister makes a finding that they *do not* pass the character test.

Revocation under s 501CA(4) of mandatory cancellation

Under s 501(3A), the Minister must cancel a visa of certain persons in prison who do not pass the character test because of sexually based offences involving a child, or because of a substantial criminal record as a result of being sentenced to death, life imprisonment, or a term of imprisonment more than 12 months.[7] The person must be serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.[8]

If a visa is cancelled under s 501(3A), the Minister must give the person a written notice setting out the decision and particulars of certain adverse information, and inviting the person to make representations about revocation of the original decision.[9]

If the person makes representations in accordance with the invitation, then under s 501CA(4), the Minister may revoke the original decision if satisfied the person passes character test or that there is another reason why the original decision should be revoked.

The judicial authorities indicate that although the provision says the decision-maker *may* revoke the cancellation if there is another reason to do so, this does not involve a separate exercise of a discretion but

[2] s 501(1).
[3] See e.g. discussion in *SZLDG v MIAC* (2008) 166 FCR 230 about the interaction between s 65 and s 501.
[4] See discussion of 'Reasonably Suspects' below
[5] *NBMZ v MIBP* (2014) 220 FCR 1 at [204]-[205].
[6] *Lesuma v MIAC (No 2)* [2007] FCA 2106 (Emmett J, 19 December 2007) at [23]-[33].
[7] Specifically, this applies to persons who fail the character test under paragraph (6)(e) or under (6)(a) due to a substantial criminal record as defined in paragraphs (7)(a), (b) or (c). See discussion of 'The Character Test' below.
[8] For these purposes, periods of periodic detention and orders to participate in certain residential schemes or programs count as terms of imprisonment: s 501(8) and (9). A 'sentence' includes any form of determination of the punishment for an offence and 'imprisonment' includes any form of punitive detention in a facility or institution and: s 501(12).
[9] s 501CA(3). The adverse information is referred to as 'relevant information' which is defined in s 501CA(2) as information that would be a reason or part of the reason for making the decision, and is specifically about an individual and not just a class of persons. Non-disclosable information as defined in s 5(1) is excluded from the definition of 'relevant information' and so need not be given under this provision. For a discussion of similarly worded adverse information provisions relating to MRD reviews, see Chapter 10 of the MRD Procedural Law Guide. In *Picard v MIBP* [2015] FCA 1430 (Tracey J, 16 December 2015) at [40], the Court observed that this was a somewhat strange provision as the obligation relates to information bearing on the decision to cancel, not information on which the Minister might rely in deciding whether or not to revoke the cancellation decision: at [40].

rather is part of a single balancing exercise.[10] In deciding whether there is 'another reason' why the decision should be revoked, the decision-maker must form a state of satisfaction about the existence of 'another reason' by forming a state of satisfaction about matters including the considerations in the Minister's Direction.[11] The Minister must assess and evaluate the factors for and against revocation, and if satisfied that the cancellation should be revoked, the Minister is obliged to act on that view – this is a single process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.[12]

In making a decision under s 501CA(4)(b), the decision-maker is not constrained to consider only 'relevant information' given at the time of formal notification of the cancellation decision and the representations made in response.[13]

In a decision not to revoke, it is preferable to express the conclusion in the terms used by the provision, that the decision-maker is neither satisfied that the person passes the character test, nor that there is 'another reason why the original decision should be revoked'.[14]

Jurisdiction

Reviewable decisions

Decisions by a delegate to refuse a visa under s 501(1), to cancel a visa under s 501(2), or not to revoke a mandatory visa cancellation under s 501CA(4), are reviewable by the AAT in its General Division.[15] As only decisions made by delegates are reviewable, decisions made by the Minister personally are not subject to merits review.[16] References to the Minister include any one of the Ministers administering the relevant provisions, including e.g. an Assistant Minister appointed to administer the Act.[17]

Statutory time limits

For decisions made under ss 501 and 501CA(4), where the person affected is in the migration zone, they must apply to the Tribunal for review within 9 days after the day on which they were notified of the decision in accordance with s 501G(1).[18] This time period cannot be extended.[19] If the applicant is outside the migration zone the review application must be lodged no later than 28 days after the document setting out the terms of the decision is given to the applicant, but this time can be extended.[20]

[10] See *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), at [21], referring to *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September, 2016) and *Marzano v MIBP* (2017) 250 FCR 548, but contrasting the emphasis Gageler and Gordon JJ placed on the word 'may' in *Falzon v MIBP* [2018] 9 HCA 2 at [74].
[11] *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [59].
[12] *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September 2016) at [38].
[13] *Marzano v MIBP* (2017) 250 FCR 548 at [56], [57], [59], [60].
[14] See *Romanov v MHA* [2018] FCA 1494 (Jagot J, 5 October 2018) at [20].
[15] s 500(1)(b), (ba). Mandatory visa cancellation decisions by delegates under s 501(3A) are not reviewable: s 500(4A). Character-based visa decisions under s 501 are not subject to review in the MRD: s 500(4)(b). See the President's Direction: Allocation of Business to Divisions of the AAT, 9 October 2017.
[16] The personal powers of the Minister to cancel or refuse visas under ss 500A(2) and (3), s 501(3), s 501A(2) and (3), s 501B(2) and 501BA(2), and the power to revoke a cancellation in s 501C(4) are not reviewable as they are not included in the list of reviewable decisions in s 500(1), and are also excluded from review by the MRD under Parts 5 or 7: s 500A(7), s 338(2), s 411(2)(aa), s 501A(7), s 501B(4), s 501BA(5), s 501C(11).
[17] Due to the effect of s 19A of the *Acts Interpretation Act 1901*: see *Maxwell v MIBP* (2016) 249 FCR 275 at [20]-[21].
[18] s 500(6B).
[19] s 500(6B) provides that s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*, which concern extensions of time, do not apply.
[20] s 29(1)(d) and (2)(a) and s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*.

Standing

Standing to apply to the AAT for review is ordinarily governed by s 27(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which provides for a person whose interests are affected by a decision to apply for a review. However, for visa cancellation and refusal decisions under s 501 (but not non-revocation decisions under s 501CA), a person is not entitled to make an application for review unless the person would be entitled to seek review of the decision under Part 5 or 7 of the Migration Act if the decision had been made on another ground.[21]

This calls for consideration of the provisions about standing to apply for review in s 347(2), (3) and (3A) (for general migration visas) and s 412(2) and (3) (for protection visas). For visa cancellations, it is generally the person whose visa was cancelled who has standing, and the person must be in the migration zone at the time of the cancellation decision. For visa refusals, the rules are more complicated, but in most cases for visas applied for onshore, the visa applicant has standing, while for offshore visas requiring sponsorship, the sponsor has standing.[22] For detailed discussion of the provisions about standing in Parts 5 and 7 of the Migration Act, including who may apply and where the review applicant must be located to apply, see Chapter 4 of the MRD Procedural Law Guide.

Application fee

The application for review must be accompanied by the prescribed fee.[23] Although the full fee $920 is payable if no concessional circumstance applies, in most onshore cases, the concessional $100 fee will apply as the applicant will be in prison or immigration detention.[24] The AAT can dismiss an application if the fee is not paid within 6 weeks of lodgement, and the AAT is not required to deal with the application until the fee is paid.[25]

The Character Test

The character test is defined in s 501(6) of the Migration Act. It is generally concerned with protection of the Australian community from the risk of harm.[26]

The character test deems individuals to be of bad character if they fit any of the criteria listed.

A person does not pass the character test only if one of the paragraphs in s 501(6) applies to that person.[27] While an applicant must satisfy the Minister in relation to factual matters relevant to the Minister's determination of whether a paragraph in s 501(6) applies, there will generally need to be a finding, or an opinion or suspicion based on reasonable grounds,[28] that one of these paragraphs applies. For example, whether or not a person has a substantial criminal record for s 501(6)(a) can only be determined by means of an objective finding by the Minister. Such a finding is therefore implicitly required.[29] In circumstances

[21] s 500(3), which refers to s 500(1)(b); *Administrative Appeals Tribunal Act 1975,* s 27(1).
[22] See ss 338 and 347 (general migration visas) and 412 (protection visas).
[23] s 29(1)(b), *Administrative Appeals Tribunal Act 1975.*
[24] s 20(1)(a) and s 21 of the *Administrative Appeals Tribunal Regulation 2015* – see in particular s 21(d), which applies where the applicant is an inmate of a prison or is otherwise lawfully detained in a public institution.
[25] s 69C(1) of the *Administrative Appeals Tribunal Act 1975* and s 24 of the *Administrative Appeals Tribunal Regulation 2015.*
[26] See, e.g., *Moana v MIBP* (2015) 230 FCR 367, at [52]-[56], where Rangiah J went through the various character grounds then in force and related them to protection of the community from harm; *Djalic v MIMA* (2004) 139 FCR 292 at [68] and [72]; *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg and Lander JJ, 25 March 2004) at [168]. Some judges, however, have expressed the view that it would not necessarily be error for the Minister acting personally not to consider the risk of harm: see *MIBP v Lesianawai* (2014) 227 FCR 562, at [26].
[27] *MIMIA v Godley* (2005) 141 FCR 552 at [54].
[28] *MIMIA v Godley* (2005) 141 FCR 552 at [34].
[29] *MIMIA v Godley* (2005) 141 FCR 552 at [48].

where the Minister is unsure whether a paragraph in s 501(6) applies, the Minister could not refuse or cancel the visa.[30]

Some paragraphs of s 501(6) require a reasonable suspicion or opinion. Section 501(6)(c), for example requires consideration of whether a person is of good character, having regard to past and present conduct.

In effect, s 501(6) provides a complete statement of how the person may satisfy the Minister. The effect of that statement is that, unless a paragraph in s 501(6) applies, the person is to be taken as having satisfied the Minister.[31] Section 501(6) provides: 'Otherwise, the person passes the character test'.

Consistent with judicial authorities, Direction No. 79 says: 'Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act'.[32]

Substantial criminal record

A person who has a substantial criminal record does not pass the character test.[33] For this purpose, the categories of sentences and detention in s 501(7) have been selected by the Parliament as objective, easily identified, criteria.[34]

Sentence

The phrase 'substantial criminal record' is defined to include having been sentenced to: death or life imprisonment; a term of imprisonment of 12 months or more; two or more terms of imprisonment totalling 2 or more years; or having been institutionalised after being acquitted on grounds of unsoundness of mind or insanity, or been found by a court[35] to not be fit to plead. The Act defines a 'term of imprisonment' broadly. It includes time that a court has ordered a person to spend in drug rehabilitation or a residential program for the mentally ill.[36] For sentences of periodic detention, the 'term of imprisonment' is calculated as the total number of days for which a person is required to be detained.[37] A sentence or conviction must be disregarded if the conviction has been quashed, or the person has been pardoned in relation to that conviction, and the effect is that the person is taken never to have been convicted.[38]

For the purposes of determining whether an applicant has been sentenced to a term of imprisonment of 12 months or more, or to two or more terms of imprisonment totalling two years or more within s 501(7), it is the term of imprisonment to which the applicant was sentenced, not the term actually served, that is relevant.[39] A sentence to a term of imprisonment which is suspended falls within the section.[40]

Sentences served concurrently must be totalled for the purposes of s 501(7).[41]

[30] See *MIMIA v Godley* (2005) 141 FCR 552 at [53]-[55].
[31] *MIMIA v Godley* (2005) 141 FCR 552 at [56].
[32] Direction No. 79, Annex A, Section 1, Discretionary visa cancellation or refusal, paragraph (2), p.22.
[33] s 5016).
[34] See *Brown v MIAC* (2010) 183 FCR 113 at [10].
[35] 'Court' includes a court martial or similar military tribunal: s 501(12).
[36] s 501(9)
[37] s 501(8).
[38] s 500(10).
[39] *Drake v MIEA* (1979) 76 FLR 409 at 415-418.
[40] *Brown v MIAC* [2010] FCAFC 33 (Moore, Rares, Nicholas JJ, 20 April 2010) at [11]-[12].
[41] s 501(7A).

Association with/membership of groups involved in criminal conduct

Individuals are also deemed to fail the character test if the Minister reasonably suspects that they have been a member of a group, or have had an association with, a person or a group who the Minister reasonably suspects has been or is involved in criminal conduct. For a person to fail the membership limb, there does not need to be an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation.[42] The evidence required will depend on the circumstances of the case. The Federal Court has said that membership implies at the very least a voluntary decision by the person to assume membership of the group and recognition by the group of the person as a member.[43]

To fail the association limb, the decision-maker must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself, sufficient. In order not to pass the character test on this ground, the association must have some negative bearing upon the person's character;[44] it does not refer to merely social, familial or professional relationships.[45] In establishing association, decision-makers are to consider the nature of the association; the degree and frequency of association; and its duration.

It has been said that it is implicit that a person who fails this test may pose a risk of harm to the Australian community.[46]

Good character, having regard to conduct

A person will not pass the character test if they are not of good character having regard to the person's past and present criminal conduct or past and present general conduct.[47]

The question whether a person is or is not of 'good character' is primarily an issue of fact and there are no precise parameters to distinguish 'good character' from 'bad character'.[48] 'Good character' does not refer to a person's reputation and repute however, a person's criminal record can assist decision makers, who should have regard to the nature of any crimes to determine whether they reflect adversely on the applicant's character as well as the applicant's evidence as to whether they have reformed and any character references.[49] 'Good character' refers to enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens.[50] Conduct may make those qualities visible, but it should never be confused with them. Having had regard to the conduct, the Minister must still come to a further conclusion, whether or not to be satisfied that the person is not of good character.[51]

Section 501 does not charge the decision-maker with the task of making a judgment, general in nature, about the character of a person, i.e, a judgment to which the statutory context is of no relevance. The concept of 'good character' in s 501 is not concerned with whether a person meets the highest standards of integrity, but with a less exacting standard than that. It is concerned with whether the person's character in the sense of their enduring moral qualities, is so deficient as to show it is for the public good to refuse entry

[42] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [133]-[149].
[43] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [144].
[44] Direction No. 79, Annex A, Section 2, 3(5), p.25. This incorporates the principle from the Full Federal Court judgment in *Haneef v MIAC* (2007) 163 FCR 414 at [130].
[45] *Haneef v MIAC* (2007) 161 FCR 40 at [254].
[46] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016), at [70].
[47] s 501(6)(c.)
[48] *Irving v MILGEA* (1996) 68 FCR 422 at 427-428.
[49] *Irving v MILGEA* (1996) 68 FCR 422 at 425.
[50] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [51].
[51] *MIEA v Baker* (1997) 73 FCR 187, at 197.

(or cancel their visa). The standard is not fixed but elastic, in the sense that identified deficiencies in the moral qualities of an applicant for a short-term visa may not justify a conclusion that a person is 'not of good character' within s 501(2), while similar deficiencies may suffice to justify that conclusion, where the person seeks long-term entry (or stay).[52]

It is for the administrative decision-maker to arrive at a decision whether a person is of good character. An applicant must satisfy the Minister in relation to factual matters relevant to that determination, but the Minister must make a supervening determination, having had regard to those matters of past and present conduct, that a person is of bad character before the visa can be refused or cancelled. The consideration of past and present conduct provides indicia as to the presence or absence of good character but does not in itself answer the question. The decision-maker must look at the totality of the circumstances and determine whether the person is distinguishable from others as a person not of good character.[53] Once the decision has been made, it matters not that another decision-maker may have concluded differently. The decision will stand unless an error of law is established, e.g. that the decision was such that no reasonable decision-maker could have arrived at it.[54]

Criminal conduct

The concepts of criminal and general conduct are not mutually exclusive.[55]

'Past criminal conduct' does not refer only to conduct the subject of criminal conviction.[56] In the absence of a prosecution and conviction, however, satisfaction that criminal conduct has occurred will not be attained on slight material.[57] In determining whether a person's conduct has been criminal, the weight to be attached to evidence such as police intelligence reports will be a matter for the Tribunal.[58]

It is necessary when finding that a person is not of good character due to their criminal conduct to:[59]

- examine the conduct and assess it 'as to its degree of moral culpability or turpitude'
- examine past and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character
- if there is no recent criminal conduct, give due weight to that fact before concluding that the person is not of 'good character'. A person of ill repute due to past criminal conduct may nonetheless reform into a person of good character.[60] It could be error not to take an absence of evidence of 'present criminal conduct' into account, and to ask instead whether there has been an affirmative demonstration of facts occurring since the relevant conduct sufficient to displace the conclusion, otherwise compelled by past conduct, that a person is not of good character.[61]

General conduct

The Act and regulations are not concerned with infractions or patterns of conduct that show weakness or blemishes in character but with ensuring that the exercise of a sovereign power to prevent a non-citizen entering Australia is only invoked when the non-citizen is a person whose lack of good character is such that

[52] *Goldie v MIMA* [1999] FCA 1277 (Spender, Drummond, Mansfield JJ, 14 September 1999) at [8].
[53] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [52],
[54] *Irving v MILGEA* (1996) 68 FCR 422, at 428.
[55] *Wong v MIMIA* [2002] FCAFC 440 (Black CJ, Hill and Hely JJ, 20 December 2002) at [33].
[56] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[57] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[58] See *Brown v MIAC* (2010) 183 FCR 113 at [128].
[59] *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [55].
[60] *Irving v MILGEA* (1996) 68 FCR 422 at 431-432.

it is for the public good to refuse entry.[62] The absence of harm to the Australian community from the issue of a visa is relevant to the meaning of good character.[63]

Conduct other than prevalent or usual conduct may be regarded as 'general conduct'. Just as a person's criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, displayed but once or twice, may lay character bare very tellingly.[64]

It is not necessary that in every circumstance there must be past general bad conduct and present bad conduct. Past bad conduct may, in certain circumstances, outweigh recent general good conduct so as to compel or favour a conclusion that the person continues to lack moral worth.[65]

A deportation order is a matter that may be taken into account[66], although such orders do not of themselves throw much light upon the inherent qualities which a person may have.[67]

Risk in regard to future conduct

This section requires an evaluative judgment by the decision-maker as to whether they are satisfied that there is a risk that a person would engage in conduct of the kinds specified. Then, if the decision-maker is so satisfied, they have a discretion to refuse or cancel a visa, or revoke a visa cancellation.[68]

A conditional finding positing that there is a risk that a person would engage in certain conduct should a second circumstance (e.g. drinking to excess) occur is not necessarily disqualified from serving as a finding of risk. However, it has been said that as a matter of logic, such a conditional conclusion can only do so if there are express, or implied, findings (a) that there is sufficient probability that the second event will happen; and (b) that that there is sufficient probability that the happening of the second event was triggered by the first.[69]

Abstract propensity reasoning (i.e. that a person who has offended once will have a propensity to reoffend) may not be permissible reasoning to reach a conclusion regarding the jurisdictional fact of whether someone passes the character test because of the risk of future conduct.[70] Direction No. 79 says that it is not enough that the person has committed relevant conduct in the past, there must be a risk that they would engage in such conduct in the future.[71]

According to the Direction, the level of risk requires that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in the relevant conduct.[72]

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[61] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [48].
[62] *Irving v MILGEA* (1996) 68 FCR 422, at 432.
[63] *Irving v MILGEA* (1996) 68 FCR 422, at 433.
[64] *MIEA v Baker* (1997) 73 FCR 187, at 195.
[65] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [47].
[66] *MIEA v Baker* (1997) 73 FCR 187, at 196.
[67] *Irving v MILGEA* (1996) 68 FCR 422, at 425-6.
[68] See *Sabharwal v MIBP* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018) at [2]. The Court considered s.501(1), but the reasoning also applies to s.501(2) and s.501(3A).
[69] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]. The judgment was overturned on appeal in *MIBP v Sabharwal* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018), at [59]-[65] because the Full Federal Court did not agree that the Minister's finding was conditional upon the probability of the applicant again drinking to excess. In these circumstances, the Full Court did not consider whether it was error to make a conditional finding without making the relevant findings on the 'triggering event'.
[70] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]-[112]. Kerr J distinguished the use of such reasoning in determining whether a person passes the character test, from cases such as *Muggeridge v MIBP* (2017) FCR 255 81, where it would not be inconsistent with the exercise of the discretion to cancel a visa if the Minister was to address the question of the likelihood of reoffending in this way, *after* the ground (in that case a 'substantial criminal record') had been made out.
[71] Direction No. 79, Annex A, Section 2, cl 6.(3), pp.28-9.
[72] Direction No. 79, Annex A, Section 2, cl 6.(2).

Other grounds

The other character grounds in s 501(6) – immigration detention offences, sexually based offences involving a child, crimes under International Humanitarian Law, national security risk, and certain Interpol notices – have not had as much judicial consideration as those discussed above.

Minister's Directions and Discretion

The discretions under ss 501 and 501CA are unfettered in their terms. Nevertheless, the law imposes certain limits on the exercise of the discretions. Decision-makers may not act arbitrarily, capriciously or legally unreasonably. The subject matter, scope and purpose of the Act may also require that certain considerations be taken into account.[73] The Minister also has the ability to provide some guidance and framework to the exercise of these discretions by way of Directions issued under s 499 of the Act.

Directions and how they should be applied

The Minister may give written directions to a person or body exercising powers under the Act if those directions are about the performance of those functions or the exercise of those powers.[74] The Minister has issued such a direction for people or bodies exercising powers under ss 501 and 501CA.[75]

The purpose of the Direction is to *guide* decision-makers exercising powers under the Act. Delegates and the Tribunal must generally follow the Minister's Direction. Non-compliance with a s 499 Ministerial Direction can constitute jurisdictional error.[76] Compliance with the Direction does not involve dictating the way in which the discretion is to be exercised; rather it creates a framework within which the discretion vested in the decision-maker is lawfully to be exercised. It identifies certain principles which provide a framework within which decision-makers should approach their task.[77] It prescribes relevant considerations which must be taken into account, but provides guidance only as to the manner in which they are to be balanced. It equips decision-makers with a width of discretion that enables them to take into account the myriad of different circumstances and different combinations of circumstances that may arise and thereby to reach a result that is fair and rational in all the circumstances, while ensuring that account is had to crucial considerations.[78]

Direction No. 79

Direction No. 79 does not determine rules of general application but gives directions to the Tribunal as to the policy it must apply in the exercise of the discretion conferred on it by s 43 of the AAT Act in exercising the power conferred by ss 501 and 501CA of the *Migration Act*. The Direction does not derogate from the Tribunal's duty to reach the preferable decision in the particular case before it. Indeed, the Direction has that end as its purpose.[79]

[73] *NBMZ v MIBP* (2014) 220 FCR 1, at [6]. The Court was discussing s 501(1), but the reasoning also applies to s 501(2) and s 501(3A). These types of considerations are discussed further below.
[74] s 499, *Migration Act 1958*.
[75] Direction No. 79 is the direction currently in force.
[76] See *Williams v MIBP* (2014) 226 FCR 112 at [34]-[35]. In *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017), the Court distinguished such non-compliance from failure to take into account a relevant consideration, assuming (but not deciding) that s 499 Directions are capable of imposing on decision-makers the kind of mandatory obligations it purports to do: at [35]-[40].
[77] *MIBP v Lesianawai* (2014) 227 FCR 562, at [80]-[81].
[78] *MIBP v Lesianawai* (2014) 227 FCR 562, at [83]. The Court was discussing Direction No. 55, but the reasoning applies equally to Direction No. 79.
[79] *Uelese v MIBP* [2016] FCA 348 (Robertson J, 12 April 2016) at [50].

Direction No. 79 revoked Direction No. 65 and commenced on 28 February 2019.[80] It is substantially the same as Direction No. 65, except with regards to the consideration of violence against women and children and in the assessment of risk and consideration of the best interests of children for non-revocation decisions.[81] Where judgments and Tribunal decisions discussed in this commentary have considered Direction No. 65 or previous Directions, the reasoning applies equally to Direction No. 79, unless indicated otherwise.

Section 1 of the Direction includes a preamble which contains statements about its objectives, general guidance and principles.

Section 2, titled 'Exercising the discretion', says that decision-makers must take into account the mandatory considerations in Parts A, B, and C of the Direction where they are relevant, and in doing so they are to be informed by the principles.[82]

Section 2 identifies primary and other considerations for each of the three types of decision - visa refusal, visa cancellation and non-revocation of mandatory visa cancellation. The primary considerations are the same for all.[83] The other considerations are generally the same for the three types of decision. The exceptions are that the strength, nature and duration of ties and extent of impediments if removed are stated considerations for cancellations and revocations,[84] but not for visa refusals. Impact on family members is an express consideration for visa refusals, but not for cancellations and non-revocations.[85]

While a decision-maker is bound to take into account certain considerations, they are not limited to those set out in the Direction. The Direction specifies the relative, but not the actual, weight to be given to those considerations. To that extent, it imposes requirements on the exercise of the Tribunal's discretion, but the Tribunal is obliged to examine the merits of the case and decide for itself whether to affirm the decision.[86]

The weight to be given to any particular matter is a matter for the decision-maker and cannot be the subject of some ritualistic formula.[87] Phrases such as 'should generally be given greater weight than the other considerations' and 'one or more primary considerations may outweigh other primary considerations' have been interpreted as provisions that are intended to provide guidance to the decision maker as to how the balancing exercise required by the Direction should be approached, while leaving it open to the decision-maker to adopt a different approach in the exercise of discretion in the individual case.[88] It is not the content of the Direction which determines the outcome of the exercise of the discretion, but rather its application by a decision-maker to the evidence and material in an individual case.[89]

As well as the considerations identified in the Direction, the Tribunal must have regard to all relevant considerations, both in determining the ground and exercising the discretion.[90] For more information, see Other considerations not set out in Direction No. 79. Where the Direction purports to interpret a statutory

[80] Direction No. 79, Section 1, p.1.
[81] Clauses 6.3(3), 9.1.1, 11.1.1, 13.1.1, 13.1.2, and 13.2(1) differ from provisions in Direction No.65. The overall effect is that decision-makers no longer need to have regard to the sentence imposed, in considering the nature and seriousness of crimes of a violent nature against women and children, that they no longer need to have regard to the principle that the community's tolerance for any risk of harm becomes lower as the seriousness of potential harm increases, in considering whether someone represents an unacceptable risk for non-revocation decisions, and they must make a determination about whether revocation 'is in the best interests of the child' instead of about whether it 'is, or is not, in the best interests of the child'.
[82] Direction No. 79, Clauses 7 and 8.
[83] Direction No. 79, Section 2, Part A, 9, p.5; Section 2, Part B, 11, p.11; Section 2, Part C, 13, p.16.
[84] Direction No. 79, Section 2, Part A, 10, p.8; Section 2, Part C, 14, p.19.
[85] Direction No. 79, Section 2, Part B, 12, p.14.
[86] See *MIBP v Lesianawai* (2014) 227 FCR 562, at [21].
[87] *Howells v MIMIA* (2004) 139 FCR 580, at [127].
[88] *MIBP v Lesianawai* (2014) 227 FCR 562 at [83].
[89] *Jagroop v MIBP* (2016) 241 FCR 461 at [78].
[90] *Craig v South Australia* (1995) 184 CLR 163, at 179, *MIAC v Li* (2013) 249 CLR 332 at [10], [26], [71], [72], [110], *MIMA v Yusuf* (2001) 206 CLR 323 at [82].

term or describe a legal requirement, a decision-maker may only apply it where the interpretation or requirement is consistent with the legislation and judicial authority.[91]

Discretion - Weighing up relevant considerations

As well as setting out relevant considerations, Direction No. 79 gives guidance on how they should be weighed and applied in the exercise of the discretion. Direction No. 79 says that in taking the relevant considerations into account both primary and other considerations may weigh in favour of, or against, refusal, cancellation, or non-revocation; that primary considerations should generally be given greater weight than other considerations; and that one or more primary considerations may outweigh other primary considerations.[92]

It makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction No. 79 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that, absent some factor that takes the case out of that which pertains 'generally', they are to be given greater weight. However, Direction No. 79 does not require that the other considerations be treated as secondary in all cases, nor does it provide that primary considerations are 'normally' given greater weight. Rather, it concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.[93]

In weighing up a consideration, the Tribunal must make a conclusion on it and, having done so, put its conclusion on that issue on the scales in the manner provided for by the Direction.[94]

When applying the discretion the Tribunal must genuinely weigh factors leading to opposite conclusions and not artificially limit the weight to be given to any of the factors.[95]

The discussion of any mitigating factors advanced by the applicant must relate the factors to a person's overall conduct, not just to the most serious parts of it.[96]

Demonstrating consideration

Courts will generally treat the written statement of reasons as a statement of the matters that a decision-maker "adverted to, considered and [took] into account", unless there is probative evidence to the contrary; and if something is not mentioned, it may be inferred that it has not been adverted to, considered or taken into account.[97]

The failure to give any weight to a factor to which a decision-maker is bound to have regard in circumstances where that factor is of great importance in the particular case may support an inference that the decision-

[91] See e.g. *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375 and *MIAC v Anochie* (2012) 209 FCR 497 at [36]. More generally, see Legal Services commentary Application of Policy.
[92] Direction No. 79, Section 2, 8(3)-(5), p.5.
[93] *Suleiman v MIBP* [2018] FCA 594 (Colvin J, 2 May 2018) at [23].
[94] *Rokobatini v MIMA* 90 FCR 583 at [23]. The issue in that case was the hardship to the applicant if removed.
[95] *Hong v MIMA* [1999] FCA 1567 (Madgwick J, 10 November 1999) at [20].
[96] *Green v MIAC* [2008] FCA 125 (Tamberlin J, 20 February 2008) at [22]-[28].
[97] *NBMZ v MIBP* (2014) 220 FCR 1 at [16], citing s 25D of the *Acts Interpretation Act 1901* (Cth.), s 501G of the Migration Act, *MIMIA v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [89] and [133]. This judgment considered a decision made by the Minister personally, but the principle is drawn from authorities applying to administrative decision-makers generally.

maker did not have regard to that factor at all.[98] Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant. On the other hand, it does not follow that a decision-maker who genuinely considers a factor only to dismiss it as having no application or significance in the circumstances of the particular case will have committed an error. A decision-maker is entitled to be brief in their consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. Whether that inference should be drawn will depend on the circumstances of the particular case.[99]

A decision-maker is not required to make a finding of fact with respect to every claim made or raised by an applicant. A finding of fact may not be required if a claim or issue is irrelevant or if it is subsumed within a claim or issue of greater generality.[100] Nor is a failure to mention every element in the process of reasoning that led to a conclusion necessarily an indication that it failed to take some matter into account.[101]

On judicial review, a Court will assess whether the decision-maker has as a matter of substance had regard to the representations put. The fact that a decision-maker says they have had regard to a representation does not by itself establish that they have, as a matter of substance, had that regard. Neither does the Court ignore such a statement.[102]

Primary considerations

(A) Protection of the Australian community

Direction No. 79 says that when considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity *or* other serious conduct by non-citizens.[103] It adds that there is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct,[104] and that remaining in Australia is a privilege conferred in the expectation that non-citizens are and have been law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.[105] These principles appear to reinforce one of the principles set out in the Preamble, the low tolerance of such conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.[106]

In addressing this consideration, decision-makers should give consideration to the nature and seriousness of the non-citizen's conduct to date, and the risk to the Australian community should the non-citizen commit

[98] *MIAC v Khadgi* (2010) 190 FCR 248 at [58]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principle applies to administrative decisions generally.
[99] *MIAC v Khadgi* (2010) 190 FCR 248 at [59]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principles apply to administrative decisions generally. See also *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41] and [45].
[100] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41].In that judgment, the Court noted that in *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), the Full Court said at [58]-[60] that although the decision-maker did not make an express finding that Mr Buadromo would or would not find it impossible to obtain work in Fiji, they addressed whether he was likely to find employment in Fiji or sufficient employment to provide for his family. The decision-maker was not required to make a precise finding about his prospects of finding employment. The decision-maker addressed the issue, finding that Mr Buadromo had work skills which might help him gain employment and expressly found that his children would suffer hardship.
[101] *Goldie v MIMA* (2001) 111 FCR 378 at
[102] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [45]
[103] Direction No. 79, cll.9.1(1), 11.1(1), 13.1(1).
[104] Direction No. 79, cl 11.1(1)
[105] Direction No. 79, cll 9.1(1), 13.1(1).
[106] Direction No. 79, cl 6.3(6).

further offences or engage in other serious conduct.[107] It has been said that these considerations help a decision-maker to gauge how low the community's level of tolerance towards non-citizens who have engaged in criminal or serious conduct would be in the particular circumstances of a case.[108] The Direction goes on to explain and provide guidance about the concepts of the nature and seriousness of conduct and the risk to the community, including matters to which decision-makers must, or should, have regard in coming to a view on the primary consideration of protection of the Australian community. Decision-makers should, however, be careful not to inadvertently elevate any of these matters into primary considerations.[109]

While the Direction provides guidance on what conduct or offences are considered serious and how risk should be assessed, a decision-maker has no duty to evaluate the risk of harm to the community 'in any particular way or to ascribe any particular characterisation to the quality of the risk' or conduct.[110] While statements about types of conduct considered serious point to the likelihood that 'serious crime' includes violent and sexual crimes, particularly against women or children or vulnerable members of the community, they ought not be regarded as the sole, or even necessarily determinative, source of information relevant to the characterisation.[111] The Direction also requires decision-makers to consider other types of evidence, such as the sentence imposed, which can serve as a guide to the objective seriousness of conduct.[112] There is no statutory constraint on the way that the decision-maker assesses risk or characterises conduct, save that whatever they take into account must be logical and rational.[113]

Evaluation of whether a risk of harm is 'unacceptable' does not discharge the function of the decision-maker,[114] it must go on to consider whether other considerations outweigh that risk. It is not possible to say that the required evaluation is subsumed in a conclusion about whether a perceived risk of future harm is unacceptable.[115]

Likelihood of engaging in further criminal or other serious conduct

To say that the statute implicitly recognises that all persons who have previously committed an offence are more likely to offend in the future is to state the implication too highly. The fact of prior offending will, in most if not all cases, invite consideration of the question of whether the person in question in fact presents some risk to the Australian community and the starting point in that consideration will invariably be the fact of the prior offending. But that is all. The statute does not, of itself, supply an answer to the factual question of whether a particular visa holder has a propensity, however slight, to re-offend. The decision-maker is not required to evaluate the risk of a person re-offending in any particular way, but if they do in fact embark upon an evaluation of a person's prospects of re-offending in a way that is acutely fact dependent (e.g. that someone is likely to re-offend if they join a motorcycle club or drink alcohol), there needs to be an evident rational connection between the conclusion and the particular materials relied on.[116] The bare recital of convictions and sentences in and of themselves, without examination of mitigating circumstances or the

[107] Direction No. 79, cll 9.1(2), 11.1, 13.1(2).
[108] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [38].
[109] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [43].
[110] *Brown v MIAC* (2010) 183 FCR 113, at [41]
[111] See *DND v MHA* [2018] AATA 2716 (Taylor SM, 9 August 2018), at [26]-[27]. The decision considered this consideration as described in part C of Direction No. 65, dealing with revocation requests. This consideration is explained in substantially similar terms in Parts A and B, which deal with cancellation and refusals, and part C, of Direction No. 79.
[112] See *NBMZ v MIBP* (2014) 220 FCR 1 at [202].
[113] *BSJ16 v MIBP* [2016] FCA 1181 (Moshinsky J, 6 October 2016) at [68].
[114] *MIBP v Lesianawai* (2014) 227 FCR 562, at [31].
[115] *MIBP v Lesianawai* (2014) 227 FCR 562, at [39]. This judgment considered Minister's Direction No. 55, which directed decision-makers to take into account the primary considerations *and* determine whether the risk of future harm was unacceptable in cl 7, 'How to exercise the discretion'. The second step, determining unacceptable risk of harm, does not appear in cl 7 of Direction No. 79, but the concept of unacceptable risk remains, e.g. in cl 9.1.2, as an element of the primary consideration 'Protection of the Australian community'.
[116] *Muggeridge v MIBP* (2017) 255 FCR 81, at [46]-[47], and [54]-[56]. The Court could not reconcile the exercise of the discretion with the Minister's express findings concerning the applicant's demonstrated rehabilitation, his serious physical debilitation and the absence of evidence that he had had any connections with like motorcycle clubs for more than two decades.

circumstances leading to each conviction, may not be sufficient to rationally support a finding that there is an unacceptable risk of harm.[117]

'Offending' does not include acts committed at a time when a person could not, by law, be attributed with criminal responsibility.[118] This does not mean that the Tribunal cannot take into account evidence about a person's conduct as a child. However, the evidence of that conduct must have some relevance to an issue that properly arises in the course of the Tribunal's decision-making and there must be some logical connection with the inferences or conclusions that the Tribunal then draws from that evidence.[119]

The Tribunal may examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[120] and its significance so far as the risk of recidivism is concerned.[121]

Serious Conduct

'Serious conduct' is not defined in the Act or Regulations, but is defined in Appendix B of Direction No. 79:

> *Behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence.*
>
> *Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s501(6)(c) and/or s501(6)(d).*[122]

Further, for cancellations and refusals, any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is considered to be serious.[123]

If a person's 'serious conduct', for which a conviction has not been recorded, is relevant to the risk of a person reoffending and the risk they pose to the Australian community, a person may need to be put on notice of that issue. Giving a person their record of criminal convictions may not be sufficient.[124]

B) The best interests of minor children in Australia

The best interests of minor children in Australia form the second of the primary considerations outlined in the Direction.

Direction No. 79 says that decision-makers must make a determination about whether cancellation/refusal/ revocation is, or is not, in the best interests of the child.[125] It is not enough merely to have regard to those interests.[126] It has been held that, at least where the decision-maker has relevant information or evidence, the balancing and weighing exercise cannot be undertaken in relation to the best interests of the child

[117] *Splendido v AMIBP (No 2)* [2018] FCA 1158 (Steward J, 8 August 2018) at [32].
[118] *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [99]. The Court said that evidence of the applicant's conduct at nine years of age was incapable of providing a logical basis for the Tribunal's statement that the applicant's 'history of offending' began at this young age.
[119] *CVN17 v MIBP* [2019] FCA 13 (Kenny, 16 January 2019) at [99].
[120] *MIEA v Daniele* (1981) 61 FLR 354 at 358
[121] *MIMA v Ali* (2000) 106 FCR 313, at [45].
[122] Direction No. 79, Appendix B, pp.32-33..
[123] Direction No. 79, cll.9.1.1(1)(d), 11.1.1(1)(d),
[124] See *Stowers v MIBP* [2018] FCAFC 174 (Flick, Griffiths and Derrington JJ, 12 October 2018) at [54].
[125] Direction No. 79, cll 9.2(1), 11.2(1), 13.2(1).
[126] *Spruill v MIAC* [2012] FCA 1401 (Robertson J, 10 December 2012) at [18].

consideration (where it is relevant) unless this determination has first been made.[127] A determination *about* whether a decision is or is not in the best interests of a child includes a finding that the decision is a neutral factor so far as the child's best interests are concerned, or that the evidence before it is insufficient to show whether or not it is in a child's best interests.[128]

The approach to this determination is to:

- identify what are the best interests of the child or children with respect to the exercise of the discretion, and

- assess whether the strength of any other considerations, or the cumulative effect of other considerations, outweigh the consideration of the best interests of the child or children understood as a primary consideration.[129]

Provided that the Tribunal does not treat any other consideration as inherently more significant than the child's best interests, it is entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweigh the best interests of the children.[130]

(C) Expectations of the Australian community

Expectations of the Australian community form the third primary consideration in the Direction. This consideration provides:[131]

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to [cancel the visa held by/refuse the visa application of/not revoke the mandatory visa cancellation of] such a person. [Visa cancellation/visa refusal/non-revocation] may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not [continue to hold/be granted/hold] a visa. Decision-makers should have due regard to the Government's views in this respect.*

The decision maker is also to be informed by the principle 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'.[132]

Accordingly, the Direction expressly states that the Australian community expects two things: first, that the Government should refuse or cancel visas of persons who commit serious crimes in Australia;[133] and second, that non-citizens will obey the law in Australia.[134] While the Direction also refers to other expectations, privileges, values and standards, none of these are described as expectations of the Australian community.

This consideration does not deal with any objective or ascertainable expectations of the Australian community; rather, it is a kind of deeming provision by the Minister about how the Government wishes to

[127] *Paerau v MIBP Protection* (2014) 219 FCR 504, per Barker J at [52]-[54]. See also Buchanan J at [27]: 'there could be no objection to the AAT concluding that the best interests of the child did not weigh either for or against the cancellation of a visa, so long as the available material was assessed conscientiously.'
[128] *Nigam v MIBP* (2017) 254 FCR 295 at [43], *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [47].
[129] *Wan v MIMA* [2001] 107 FCR 133 at [32]..
[130] *Wan v MIMA* [2001] 107 FCR 133 at [32].
[131] Direction No. 79, cll 9.3 (Part A, for visa cancellation under s 501), 11.3 (Part B, for visa refusal under s 501) and 13.3 (Part C, for revocation under s 501CA of mandatory visa cancellation).
[132] Direction No. 79, cll 6.3(2) and 7.1.
[133] Direction No. 79, cl 6.3(2).
[134] Direction No. 79, cll 9.3, 11.3 and 13.3.

articulate community expectations, whether or not there is any objective basis for that belief. [135] Given the difficulties in obtaining evidence about and assessing community expectations (or standards or values),[136] inquiries about what is meant about community expectations are unnecessary – the Direction sets out the Government's view of what the community expects, and it does not require decision-makers to have regard to any expectations of the community not stated in the Direction. Indeed, the deeming nature of the consideration may mean that doing so could create a risk of error on the basis of a misapplication of the Direction, taking into account an irrelevant consideration, or making findings based on no evidence.[137] References to the AAT's own opinion or belief are best avoided because of the risk of it leading to error.[138] Considerations such as expectations of a 'fair go' or sympathy arising out of the length of time in the community, compassionate or mitigating circumstances, prospects for rehabilitation, and community standards and values, could be dealt with either under considerations in the Direction expressly referring to these matters or under 'other considerations', which are non-exhaustive.[139]

It is also clear from the authorities that where a person has committed serious crimes, the deeming effect is that it weighs adversely for the applicant (i.e. in favour of cancelling or refusing the visa, or against revoking a cancellation). The Direction describes the following as serious crimes, which would be relevant in determining the application of this consideration: violent and or sexual crimes, crimes against vulnerable members of the community (such as minors, the elderly or disabled), and certain offences relating to immigration detention.[140]

The application of this consideration in cases not involving serious crimes is less clear. Where a non-citizen has not obeyed Australian laws while in Australia, that person has not met the community's expectations, but unlike the expectation in relation to serious crimes (that the person should not hold a visa), the Direction does not tie any consequence to a breach of that expectation. Additionally, while the Direction states that the nature of some character concerns or offences are such that the Australian community would expect that the relevant person should not hold a visa, it does not indicate what kinds of concerns or offences these are, beyond saying that if a person has committed a serious crime, the community expects that they should not hold a visa. While the principles do refer to a 'low tolerance of any criminal or other serious conduct[141] by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia,'[142] on a plain reading, what is referred to here is not a deemed expectation of the Australian community, but the absence of an expectation. In sum, where there are character concerns which are not serious crimes, the Direction does not appear to go so far as to articulate an expectation by the community that a visa be cancelled or refused.

[135] *Uelese v MIBP* (2016) 248 FCR 296 at [23]

[136] See e.g. *Visa Cancellation Applicant and MIAC* [2011] AATA 690 (Downes J and McCabe SM, 6 October 2011) at [73]-[83]. That case was more about the role of community standards and values in discretionary administrative decision-making, as the Direction in force at that time (Direction no. 41), did not require decision-makers to consider community expectations. The Minister's submissions in *Uelese* at [43] referred to paragraph [77] of *Visa Cancellation Applicant and MIAC*, which in turn refers to a lecture by Sir Anthony Mason stating that it 'scarcely seems sensible' to require proof of public opinion by evidence. See also *LCNB and Minister for Immigration and Border Protection* [2015] AATA 463 (Frost DP, 30 June 2015) at [80].

[137] See *Uelese v MIBP* (2016) 248 FCR 296 at [23], [64]-[66], *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [76]-[77], and *Afu v MHA* [2018] FCA 1311 (Bromwich J, 29 August 2018) at [85].

[138] See *Ali v MHA* [2018] FCA 1895 (Bromwich J, 30 November 2018) at [38].

[139] Each of clauses 10(1), 12(1) and 14(1) lists 5 categories of 'other considerations' to be taken into account where relevant, but notes that the other considerations are not limited to those categories. Expectations around compliance with international non-refoulement obligations, ties to Australia and other matters specifically referred to could be addressed under those expressly stated considerations in the Direction.

[140] Direction No. 79, cll 9.1.1(1)(a), (c) and (d); 11.1.1(1)(a), (c) and (d); and 13.1.1(1)(a), c) and (i).

[141] Annex B of Direction No. 79, titled 'Interpretation', defines 'serious conduct' as 'behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence. Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s 501(6)(c) [past and present criminal and general conduct] and/or s 501(6)(d) [harassment/vilification/inciting discord]'. The Direction , in the context of the primary consideration of protection to the community, also provides the principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test under s 501(6)(c) is serious, for refusals and cancellations under s 501: cll 9.1.1(1)(e) and 11.1.1(1)(e).

[142] Direction No. 79, cl 6.3(6).

Accordingly, this consideration is more likely to be neutral in the absence of a serious crime, but in most cases it is unlikely to be favourable to the applicant.[143]

Whatever assessment is made of this consideration (whether adverse or neutral), it is not necessarily fatal as it needs to be weighed alongside findings on other considerations in making the correct or preferable decision on review.

Other considerations

Other considerations which must be taken into account where relevant include international non-refoulement obligations (for former visa holders and applicants), and the extent of impediments if removed (for former visa holders only).[144] Information suggesting that a former visa holder may face harm if removed could be relevant to both of these considerations. The level of detail necessary for these considerations will depend, among other things, on the likelihood of a person being removed and the level of generality or specificity of the information[145] suggesting harm. Generally speaking, less detailed consideration will suffice where a person is not at immediate risk of removal as a result of the particular power being exercised, or suggestions of harm are vague and general.

In addressing these considerations, decision-makers must properly understand and consider the legal consequences of the decision being made (in particular detention and removal). What the legal consequences are is a question of fact. To avoid error in this consideration, decision-makers must address and properly understand the direct and immediate consequences of their decision, as well as other (possibly less direct) consequences raised by an applicant.

Decision-makers must also consider the adverse impact of removal upon an applicant, including the impact of harm which does not engage Australia's non-refoulement obligations.[146]

In practice, consideration of the consequences of a decision, including detention and removal, international non-refoulement obligations, the risk of harm and other difficulties in a person's home country may need to be considered together, particularly where removal is a direct consequence of the decision.

International non-refoulement obligations

Direction No. 79 describes 'international non-refoulement obligations' as obligations not to forcibly return a person to a place where they will be at risk of harm from which persons are protected under international agreements such as the Refugees Convention, the Convention Against Torture, and the International Covenant on Civil and Political Rights.[147]

The Direction states that:

- Australia will not remove a person to a country in respect of which there is a non-refoulement obligation

[143] Clause 8(3) of Direction No. 79 states that both primary and other considerations may weigh in favour of, or against an applicant. The community expectations consideration could weigh in an applicant's favour, if for example, they have complied with Australian laws while in Australia, but are being considered for refusal on another basis (e.g. a non-serious crime committed overseas).
[144] Cll. 10, 12, 14. The other considerations are the impact on Australian business interests; the impact on victims; the impact on family members (visa applicants only) and the strength, nature and duration of ties (visa holders only). They are not discussed further in this commentary.
[145] See, e.g., *Ogbonna v MIBP* [2018] FCA 620 (Thawley J, 7 May 2018) at [62].
[146] See, e.g. *BCR16 v MIBP* (2017) 248 FCR 456.
[147] Direction No. 79, cll 10.1 (visa cancellations), 12.1 (visa refusals) and 14.1 (decisions about whether to revoke a visa cancellation). See also *BKS18 v MHA* [2018] FCA 1731 (Barker J, 13 November 2018) at [86].

- if the person could apply for another visa, then for the purposes of the decision it is unnecessary to decide whether non-refoulement obligations are owed

- if the decision relates to a protection visa, the person is generally barred from applying for a further protection visa, and in these circumstances the decision-maker should seek an assessment of international obligations and weigh any such obligation against the seriousness of the criminal offending, noting the person would face the prospect of indefinite detention.

The terms of the Direction and judicial authority suggest that the key question in this consideration is whether a decision is likely to result in a breach of Australia's international non-refoulement obligations. This enquiry involves two questions:

- Will the decision result in a person's removal to a country where they face a risk of harm?

- Does the person face a real risk of serious or significant harm if removed to their home country? If a person does not face such a risk, it may be unnecessary to address the likelihood of removal for this consideration.

Will the decision result in removal?

If a person is unlikely to be removed, it may not be strictly necessary to assess the risk of harm in a person's home country. Even if a person is owed non-refoulement obligations, those obligations will not be breached if the person is not removed. Accordingly, a key issue which arises when considering non-refoulement obligations is the extent to which a decision-maker can rely on the ability of the person to apply in Australia for a protection visa. Several judgments have suggested that removal is not generally considered to be a direct and immediate consequence of a decision, where a person has a right to apply for another visa in Australia.[148] However, in some circumstances the risk of harm must be assessed even where a person can apply for another visa.[149]

In *BCR16 v MIBP* (2017) 248 FCR 456, a Full Court of the Federal Court held in a judicial review of a personal Ministerial decision under s 501CA that a decision-maker may fall into error if they decline to consider the harm befalling an applicant if they are returned to their home country based on the mistaken assumption that non-refoulement obligations would necessarily be considered during the determination of a protection visa application, if one was made. At that time, nothing in the decision-making scheme required those obligations to be considered. The visa could be refused on character criteria which would mean that considerations of the risk of harm might never be reached.[150] On this reasoning, whether non-refoulement obligations were owed had to be determined in all cases, regardless of whether the person could subsequently apply for a protection visa.

Since the decision in *BCR16*, the Minister has made a further s 499 Direction requiring departmental delegates to assess protection claims before assessing character considerations in making decisions on protection visa applications.[151] A line of Federal Court judgments at first instance have held that this direction has addressed the misunderstanding as to the sequence in which claims would be considered which was

[148] See, e.g., *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27].
[149] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019).
[150] *BCR16 v MIBP* (2017) 248 FCR 456, at [68]. This concerned a non-revocation, but in *Steyn v MIBP* [2017] FCA 1131 (Jagot J, 25 September 2017) the court held that the same principles apply to the refusal and cancellation powers under s 501(1) and (2).
[151] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No.75 Directions, para 1. See also *Applicant in WAD531/2016 v MIBP* [2018] FCAFC 213 (White, Moshinsky and Colvin JJ, 30 November 2018) at [99].

identified in *BCR16*.[152] These judgments have upheld decisions stating that it was unnecessary to determine whether the applicant was owed non-refoulement obligations as it was considered that the applicant was able to make a valid application for a protection (or other) visa. A decision on another visa application would be made at some point of time in the future, but the discretion for the particular character decision needs to be exercised by reference the facts and circumstances prevailing at the time that decision is made.[153]

These cases were distinguished, however, in *Omar v MHA* [2019] FCA 279, another Federal Court judgment at first instance.[154] In *Omar*, the Court did not consider those other judgments to be incompatible with its own conclusions. On the facts of the case before it, however, including the representations made to the Assistant Minister, which included submissions about the effect of continued detention on the applicant's mental health, and the prospect of spending considerable time in detention until any future application was decided, and of indefinite detention afterwards, the Assistant Minister was not authorised to simply carve out aspects of the representations made and particular reasons for revoking the cancellation, hive them off to any (as yet) non-existent protection visa application process, and decline to deal with them.[155]

In light of the line of cases following *Ali*, and the distinction drawn between those cases and *Omar*, the following principles appear to apply in cases where a person may make another visa application in Australia:

- It is permissible to have regard to the fact that a person may make another visa application in Australia in considering non-refoulement obligations for the exercise of the discretion in character decisions, but using a formulation such as "It is not necessary to determine whether the applicant is owed non-refoulement obligations" may be interpreted as a failure to undertake the required statutory task. Where it appears that a person may be owed non-refoulement obligations, and a likely consequence is removal, it appears necessary based on the reasoning in *Omar* to determine whether non-refoulement obligations are owed.[156]

- Where a person may be owed non-refoulement obligations or there is some other significant obstacle to a person's removal, the prospect of detention until a further visa application is decided will need to be considered at the time the discretion is exercised. It cannot be disposed of by reference to a decision to be made on a future visa application. Where there are no significant obstacles to a person returning to their home country, detention is not necessarily a consequence of an adverse decision.

If a decision-maker does rely on the ability of an applicant to apply for a further visa, they should not assume that other matters, such as the prospect of indefinite detention, will be considered in a separate visa decision to refuse or grant a visa. This is because there is no requirement to consider other matters in deciding a protection visa application if it is found that a person is not owed protection obligations.[157] Nor is there a requirement to consider other matters if a person does not satisfy the criteria in s 36(1C) or (2C) (ineligibility because of involvement in crimes/security risk). Direction No. 75 states that its purpose is to direct decision-makers to refuse protection visa applications using s 36(1C) or 36(2C)(b) rather than to refer the case for consideration under s 501.[158] A general discretion to consider other matters is enlivened, however, if refusal is considered under s 501 because a person does not meet the character test. Direction No. 75 says that if the decision-maker finds that s 36(1C) or (2C)(b) do not apply to an applicant, the decision-maker may

[152] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Turay v AMHA* [2018] FCA 1487 (Farrell J, 3 October 2018) at [40]-[41]; *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [35]**;** *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27].
[153] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [33].
[154] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019)
[155] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [27], [33]-[35], [38], [51], [81].
[156] See *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[59], [66]..
[157] See, e.g., *EAO17 v MIBP* [2018] FCCA 3319 (Judge Neville, 6 December 2018), at [41].

consider whether any residual character concerns justify referral of the application for consideration under s 501.[159]

Another issue which often arises in the context of non-refoulement obligations concerns the decision-maker's understanding of the consequences of a decision to refuse or cancel a visa in light of ss 197C and 198. In particular, in circumstances where non-refoulement obligations are owed, the person will not necessarily be indefinitely detained because the person must be removed irrespective of any such obligations.[160] Accordingly, it may be a jurisdictional error to fail to recognise in an appropriate case that, subject to consideration of alternative management options such as those outlined in s 195A, ss 197C and 198 require the person to be removed from Australia. Statements in paragraphs 10.1(6), 12.1(6) and 14.1(6) of Direction No. 79 that 'Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of ss 189 and 196 of the Act means that, if the person's Protection visa [were cancelled/ were refused/remains cancelled], they would face the prospect of indefinite immigration detention' may reflect a misunderstanding of the legal consequences of a decision, and should not be applied.[161] Nevertheless, it will not necessarily be an error to consider the potential for indefinite detention, as long as the legal effect of s 501CA is properly understood.[162]

The legal consequences of the decision more broadly, including mandatory detention and removal, are discussed in more detail under Detention and removal.

Is there a real chance that a person will be harmed if removed?

In assessing the risk of harm for this purpose, a decision-maker must apply the real risk/real chance standard.[163] For further information on the real chance test, see MRD Services Guide to Refugee Law, Chapter 3.

Where there are claims of harm, decision-makers should also be careful to consider harm which might not necessarily enliven international non-refoulement obligations.[164]

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[165] A conclusion that a consequence of the

[158] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, 4. Preamble, Objectives, Item 6.
[159] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No. 75 – Directions, Item 4.
[160] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30], *NKWF v MIBP* [2018] FCA 409 (Siopis J, 27 March 2018) at [41]-[44].
[161] See, e.g., *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576. See *PRHR* at [158], for an example of the Tribunal's consideration of non-refoulement obligations and the consequences of the decision to refuse to grant a temporary protection visa, taking account of s 197C.
[162] See, e.g. *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[57], where the Court said that if non-refoulement obligations are engaged, and if the Minister decides not to revoke a visa cancellation, the likely alternative is indefinite detention. It gave *DMH16v MIBP* [201] FCA 448 as an example of a case where the Minister did consider indefinite detention as a possible outcome. In *DMH16*, the Minister, immediately after rejecting a protection visa application, agreed to consider alternative management options. The applicant could be detained until the Minister completed that consideration. However, once the Minister refused to consider, or did consider and rejected, the exercise of power under s 195A, then s 197C required that he be removed to Syria, notwithstanding the fact that Australia had been found to owe non-refoulement obligations in respect of him: *DMH16*, at [22].
[163] *MIAC v SZQRB* (2013) 210 FCR 505 at [246]-[247].
[164] *Goundar v MIBP* [2016] FCA 1203 (Robertson J, 12 October 2016) at [53]-[56], *BCR16 v MIBP* (2017) 248 FCR 456 at [70]-[72].
[165] *Ayoub v MIBP* (2015) 231 FCR 513 at [28]. For examples, see *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576; and *CZCV and MHA (Migration)* [2019] AATA 91 (Evans SM, 6 February 2019) at [145]-[152] and [164]-[167].

decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.[166]

Other considerations not set out in Direction No. 79

The matters set out in the Direction are not exhaustive.[167] Other matters that may be relevant include submissions by the applicant and factors referred to in Ministerial or policy guidelines.[168] Some factors, such as detention and removal, are so closely related to the scheme of the Act that they may need to be considered, whether raised by an applicant or in guidelines or not.[169] What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the relevant factors are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.[170]

In short, any matter that would move the Minister to allow a person of proven bad character (as is defined in the Act) to travel to or remain in Australia, notwithstanding that proven bad character, would be relevant.[171]

Consequences of character cancellation/refusal

In determining whether or not to exercise the powers in ss 501(1), 501(2) and 501CA(4) of the Act, the decision-maker must take into account the legal consequences of the decision.[172] The reason it must do so has been described as being necessary because the subject matter, scope and purpose of the Act require that they be taken into account,[173] and because consequences such as becoming subject to detention or refoulement are the most up to date material before the decision-maker relevant to consideration of the detriment to the applicant from the exercise of the power.[174] The legal framework which must be taken into account includes the direct and immediate statutorily prescribed consequences of the decision in contemplation.[175]

In the case of a decision under s 501CA(4), there is also an obligation to consider matters raised in representations made in response to the statutorily mandated invitation.[176]

The consequences of a visa refusal or cancellation under s 501 or related provisions include:

- unlawful status
- the likelihood of becoming subject to detention and/or removal[177]
- refusal of other visa applications and cancellation of other visas[178]
- a prohibition on applying for other visas[179]

[166] For an example, in *CWGF and MHA (Migration)* [2019] AATA 179 (Illingworth SM, 19 February 2019) at [92]-[103], the AAT found that the applicant was a person to whom Australia had non-refoulement obligations, but affirmed the decision not to revoke the cancellation because this was outweighed by other considerations.
[167] See *SZRTN* [2014] FCA 303 (Katzmann J, 31 March 2014) at [86].
[168] Generally speaking, the Tribunal should have regard to Departmental guidelines when exercising a discretion, but not for interpreting a term, or determining the relevant legal test: see MRD Legal Services Commentary Application of Policy.
[169] See *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky and Bromwich JJ, 4 May 2018) at [135]-[139].
[170] See *Tanielu v MIBP* (2014) 225 FCR 424 at [122].
[171] *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg, Lander JJ, 25 March 2004) at [107].
[172] *NBMZ v MIBP* (2014) 220 FCR 1 at [6]. *MIBP v Le* (2016) 244 FCR 56 at [61].
[173] *NBMZ v MIBP* (2014) 220 FCR 1 at [6], for s.501; *DLJ18 v MHA* [2018] FCA 1650 (Thawley J, 6 November 2018) at [43].
[174] *FRH18 v MHA* [2018] FCA 1769 (Rares J, 16 November 2018) at [45].
[175] *Taulahi v MIBP* (2016) 246 FCR 146 at [84]. See also *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky, Bromwich JJ, 4 May 2018) at [136].
[176] *Hay v MHA* [2018] FCAFC 149 (White, Moshinsky, Colvin JJ, 5 September 2018) at [9]-[15].
[177] ss.189, 196, 197C, 198.
[178] s 501F.

- periods of exclusion and special return criteria may apply[180]

Unlawful status

Where a visa application is refused or a visa is cancelled under s 501, any other non-protection visa held by that person is taken to have been cancelled.[181] Generally, if a visa is cancelled its former holder becomes an unlawful non-citizen immediately after cancellation.[182] Under s 189 of the Act, an immigration officer who reasonably suspects that a person in Australia is an unlawful non-citizen must detain that person and, in the absence of a visa application or other specified circumstances, must remove them as soon as reasonably practicable under s 198.

Detention and removal

The legal consequences may include the prospect of the affected person being held in indefinite (or indeterminate) detention because of the operation of ss 189, 196 and 198 of the Act.[183] The test is whether, on the basis of all the material which is before the decision-maker at the time of considering whether or not to exercise the powers, there is at least a real possibility that the person's removal from Australia would not be reasonably practicable, with the consequence that the person faces the prospect of indefinite detention.[184] The factual circumstances which can give rise to the prospect of indefinite detention can vary considerably – for example, the state of the person's health,[185] or the unwillingness of their country of reference to accept them.

The key features of the detention and removal scheme are as follows:

- Section 189, which requires departmental officers to detain any suspected unlawful non-citizen (person without a visa);

- Section 198, which requires officers to remove an unlawful non-citizen as soon as reasonably practicable in certain circumstances. These relevantly include if an unlawful-non citizen's visa was cancelled under s 501(3A), they do not have a valid substantive visa application on foot, and they either did not make representations about revocation, or they did so and the cancellation was not revoked; and

- Section 197C, which provides that for the purposes of removal under s 198, it is irrelevant whether Australia has non-refoulement obligations, and the duty to remove the unlawful non-citizen arises irrespective of whether such obligations have been assessed.

The Minister also has personal, non-compellable, discretionary powers that can ameliorate the consequences of the mandatory detention and removal regime, including the ability to grant a detainee a visa of any kind under s 195A, and making a 'residence determination' under s 197AB, that a person reside at a place other than an immigration detention centre in what is often referred to as 'community detention'. Under a residence determination the person remains a detainee under the law, but instead of being detained they must reside at a specific place in the community. Because these powers are non-

[179] s 501E.
[180] s 503, SRC 5001.
[181] s.5F.
[182] s.15.
[183] *MIBP v Le* (2016) 244 FCR 56 at [61].
[184] *MIBP v Le* (2016) 244 FCR 56 at [61].
[185] See, e.g. *Sach v MHA* [2018] FCA 1658 (Barker J, 12 December 2018).

compellable, their relevance in a given case is unlikely to be significant, unless there is evidence that the Minister intends to exercise them to grant a visa.[186]

Where a person may make a further visa application

In determining whether or not to exercise powers under s 501 or s 501CA, Australia's non-refoulement obligations and the prospect of indefinite detention are, in the absence of representations that they be considered, not mandatory considerations in circumstances where it is open to the person whose visa has been refused or cancelled on character grounds to apply in Australia for a protection visa or some other visa (which visa application the decision-maker is legally bound to consider and determine). This position is generally unaffected by the presence in the Act of various provisions which confer personal powers on the Minister to 'lift the bar' (such as s 48B) or to grant a visa to a detainee which would have the effect of changing the detainee's status from being an unlawful non-citizen (such as s 195A). As there is no legal duty on the Minister to consider whether to exercise such a personal power, there is no assurance that any consideration will be given in a relevant case to Australia's non-refoulement obligations or the prospect of indefinite detention.[187]

In these circumstances, removal and its consequences are not necessarily direct and immediate consequences of the AAT's decision. The legal consequences in these circumstances may include a period of detention until a person's visa application is decided. In terms of harm and other impediments in an applicant's home country, these should be considered, but the reasoning does not need to assume that an applicant will be removed. Nevertheless, where there is strong evidence that a person would face a real risk of harm or other difficulties *if* removed it could necessary to assess the risk of harm. For example, in *Omar v MHA* [2019] FCA 279, the Federal Court held that, at least where non-refoulement obligations are raised in response to a s.501CA(3)(b) (mandatory cancellation) invitation, it is an error to decline to determine those factual matters by reference to a different statutory process, which is non-existent at the time of the exercise of the power.[188]

Where a person may not make a further visa application

Where a person is prevented by the Act from applying in Australia for a protection visa, the Minister's obligation to consider the legal consequences of a decision under s 501 will include consideration of Australia's non-refoulement obligations and the prospect of indefinite detention, where those matters are relevant to the person's particular circumstances.[189] However, decision-makers should be careful not to assume a person will be indefinitely detained because Australia owes them non-refoulement obligations, due to the terms of s 197C.[190]

In these circumstances, detention and/or removal will generally be direct and immediate consequences of the AAT's decision. Detention is a consequence because the effect of ss 189, 197C and 198 of the Act is that an unlawful non-citizen must be removed as soon as reasonably practicable, and detained until then. Prolonged detention might occur because, for example, a person's health prevents them travelling, or because there is no country which will accept them. Under the legislation, indefinite detention will *not* occur on the basis that removal would result in a breach of non-refoulement obligations, and it would be error for the AAT to assume that it would.[191]

[186] See, e.g., *MIBP v Le* (2016) 244 FCR 56 at [61].
[187] *MIBP v Le* (2016) 244 FCR 56 at [61]
[188] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [81]. The Court distinguished *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) and *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) on the basis that the grounds of review and the basis on which the Courts considered the applicant's arguments were different.
[189] *MIBP v Le* (2016) 244 FCR 56 at [61]
[190] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30].
[191] *DMH16 v MIBP* (2017) 253 FCR 576 at [30].

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[192]. A conclusion that a consequence of the decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.

Prohibition on applying for other visas

Under s 501E, a person cannot apply for another visa while they remain in Australia if:

- they have been subject to a visa refusal or cancellation under s 501 and
- the decision has not been set aside or revoked prior to their making the visa application.

Such an application is not a valid application for a visa.[193] The only exceptions are an application for a protection visa or a visa specified in the Regulations (i.e. r 2.12AA).[194]

Deemed refusal and cancellation

If a decision to refuse to grant or to cancel a visa is made under s 501, any other visa application made by that person is taken to have been refused and all other visas held by the person are taken to have been cancelled.[195] The only exceptions relate to protection visas and visas prescribed in the Regulations. There are currently no visas prescribed in the Regulations.

If the original decision made under s 501 is set aside or revoked, any refused visa applications or cancelled visas are revived.[196]

Periods of exclusion/special return criteria

Certain visas are subject to special return criteria (SRCs). For the visa subclasses to which SRCs apply, the SRC is prescribed in Schedule 2 to the Regulations as a criterion for visa grant.

Relevantly, SRC 5001(c) provides for permanent exclusion if the visa applicant has previously had a visa cancelled under s 501 and there was no revocation of the decision under s 501CA. There is no provision for a visa applicant to whom SRC 5001 applies to request a waiver of the permanent exclusion.

SRC 5001 ceases to apply if the Minister acts personally to grant a permanent visa to a person whose visa was cancelled under s 501.

Conduct of the review

The Tribunal must not hold a hearing or make a decision under s 43 of the AAT Act until at least 14 days after the day on which the Minister was notified that the application had been made.[197]

[192] *Ayoub v MIBP* (2015) 231 FCR 513 at [28].
[193] s 46(1)(d).
[194] s 501E(2).
[195] s 501F.
[196] s 501F(4).
[197] s 500(6G).

Decision to be made within 84 days

Where the applicant is in the migration zone, the Tribunal must make a decision within the period of 84 days after the day on which the person was notified of the decision otherwise the decision will be taken to have been affirmed.[198]

It would be futile to reinstate an application under s 42A(9)[199] of the AAT Act after the 84-day period has elapsed. This is because the effect of reinstatement would be that no decision under s 42A in relation to the decision under review would be extant.[200]

The 2-day Rule

Where an applicant is in the migration zone, the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (except for a directions hearing) in relation to the decision under review.[201] If the oral evidence does not change the nature of the case and merely 'puts flesh on the bones', it may not be capable of being excluded from consideration.[202]

The restriction extends to oral evidence to be given by a witness for the applicant.[203] It only applies to information presented 'in support of the person's case', i.e., information that the applicant provides as part of their case-in-chief,[204] and not to submissions which an applicant may wish to make in respect of the evidence before the Tribunal.[205] An applicant's answer to a question asked of him or her or of one of his or her witnesses in the course of cross-examination is not excluded under these provisions. Such an answer is information elicited orally at the instance of the Minister with the aim of derogating from the applicant's case and thereby or otherwise supporting the Minister's case. Further, an oral submission to a matter raised by the AAT of its own motion is not excluded from consideration by s 500(6H).[206]

A witness could be called to speak to their statement, to correct any inaccuracies, to explain any ambiguities, or to elaborate upon certain matters as long as in doing so they do not stray outside the subject matter of the material covered in the statement.[207]

This restriction also applies to any documents submitted in support of the applicant's case (except for documents in the Minister's possession).[208]

These provisions are binding on the Tribunal and failure to comply with them would arguably amount to jurisdictional error.[209]

The purpose of these provisions is that the Minister is to be given an opportunity to answer the case to be put by the applicant for review without the necessity of an adjournment of the hearing. The purpose of the

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[198] s 500(6L)(c).
[199] Under s 42A(9) of the *Administrative Appeals Tribunal Act 1975* (Cth.), the Tribunal may reinstate an application and give such directions as it appears to be appropriate.
[200] *Somba v MHA (No 2)* [2018] FCA 1537 (Barker J, 12 October 2018) at [47]. In that case, the AAT dismissed the application for review on 8 January 2018, following the applicant's failure to appear at the hearing scheduled for that day. The 84th day after notification was 17 January 2018, and the applicant applied for reinstatement on 6 February 2018.
[201] s 500(6H)
[202] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[203] *Demillo v MIBP* [2013] FCAFC 134 (Greenwood, Buchanan, McKerracher JJ, 21 November 2013) at [18].
[204] *Jagroop v MIBP* (2014) 225 FCR 482 at [94].
[205] *Jagroop v MIBP* (2014) 225 FCR 482 at [102].
[206] *Uelese v MIBP* (2015) 256 CLR 203 at [102].
[207] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[208] s 500(6J).
[209] *Milne v MIAC* [2010] FCA 495 (Gray J, 20 May 2010) at [40].

scheme in s 500 is that an applicant for review should not be able to change the nature of his or her case, catching the Minister by surprise, and forcing the Tribunal into granting one or more adjournments to enable the Minister to meet the new case put. The expressed intention of the amending legislation was to prevent the use of the procedure of merits review to prolong the stay in Australia of a person denied a visa by the application of the character test.[210]

Section 500(6H) does not suggest an intention to fetter the power of the Tribunal to grant an adjournment where the fair conduct of the review hearing requires it and where the applicant has not sought to surprise the Minister with late changes to the applicant's case.[211] It does not limit the power of the Tribunal to conduct a review or authorise the Tribunal to give less than the 'proper consideration of the matters before it'.[212] Nothing in its text warrants the imposition of a rigid limit upon the otherwise flexible power of the Tribunal to ensure that the proceedings before it are conducted fairly to all parties.[213] The Tribunal may adjourn the hearing in order to hear more submissions and evidence from an applicant where they comply with the 2-day rule with respect to the new hearing date. The purpose of ensuring that reviews under s 500 are dealt with expeditiously does not require a blanket limitation on the Tribunal's power to adjourn a hearing.[214]

If either party seeks an adjournment on the ground that it is surprised and disadvantaged by new evidence and requires an adjournment of the hearing to meet that disadvantage, then the question whether or not the fair determination of the application for review could only be achieved by granting the adjournment would arise for the Tribunal to resolve. Delaying tactics such as of an applicant such as cynically withholding oral evidence in order to have it presented later in the course of a hearing so as to precipitate an adjournment would expose an applicant to the risk of a deemed affirmation of the decision by operation of s 500(6L). In exercising its discretion, the Tribunal must be mindful of the timeframe established by s 500(6L).[215]

Protected information

Section 503A is designed to protect intelligence about criminals and criminal activity. Sections 503A(2)(c) and 503A(6) can operate to override the natural justice requirement to provide information to a person whose visa has been cancelled where that information is credible, relevant and significant to the Minister's decision under s 501 or s 501CA.[216]

Evidentiary matters

The Tribunal is under no obligation to inquire into the provenance of unchallenged documents such as the record of convictions, bail reports, statements of facts before sentencing judges or parole officers' reports, or the qualifications of parole officers expressing opinions.[217]

[210] *Goldie v MIMA* (2001) 111 FCR 378 at [25], referring to the second reading speech to the bill that became the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth.)
[211] *Uelese v MIBP* (2015) 256 CLR 203 at [73] Nettle J agreeing at [105].
[212] *Uelese v MIBP* (2015) 256 CLR 203 at [54].
[213] *Uelese v MIBP* (2015) 256 CLR 203 at [74].
[214] *Uelese v MIBP* (2015) 256 CLR 203 at [77].
[215] *Uelese v MIBP* (2015) 256 CLR 203 at [74]-[77]. Section 500(6L) provides that, if the Tribunal has not made a decision upon the review within 84 days after the day on which the application was notified of the decision under review, the Tribunal is taken, at the end of that period, to have decided to affirm the decision under review. See Decision to be made within 84 days..
[216] *Vella v MIBP* [2015] FCAFC 53 (Buchanan, Flick and Wigney JJ, 21 April 2015), at [61] and [68].
[217] *Aporo v MIAC* [2009] FCA 79 (Bennett J, 12 February 2009) at [81]-[86].

Reasonably suspects

The cancellation power in s 501(2) is enlivened if the Minister 'reasonably suspects' that a person does not pass the character test. The character test also includes limbs where the Minister 'reasonably suspects' their membership of or association with a group or person involved in criminal conduct,[218] or involvement in certain criminal activities.[219] The meaning of the term 'reasonably suspects' has been judicially considered in relation to s 501(2), and the reasoning is probably applicable to s 501(6) as well.

A suspicion that a person does not pass the character test may be objectively reasonable even if the suspicion is subsequently discovered to be affected by a mistake of fact or law.[220] Whether or not the suspicion is reasonable at the relevant time will depend on the matters known or reasonably capable of being known by the decision-maker at the relevant time.[221]

Section 501(2) requires that the Minister, having first formed that reasonable suspicion, then go on to determine whether the person concerned has satisfied him or her that the person passes the character test. In that regard, the Act contemplates that the Minister will, in the exercise of the powers conferred under s 501(2) form a considered view as to whether the person passes the character test or not by reference not only to the material supporting the Minister's suspicion formed under s 501(2)(a), but also by reference to materials provided to the Minister by the visa holder for the purposes of s 501(2)(b).[222]

The Court's jurisdiction to determine whether an administrative decision is affected by legal unreasonableness (as explained in *Li*[223]) is properly to be exercised by reference to all of the materials before the Minister that properly bear upon that question. It is not to be exercised on a fiction that the Minister only had before him the disclosed materials and nothing else.[224]

The meaning of 'reasonably suspects' is discussed in Direction No. 79 in relation to the membership/association character ground, but not more generally. It is probably not an error to have regard to the meaning there when applying the term for other character grounds, but it could be an error to assume that a decision-maker is bound to apply that meaning.

Effect of conviction on exercise of discretion

It is impermissible in a decision on character grounds for the Tribunal to impugn the conviction on which the decision was based.[225] The decision-maker is entitled to receive evidence of a conviction and sentence and to treat it as probative of the factual matters upon which the conviction and sentence were necessarily based.[226] This principle applies to the substantial criminal record and immigration detention and child sex offence grounds.

[218] s 501(6)(b).
[219] s 501(6)(ba).
[220] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [14], citing *Ruddock v Taylor* (2005) 222 CLR 612.
[221] *Ruddock v Taylor* (2005) 222 CLR 612 at [40].
[222] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [56].
[223] *MIAC v Li* (2013) 249 CLR 332.
[224] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [109].
[225] *MIMA v SRT* (1991) 91 FCR 234. The judgment concerned the deportation power in s 200, but the reasoning applies equally to those character grounds which are enlivened by a conviction.
[226] *MIMA v Ali* (2000) 106 FCR 313 at [41].

For other grounds, where suspected criminal conduct may be relevant but no conviction is necessary, or for conviction grounds where there is another conviction that is not the basis for failing the character test, even a conviction or sentence which is not a precondition to the exercise of the relevant statutory power should be treated as strong prima facie evidence of the facts upon which it is necessarily based.[227] There is, however, no absolute rule that the Tribunal may not consider material which challenges the grounds upon which relevant convictions are based.[228] In these circumstances, the decision-maker is not obliged to make findings of guilt or innocence if there is no sufficient basis for such a finding or such an inquiry.[229]

The Tribunal may, however, examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[230] and its significance so far as the risk of recidivism is concerned.[231]

Relevant case law and AAT decisions

Afu v MHA [2018] FCA 1311
Akpata v MIMIA [2004] FCAFC 65; 139 FCR 292
Ali v MIBP [2018] FCA 650
Ali v MHA [2018] FCA 1895
Aporo v MIAC [2009] FCA 79
Ayoub v MIBP (2015) 231 FCR 513; [2015] FCAFC 83
BCR16 v MIBP [2017] FCAFC 96; (2017) 248 FCR 456
BKS18 v MHA [2018] FCA 1731
Brown v MIAC [2010] FCAFC 33; 183 FCR 113
BSJ16 v MIBP [2016] FCA 1181
Craig v South Australia (1995) 184 CLR 163; (1995) 184 CLR 163
CVN17 v MIBP [2019] FCA 13
CWGF and MHA (Migration) [2019] AATA 179
CZCV and MHA (Migration) [2019] AATA 91
Demillo v MIBP [2013] FCAFC 134
Djalic v MIMA [2004] FCAFC 151
DMH16 v MIBP [2017] FCA 448; 253 FCR 576
DND and MHA [2018] AATA 2716
DOB18 v MHA [2018] FCA 1523
Drake and MIEA [1979] AATA 179
Drake v MIEA (1979) 46 FLR 409
EAO17 v MIBP [2018] FCCA 3319
FRH18 v MHA [2018] FCA 1769
Gaspar v MIBP [2016] FCA 1166
Godley v MIMIA [2004] FCA 774
Goldie v MIMA [1999] FCA 1277
Goldie v MIMA (2001) 111 FCR 378; [2001] FCA 1318
Goundar v MIBP [2016] FCA 1203
Green v MIAC [2008] FCA 125
Greene v AMHA [2018] FCA 919
Haneef v MIAC [2007] FCA 1273
Hay v MHA [2018] FCAFC 149

[227] *MIMA v Ali* (2000) 106 FCR 313, at [43].
[228] *MIMA v Ali* (2000) 106 FCR 313, at [43]. At [44], however, the Court said that although a decision-maker in such a case may accept evidence which contradicts the facts essential to a conviction, they may not be entitled to reach or express a view that the person was wrongly convicted.
[229] *Tham v MIAC* (2012) 204 FCR 612, at [37].
[230] *MIEA v Daniele* (1981) 54 [1981] FCA 212 (Fisher, Davies, Lockhart JJ, 17 December 1981), (1981) 61 FLR 354at [358].
[231] *MIMA v Ali* (2000) 106 FCR 313, at [45].

Hong v MIMA [1999] FCA 1567
Howells v MIMA [2004] FCA 530; 139 FCR 580
Irving v MILGEA [1996] FCA 663; 68 FCR 422
Jagroop v MIBP (2016) 241 FCR 461; [2016] FCAFC 48
Karabay and MHA (Migration) [2019] AATA 167
Kumeroa and MHA [2018] AATA 3744
Lesuma v MIAC (No.2) [2007] FCA 2106
LNCB and MIBP [2015] AATA 463
Maxwell v MIBP [2016] FCA 47; FCR 275
MHA v Buadromo [2018] FCAFC 151
MIAC v Anochie [2012] FCA 1440; 209 FCR 497
MIAC v Khadgi (2010) 190 FCR 248; [2010] FCAFC 145
MIAC v Li (2013) 249 CLR 332; [2013] HCA 18
MIAC v SZQRB (2013) 210 FCR 505; [2013] FCAFC 33
MIBP v BHA17 [2018] FCAFC 68
MIBP v Le (2016) 244 FCR 56; [2016] FCAFC 120
MIBP v Lesianawai [2014] FCAFC 141; 227 FCR 562
MIBP v Maioha [2018] FCAFC 216
MIEA v Baker [1997] FCA 105; 73 FCR 187
MIEA v Daniele (1981) 39 ALR 649; 61 FLR 354
Milne v MIAC [2010] FCA 495
MIMA v Ali [2000] FCA 1385; 106 FCR 313
MIMA v SRT [1999] FCA 1197; 91 FCR 234
MIMIA v Godley [2005] FCAFC 10; (2005) 141 FCR 552
MIMIA v Huynh [2004] FCAFC 256; 139 FCR 505
MIMIA v Yusuf (2001) 206 CLR 323; [2001] HCA 30
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Misa and MHA [2018] AATA 1511
MNLR and MHA (Migration) [2019] AATA 61
Moana v MIBP [2014] FCA 1084; (2015) 230 FCR 367
Muggeridge v MIBP [2017] FCA 730; 255 FCR 81
Mujedenovski v MIAC [2009] FCAFC 149
NBMZ v MIBP [2014] FCAFC 38; 220 FCR 1
Nigam v MIBP (2017) 254 FCR 295; (2017) FCAFC 127
NKWF v MIBP [2018] FCA 409
Nweke v MIAC [2012] FCA 266
Ogbonna v MIBP [2018] FCA 620
Omar v MHA [2019] FCA 279
Paerau v MIBP [2014] FCAFC 28; (2014) 219 FCR 504
Port of Brisbane Corporation v Deputy Commissioner of Taxation [2004] FCA 1232; 140 FCR 375
PRHR and MIBP [2017] AATA 2782
Roach v MIBP [2016] FCA 750
Rokobatini v MIMA [1999] FCA 1238; 90 FCR 583
Romanov v MHA [2018] FCA 1494
Ruddock v Taylor (2005) 222 CLR 612
Sabharwal v MIBP [2018] FCA 10
Sabharwal v MIBP [2018] FCAFC 160
Sach v MHA [2018] FCA 1658
Shaw v MIMIA [2005] FCAFC 106; 142 FCR 402
Somba v MHA (No 2) [2018] FCA 1537
Sowa v MHA [2018] FCA 1999
Splendido v AMIBP (No 2) [2018] FCA 1158
Spruill v MIAC [2012] FCA 1401
Stevens v MIBP [2016] FCA 1280
Steyn v MIBP [2017] FCA 1131
Suleiman v MIBP [2018] FCA 594
SZRTN v MIBP [2014] FCA 303
Tanielu v MIBP [2014] FCA 673; 225 FCR 424

Taulahi v MIBP (2016) 246 FCR 146; [2016] FCAFC 177
Tham v MIAC [2012] FCA 234; 204 FCR 612
Turay v AMHA [2018] FCA 1487
Uelese v MIBP [2016] FCA 348; (2016) 248 FCR 296
Vella v MIBP [2015] FCAFC 53
Visa Cancellation Applicant and MIAC [2011] AATA 690
Waits and MIMIA [2003] AATA 1336
Wan v MIMA [2001] FCA 568; 107 FCR 133
Williams v MIBP (2014) 226 FCR 112; [2014] FCA 674
Wong v MIMIA [2002] FCAFC 440
YNQY v MIBP [2017] FCA 1466

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