Migration and Citizenship Law in the Context of Criminal Proceedings

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Introduction

1. When a non-citizen encounters the criminal justice system, some complexities can arise. The immigration system and the criminal justice system operate independently but each may impact upon the other. To explore some of those impacts, this paper provides a brief discussion of the following:

   (a) A basic outline of the immigration system.

   (b) Visa cancellations whilst criminal charges are pending.

   (c) Visa cancellations after conviction.

   (d) How immigration status might impact on criminal sentencing.

2. This paper seeks to address some of the more common situations that arise. It does not purport to be comprehensive.

Basic outline of the immigration system

3. The concept of Australian citizenship is established by the *Australian Citizenship Act 2007* (Cth) (the **Citizenship Act**). Citizenship may be acquired automatically (such as through birth: s 12) or by application (including by "conferral"). Relevantly, where citizenship has been acquired through application and conferral, it may sometimes be revoked: s 34(2).

4. The Citizenship Act does not spell out the rights of a citizen, but it interacts with (relevantly) the *Migration Act 1958* (Cth) (the **Migration Act**) because the Migration Act operates in respect "non-citizens" (ie, persons who are not Australian citizens).

5. Relevantly, the basic structure of the Migration Act is this:

   (a) A "visa" is permission (temporary or 'permanent'), granted by the Minister, for a non-citizen to enter or remain in Australia: s 29.

(b) Generally, a non-citizen must not travel to Australia without a valid visa: s 42.

(c) A non-citizen who is in Australia without a valid visa is an "unlawful non-citizen": ss 13, 14.

(d) Unlawful non-citizens are subject to mandatory detention: s 189.

(e) Unlawful non-citizens are subject to be removed from Australia (deported): s 198.

6. Just as the Minister may grant permission for a non-citizen to enter or remain in Australia, so too may that permission be revoked: that is, a visa may be cancelled. If a person's visa is cancelled, the person becomes an unlawful non-citizen and is subject to detention and deportation.

7. Visa cancellation decisions made under the Migration Act can usually—but not always—be reviewed on their merits by the Administrative Appeals Tribunal (the **AAT**). Judicial review will also be available at an appropriate point, although that is a far more limited form of review.

Visa cancellations when criminal proceedings are pending

8. I am sometimes asked: *Can the Department cancel a visa whilst criminal charges are pending, on the basis of untested allegations before the defendant has even had their 'day in court'*? Some defendants are surprised to learn that the answer is *yes*.

9. A non-citizen's immigration status is fragile. A 'permanent' visa might more accurately be called an indefinite visa, because even a 'permanent' visa is liable to be cancelled (albeit in fewer circumstances). It is not uncommon for criminal proceedings to trigger a visa cancellation decision under the Migration Act ***before*** any determination of guilt.

10. Section 116 of the Migration Act is headed "Power to cancel". Section 116(1) outlines seven broad circumstances in which a visa may be cancelled and the Regulations then identify additional circumstances. However, a permanent visa may only be cancelled under s 116 if the person is outside Australia: s 117.

11. For present purposes, s 116(1)(e) of the Migration Act is the most relevant provision:

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she

is satisfied that:

…

(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:

(i) the health, safety or good order of the Australian community or a segment of the Australian community; or

(ii) the health or safety of an individual or individuals …

12. The "risk" mentioned in s 116(1)(e) is commonly considered in the context of pending criminal charges. Where such charges are relied on as the basis for a cancellation decision under s 116, the case-law suggests the following propositions:

(a) The mere fact that criminal charges have been laid against a person does not give rise to an inference that there was a reasonable basis for the charges; there must at least be some evidence of the relevant facts for the decision-maker to assess: *Gong v Minister for Immigration* [2016] FCCA 561, [55]; *Dalla v Minister for Immigration and Border Protection* [2016] FCA 998, [29].

(b) The decision-maker is not required to decide whether the person is in fact guilty of the charges. A finding of the type of "risk" mentioned in s 116(1)(e) does not require "any direct, solid or certain foundation"; "it can arise on the possibility that some event occurred in the past": *Gong v Minister for Immigration* [2016] FCCA 561, [41], [45], [51]. Compare, though, the discussion in *Nafady v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1434, [63]-[65].

(c) The decision-maker is not required to quantify or assess the risk the person poses in any particular way: *Ferdous v Minister for Home Affairs* [2019] FCCA 1862, [33]; *Cai v Minister for Immigration* [2020] FCCA 1225, [66].

(d) The decision-maker has no general obligation to await the outcome of the criminal proceedings before making a decision about the person's visa: *Cai v Minister for Immigration* [2020] FCCA 1225.

(e) There might, however, be specific circumstances or factors requiring the decision-maker to await the outcome of the criminal trial due—an example may be where the victim has given evidence withdrawing the allegations and supporting the visa holder: *Ferdous v Minister for Home Affairs* [2019] FCCA 1862, [77]-[80].

(f) A history of family violence in the context of an existing protection order may be sufficient to ground a finding of relevant risk: *Cai v Minister for Immigration* [2020] FCCA 1225, [72].

(g) A risk of an adverse reaction by members of the community to the person's presence in Australia (and thus a risk to good order) may be a sufficient basis for the exercise of power: *FMV17 v Minister for Immigration* [2019] FCCA 186, [36].

(h) Once the risk described in s 116(1)(e) is found to exist, the decision-maker nevertheless "retains a discretion to cancel the visa or leave it on foot" having regard to the circumstances giving rise to that discretion: *Montero v Minister for Immigration and Border Protection* (2014) 229 FCR 144, [35]; *DOY17 v Minister for Immigration and Border Protection* [2019] FCA 1592, [31].

13. Where the Department is considering cancelling a visa under s 116, it will often be worth trying to persuade the decision-maker to ***defer*** making a decision until ***after*** the criminal proceedings are finalised. Obtaining a deferral is difficult but there is generally no harm in trying. Requests for deferral should be supported by detailed evidence, such as in relation to the timing of any future trial, the likely evidence to be available at the trial, further disclosure that is expected, or any matters that render a deferral warranted.

14. If a visa is cancelled under s 116, the cancellation decision will be reviewable by the AAT (unless the decision was made personally by the Minister): Migration Act, s 338. The AAT will review the decision on the merits; that is, the AAT will decide for itself whether the relevant risk arises and, if so, whether the discretion to cancel should be exercised. Again, it may be appropriate to consider requesting that the AAT defer making a decision until after the criminal proceedings are finalised.

15. A decision of the AAT may only be challenged by way of judicial review. Succeeding on judicial review requires that 'jurisdictional error' be established.

Visa cancellation after conviction

Risk-based cancellation

16. Section 116(1)(e) of the Migration Act may also be relied on by a decision-maker after a person has been convicted of a criminal offence. Whilst a minor past conviction with nothing more is unlikely to be sufficient to demonstrate future risk, it is possible that "a single past conviction, and even in circumstances where the criminal conduct is highly unlikely to be repeated, may be sufficient to satisfy a decision-maker of relevant risk": *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120, [69].

17. An example is *Nusipepa v Minister for Immigration* [2020] FCCA 1088. The visa holder was charged with various counts of assault against his wife and children. The AAT awaited the outcome of the criminal proceeding, which resulted in a conviction on one count of assault and acquittal on six other charges. An apprehended violence order was in force. The visa holder's wife provided a statement in his support, wanting "him to be given a second chance" (at [11]). The AAT took into account that the visa holder had a close relationship with his children and that visa cancellation would lead to hardship and separation for him and his family, but that "nature of the offence" outweighed other considerations. It cancelled the visa.

18. The cancellation power under s 116 may take criminal convictions into account, but the existence of a criminal conviction is not an express condition of the power. As such, traditional case-law tends to suggest that it is open to the visa holder to challenge—and the decision-maker to assess—the facts underlying the conviction. More recent cases raise a question as to whether or not it is open to challenge the facts underlying the conviction: *DOY17 v Minister for Immigration and Border Protection* [2019] FCA 1592, [33], [37] and see *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202.

Character test cancellation – discretionary

19. After a defendant has been convicted of a criminal offence, the more commonly triggered cancellation power is that which appears in s 501 of the Migration Act. The two most common limbs of that cancellation power relate to the "character" test: one

limb deals with discretionary cancellation and the other with mandatory cancellation.

20. Section 501(2) provides for the cancellation of a visa at the Minister's ***discretion***:

> (2) The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and
>
> (b) the person does not satisfy the Minister that the person passes the character test.

21. The structure of s 501(2) is that once the decision-maker has a reasonable suspicion that the person does not pass the "character test", it then falls to that person to attempt to satisfy the decision-maker that he or she does pass the "character test". If the decision-maker is not satisfied that the person passes the "character test", then the decision-maker has a discretion to cancel the person's visa (ie, "may cancel").

22. The "character test" is dealt with in s 501(6), which provides that a person does not pass the "character test" if the person falls within any of various circumstances. Some of the more common situations in which a person will fail the "character test" include:

(a) If the person has a "substantial criminal record", which includes any term of imprisonment of 12 months or more (s 501(6)(a) and (7)(c)).

(b) If the Minister reasonably suspects the person "has been or is a member of a group or organisation" that "has been or is involved in criminal conduct" (s 501(6)(b)).

(c) If the person is "not of good character" having regard to past and present criminal or general conduct (s 501(6)(c)).

(d) If there is a risk that, if allowed to remain in Australia, the person would engage in criminal conduct or represent a danger to any segment of the Australian community (s 501(6)(d)).

(e) If the person has been convicted of "one or more sexually based offences involving a child" (s 501(6)(e)).

23. There are various other circumstances described in s 501(6).

24. The rules of natural justice apply to a decision made under s 501(2), so the person will be given notice of the proposed cancellation before a decision is made. That gives the person an opportunity—which should not be ignored—to persuade the decision-maker that the person in fact passes the "character test" (if that is open) or that the discretion to cancel should not be exercised adversely having regard to the person's particular circumstances.

25. Unless the cancellation decision under s 501(2) was made personally by the Minister, the decision can generally be reviewed by the AAT: s 500.

26. Two of the most common grounds for cancellation under s 501(2) are where the person has been sentenced to a term of imprisonment of at least 12 months or has been convicted of a sexually based offence involving a child. In such cases, the cancellation decision takes the fact of sentence or conviction as its starting point and so it will not be open to the person to dispute the essential facts of the offence for the purposes of the visa decision. That is, the person cannot challenge the essential facts of the relevant offence (or upon which the relevant sentence was based) but may provide contextual evidence relevant to assessing the seriousness of the offence. See, generally, *DOY17 v Minister for Immigration and Border Protection* [2019] FCA 1592 and see *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202.

Character test cancellation – mandatory

27. Section 501(3A) requires that a visa must be cancelled in some situations:

> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is 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.

28. As noted above, a person has a "substantial criminal record" if, *inter alia*, the person has been sentenced to imprisonment of 12 months or more. As such, the mandatory cancellation rule arises in any case where a defendant has been sentenced to at least 12 months imprisonment or convicted of a sexual offence involving a child ***and*** is serving a sentence in full-time custody.

29. Although cancellation under s 501(3A) is mandatory, it is not a self-executing provision. That is, a decision-maker must turn his or her mind to the matter and be satisfied of the person's circumstances before any cancellation decision is made and takes effect. Anecdotally, it is not uncommon for there to be administrative delay—even substantial delay—after a person has been convicted and sentenced but before a cancellation decision is made under s 501(3A). That said, some decisions are made promptly and persons who are subject to the operation of s 501(3A) should assume that a cancellation decision could occur at any time.

30. A mandatory visa cancellation scheme decision is not subject to the rules of natural justice. The scheme was described in *Ketjan v Assistant Minister for Immigration and Border Protection* [2019] FCAFC 207 as follows (at [1]):

> The mandatory visa cancellation scheme was introduced in 2014. In contrast to the pre-existing discretionary visa cancellation powers of the Minister, the additional scheme established a process by which a non-citizen's visa would be mandatorily cancelled by the Minister in particular circumstances prescribed by statute. Where this occurred, the non-citizen would then be entitled to make representations to the Minister and request the revocation of the visa cancellation.

31. That is, the decision to cancel a visa under s 501(3A) will occur without prior notice to the visa holder and without that person first having an opportunity to be heard. Once a cancellation has occurred under s 501(3A), the rules in s 501CA apply.

32. Under s 501CA, the following procedure is to be followed:

    (a) As soon as practicable after the visa is cancelled, the Department must give the person notice of that decision and particulars of the reason for the decision: s 501CA(3)(a).

(b) The Department must also invite the person to "make representations to the Minister" about revocation of the visa cancellation (ie, about restoring the person's visa): s 501CA(3)(b).

(c) The representations must be made within 28 days: *Migration Regulations 1994* (Cth), s 2.52(2)(b).

(d) The representations must include certain information, including "a statement of the reasons on which the person relies to support the representations": *Migration Regulations 1994* (Cth), s 2.52(4).

(e) Where representations have been made, the Department "may revoke" the visa cancellation if satisfied that the person passes the character test: s 501CA(4)(b)(i).

(f) Alternatively, where representations have been made, the Department "may revoke" the visa cancellation if satisfied "that there is another reason why the original decision should be revoked": s 501CA(4)(b)(ii).

33. If the cancellation of the visa is revoked, the original cancellation of the visa is undone; the original decision "is taken not to have been made": s 501CA(5). However, any period of detention of the person prior to the revocation is deemed to be lawful: s 501CA(6).

34. Once a visa holder receives notice of a visa cancellation under s 501(3A), it is essential that the person make representations to the Department within the time stipulated in the notice. This is a strict time limit and if the person fails to make representations, there is no power for the Department to re-issue the notice or allow the person any further time to make representations: see, generally, *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91.

35. Given the strictness of the scheme, and the difficulties imposed by the fact of imprisonment, it is prudent for a person who *prima facie* falls within the mandatory cancellation provisions to prepare (at least in draft form) their representations (ie, submissions and supporting material) without waiting for the actual cancellation decision to occur. Submissions should take into account the relevant Ministerial guidelines.

36. Decisions refusing to revoke the mandatory cancellation of a visa are generally reviewable. Unless the decision refusing to revoke under s 501CA(4) was made personally by the Minister, the decision can generally be reviewed by the AAT: s 500.

37. Where a visa has been cancelled under s 501(3A), the administrative decision-making takes the fact of conviction and sentence as its starting point. As such, it will not be open to the person to challenge the essential facts of the relevant offence (or upon which the relevant sentence was based) but the person may provide contextual evidence relevant to assessing the seriousness of the offence. See, generally, *DOY17 v Minister for Immigration and Border Protection* [2019] FCA 1592 and see *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202.

Cancellations pending appeal?

38. Where a person has been convicted or sentenced in a way that enlivens the powers under s 501 of the Migration Act, some difficult questions may arise where that person has appealed against the conviction or sentence.

39. The starting point is that the mere existence of a pending appeal will not prevent the decision-maker from exercising the power under s 501.

40. Significantly, though, a sentence of imprisonment is to be disregarded for the purposes of the character test if the conviction is overturned. Section 501(10) provides:

> (10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:
>
> (a) the conviction concerned has been quashed or otherwise nullified; or
>
> (b) both:
>
> (i) the person has been pardoned in relation to the conviction concerned; and
>
> (ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.

41. Where a defendant is appealing against a conviction, and no cancellation has yet occurred, the best case for the defendant is to have the Department defer making any

decision until the appeal is determined. As noted above, that is sometimes achievable simply through Departmental inertia. However, inertia is unreliable, so when an appeal is lodged it might (depending on the circumstances) be prudent to:

(a) Notify the Department that the conviction is under appeal.

(b) Ask that the Department to defer making any decision until the appeal is resolved.

42. There is no obligation for the decision-maker to await an appeal, but the discretion about whether to defer the decision must be exercised reasonably: *Minister for Home Affairs v Ogawa* [2019] FCAFC 98, [135]. Obtaining a deferral is difficult but there is generally no harm in trying. Requests for deferral should be supported by detailed evidence, such as in relation to the timing of the appeal, the likely evidence to be available at the appeal (if relevant), or any matters that render a deferral warranted.

43. If the appeal succeeds and the relevant conviction is quashed before a visa cancellation decision is made (or before a revocation decision is made under s 501CA(4)), the person will have the benefit of s 501(10) (ie, conviction / sentence disregarded). The relevant grounds for visa cancellation will have been removed or at least altered and any decision by the Department will proceed on that basis.

44. On the other hand, if the person's visa is cancelled (or revocation of cancellation is refused) whilst an appeal against conviction is pending, steps should be taken to preserve the person's rights. Where merits review in the AAT is available, it should be pursued (with a request to the AAT to defer its decision until after the criminal appeal). If the appeal against conviction succeeds before the AAT makes its decision, the AAT will be able to take that into account and act upon that information.

45. More difficulty arises if a conviction is overturned ***after*** a visa has been cancelled and any revocation of cancellation has been refused and no further review on the merits is available. The Department cannot reconsider the question of revoking the visa cancellation: *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91. The refusal to revoke the cancellation cannot be reconsidered in light of a subsequent quashing of the relevant conviction. In such cases, there are very limited avenues for relief (eg, *BDS20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 91, [117]).

Immigration status in the sentencing process

46. Where a non-citizen has been convicted and is to be sentenced, the person's immigration status is not entirely irrelevant but the manner in which it might be taken into account is nuanced and depends on the particulars facts.

47. That said, at least one proposition is clear. A sentencing Court cannot craft or fashion a sentence for the purpose of avoiding or frustrating the operation of the Migration Act (eg, *R v Norris; Ex parte Attorney-General* [2018] QCA 27, [33]-[35]).

48. On the other hand, and despite some statements to the contrary, the prospect of deportation is not irrelevant although its impact (if any) very much depends upon the state of the evidence: *R v Norris; Ex parte Attorney-General* [2018] QCA 27, [38]-[41].

49. Where a non-citizen is being sentenced and is facing either likely or mandatory visa cancellation under the Migration Act, the law seems to be as discussed in *R v Schelvis* [2016] QCA 294 (and *R v UE* [2016] QCA 58) (at [71]; footnotes omitted):[1]

> … if the risk of deportation following a sentence to a term of imprisonment greater than one year is capable of assessment by the sentencing court rather than being merely "a speculative possibility", then it may be shown by evidence to be relevant to the sentence in two ways: first, it "may well mean that the burden of imprisonment will be greater for [the offender] than for someone who faces no such risk [of deportation]" and, secondly "in an appropriate case, it will be proper to take into account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia. ... "

50. That is, there are at least two ways in which the risk of deportation might be taken into account in sentencing:

    (a) By demonstrating that the burden of imprisonment will be greater for the offender than for a person not facing deportation.

    (b) By demonstrating that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia.

1 Interestingly, the position in NSW seems to view the risk of deportation as irrelevant: *Hanna v Environment Protection Authority* [2019] NSWCCA 299.

51. Critically, the cases emphasise that the risk of deportation must be proved to be more than a "speculative possibility". And the adverse impact of the potential sentence must be proved, not merely asserted. These are situations where it will be important to advance careful affidavit evidence to support the sentencing arguments rather than relying on those provisions permitting the Court to act on lesser information.

52. Similarly, if the offender's visa has already been cancelled by the time of the sentence hearing, it will be necessary to establish the relevant facts. There may be cases where, the visa having already been cancelled and reviews exhausted, the person's future detention and deportation can be treated as a certainty. In such cases, it may be important to adduce evidence of what will happen to the person if released on parole or if imprisonment is suspended. For example, will the person be deported and be subject to an overseas parole-type scheme—see, *R v Kaisara* [2022] QDC 270.

53. Ultimately, it may be that specific issues of mitigation or rehabilitation may provide the better focal point for sentencing arguments in the context of a person's immigration status. Whilst it is not open to a sentencing Court to fashion a sentence simply for the purpose of avoiding a person's deportation, the client has a different interest. There is nothing improper in an offender seeking to identify the type of sentence that would avoid deportation and then attempting to build a case that supports that outcome.

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