



Australian
Human Rights
Commission

Background paper:
Human rights issues raised by
visa refusal or cancellation
under section 501 of the
Migration Act

June 2013

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1 Summary

Under section 501 (and/or sections 501A and 501B)¹ of the *Migration Act 1958* (Cth) (Migration Act), a non-citizen's application for a visa may be refused or their visa may be cancelled if they do not satisfy the Minister for Immigration and Citizenship (the Minister), or the Minister's delegate, that they pass the 'character test'. During the 2011-12 financial year 88 people had their visa applications refused and 157 people had their visas cancelled on this basis.²

Visa refusal or cancellation can have serious consequences for a person, including placement in immigration detention for lengthy periods of time, separation from family and friends, removal and effective exclusion from Australia. The Australian Human Rights Commission is concerned that a decision to refuse or cancel a person's visa may lead to breaches of the human rights of that individual and their family members. The Commission is particularly concerned about the impact on refugees who have their applications for protection visas refused under section 501, and the impact of visa cancellation on long-term permanent residents of Australia who have strong ties to the Australian community, including Australian partners or spouses, and/or children. The Commission has concerns about:

- the risk that such persons may be subjected to arbitrary detention (including prolonged or indefinite detention)
- the risk of separation from children and other family members due to a person's detention and/or removal from Australia
- the broad nature of the Minister's personal powers to refuse or cancel a visa on character grounds, and the limited ability of persons to seek review of the Minister's decisions.

This background paper sets out some basic information about the process of visa refusal and cancellation under section 501, and discusses these human rights concerns about the process and its consequences.

2 When can a visa be refused or cancelled under section 501?

2.1 A two stage decision-making process

There are two stages of the decision-making process under section 501. At the first stage, the Minister or the delegate must consider whether the person passes the character test (referred to as the 'threshold test for refusal or cancellation' in the sections below). The character test is set out in subsection 501(6), and is discussed in section 2.3 below.

If the Minister or the delegate is satisfied that the threshold test under subsection 501(1), (2), or (3) for refusal or cancellation has been met, this triggers the second stage of the decision-making process under section 501. At this stage, the Minister or the delegate must decide whether to exercise their discretion to refuse or cancel the person's visa.

To guide the decision-making process under section 501, the Minister can give a Direction under section 499 of the Migration Act. The current Ministerial Direction is

Direction No. 55, which commenced on 1 September 2012.³ Officers of the Department of Immigration and Citizenship (DIAC) making visa cancellation and refusal decisions under subsections 501(1) and (2) must comply with this Direction.⁴ The Direction does not apply to visa refusal or cancellation decisions made by the Minister personally. In exercising his or her personal powers, the Minister may refer to the Direction, but he or she is not obliged to follow it (the Minister's personal powers are discussed further in section 5.3 below).

2.2 Stage 1: The threshold test for refusal or cancellation

(a) Refusal or cancellation by the Minister or a delegate under subsections 501(1) or (2)

The Minister may refuse to grant a visa to a person under section 501(1) if the person does not satisfy the Minister that he or she passes the character test.

A person's visa may be cancelled under section 501(2) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test, and
- the person does not satisfy the Minister that they pass the character test.

The power in subsections 501(1) and 501(2) can be exercised by the Minister personally, or by a delegate of the Minister. In practice, certain DIAC officers usually act as the Minister's delegates in making such decisions.

(b) Refusal or cancellation by the Minister under subsection 501(3)

The Minister may refuse to grant a visa or may cancel a person's visa under subsection 501(3) of the Migration Act if:

- the Minister reasonably suspects that the person does not pass the character test and
- the Minister is satisfied that the refusal or cancellation is in the national interest.

This power can only be exercised by the Minister personally. 'National interest' is not defined – it is a matter for the Minister to determine what constitutes the national interest in making a decision about whether to refuse or cancel a person's visa.

It is also important to note the Minister's personal powers under sections 501A and 501B of the Migration Act. These powers enable the Minister to set aside an initial decision by a delegate or the Administrative Appeals Tribunal in relation to refusal or cancellation under section 501, and substitute it with his or her own decision to refuse or cancel the visa on character grounds. These personal powers are discussed in section 5.3 below.

2.3 *The character test*

(a) *Introduction*

Section 501 of the Migration Act provides that a person does not pass the character test if they fall within any of the grounds specified in subsections 501(6)(a) to (d). These grounds can be grouped into five broad categories:

- substantial criminal record
- conviction for immigration detention offences
- association with persons suspected of engaging in criminal conduct
- past and present criminal or general conduct
- significant risk of particular types of future conduct.⁵

Further guidance on the interpretation and application of these grounds is contained in Direction No. 55.⁶ Each of these categories is discussed briefly below.

(b) *Substantial criminal record*

A person will not pass the character test if they have a 'substantial criminal record', as defined in subsection 501(7).⁷ For the purposes of the character test, a person has a 'substantial criminal record' if they have been:

- sentenced to death or to imprisonment for life
- sentenced to imprisonment for 12 months or more
- sentenced to two or more terms of imprisonment where the total of these terms is two years or more
- acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result they have been detained in a facility or institution.⁸

A person who has a 'substantial criminal record' will automatically fail the character test, regardless of any mitigating factors which attended their offending. However, mitigating factors may be taken into account at the second stage under section 501, when the decision-maker is considering whether to exercise the discretion to refuse or cancel the person's visa (discussed in section 2.4 below).

(c) *Conviction for immigration detention offences*

In 2011 the character test in section 501 was amended to include additional grounds upon which the Minister or a delegate may decide to refuse to grant, or to cancel, a person's visa.⁹ These amendments to the character test were introduced following disturbances in the Christmas Island and Villawood Immigration Detention Centres in March and April 2011.¹⁰ Due to these amendments, a person will fail the character test if that person has been convicted of any offence which was committed while the person was in immigration detention, or during or after an escape from immigration detention, before being re-detained.¹¹ Also, an escape from immigration detention is itself an offence which will result in the person failing the character test under section 501.¹²

The effect of these amendments is that if a person commits an offence while in (or while escaping from) immigration detention, pursuant to subsection 501(6)(aa) or (ab) their criminal behavior will trigger the power in section 501 to refuse or cancel their visa, even if the offence is not serious enough to warrant a sentence of 12 months' imprisonment (or any period of imprisonment). Under subsection 501(6)(aa) or (ab) therefore, a lower level of criminality may cause a person to fail the character test, because of the context in which their offence was committed, as compared to the criminality required for a 'substantial criminal record' for the purposes of subsection 501(6)(a).

Also, unlike under the ground of 'past and present criminal or general conduct' in subsection 501(6)(c) (discussed below), under subsections 501(6)(aa) and (ab) there is no consideration of the severity (or lack thereof) of the offending, or any mitigating circumstances. If an 'immigration detention offence' conviction has been recorded, the person will automatically fail the character test.

(d) *Association with persons suspected of engaging in criminal conduct*

A person does not pass the character test under subsection 501(6)(b) if the person 'has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct'.¹³

Direction No. 55 requires that in establishing 'association' for the purposes of the character test, decision-makers are to consider:

- the nature of the association
- the degree and frequency of association the person had or has with the individual, group or organisation, and
- the duration of the association.¹⁴

Direction No. 55 also requires decision-makers to assess whether the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation, and directs that 'mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association'.¹⁵ The association must have some negative bearing upon the person's character in order for the person to fail the character test on this ground.¹⁶

(e) *Past and present criminal or general conduct*

Under subsection 501(6)(c) of the Migration Act, a person does not pass the character test if, having regard to the person's past and present criminal conduct and/or general conduct, the person is 'not of good character'.

In considering whether a person is 'not of good character', Direction No. 55 requires decision-makers to take into account 'all the relevant circumstances of the particular case ... to obtain a complete picture of the person's character', including evidence of 'recent good behaviour'.¹⁷

In determining whether a person's past or present *criminal conduct* means that they are 'not of good character', decision-makers are to consider:

- the nature, severity, frequency and cumulative effect of the offence/s

- any surrounding circumstances which may explain the criminal conduct
- the person's conduct since the offence/s were committed, including:
 - the length of time since the person last engaged in criminal conduct
 - any evidence of recidivism or continuing association with criminals; any pattern of similar offences; or any pattern of continued or blatant disregard or contempt for the law
 - 'any conduct which may indicate character reform'.¹⁸

The consideration under subsection 501(6)(c)(ii) of a person's past or present *general conduct* allows the decision-maker to take into account 'a broader view of a person's character where convictions may not have been recorded or where the person's conduct may not have constituted a criminal offence'.¹⁹ In considering this broader view of character, the decision-maker should take into account all relevant circumstances, including evidence of rehabilitation and any relevant periods of good conduct'.²⁰

Direction No. 55 sets out the following factors which may be considered in determining whether a person's past or present general conduct means that they are 'not of good character':

- whether the person has been involved in activities which show contempt or disregard for the law or human rights (such as war crimes, crimes against humanity, terrorist activities, drug trafficking, 'political extremism', extortion, fraud, or 'a history of serious breaches of immigration law')
- whether the person has been removed or deported from Australia or another country, and the circumstances that led to the removal or deportation
- whether the person has been dishonourably discharged or discharged prematurely from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct, that in Australia would be regarded as serious.²¹

(f) *Significant risk of particular types of future conduct*

Subsection 501(6)(d) provides that a person does not pass the character test if there is a significant risk that, while in Australia, the person would:

- engage in criminal conduct
- harass, molest, intimidate or stalk another person
- vilify a segment of the Australian community
- incite discord in the Australian community or in a segment of the community or
- represent a danger to the Australian community or to a segment of the community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.²²

Direction No. 55 provides that these 'significant risk' grounds are enlivened if there is evidence suggesting that there is 'more than a minimal or remote chance that the

person, if allowed to enter or remain in Australia, would engage in [the prescribed] conduct'.²³ It is not sufficient to find that the person has engaged in such conduct in the past – there must be a significant risk that the person would engage in such conduct in the future.²⁴

Direction No. 55 also states that the operation of the last three grounds of 'future conduct' set out above must be balanced against Australia's 'well established tradition of free expression'. The Direction states that these grounds are not intended to be used in order to deny entry or continued stay of persons merely because they hold and are likely to express unpopular opinions, even if those opinions may attract strong expressions of disagreement and condemnation from some elements of the Australian community.²⁵

2.4 Stage 2: Factors relevant to the exercise of discretion to refuse or cancel a visa

(a) The relevance of Ministerial Direction No. 55 to the exercise of the discretion

As mentioned above, if a person fails to satisfy the Minister or a delegate that he or she passes the character test, the person's visa is not automatically refused or cancelled. The decision-maker must decide whether to exercise their discretion under section 501 to refuse or cancel the person's visa.

In making that decision, the Minister's delegate is required to consider a number of factors, as set out in Direction No. 55. Part A of the Direction sets out a range of primary considerations and other considerations which must be taken into account (where relevant) when deciding whether to cancel a visa. Part B of the Direction sets out those primary and other considerations which must be taken into account when deciding whether to refuse a visa application. An overview of these considerations is provided below.

In addition to taking into account the considerations in Part A or Part B, the Direction requires the decision-maker, to 'determine whether the risk of future harm by a non-citizen is unacceptable'.²⁶ To assess this, the decision-maker is required to undertake a balancing exercise and to consider 'the likelihood of any future harm, the extent of the potential harm if it should occur, and the extent to which, if at all, any risk of future harm should be tolerated by the Australian community'.²⁷

Although the Direction sets out primary and other considerations which must be considered by DIAC officers in exercising their discretion, it does not dictate outcomes. Also, as noted above, the Minister is under no obligation to follow the Direction when making a personal decision to refuse or cancel a visa on character grounds under section 501.

(b) Primary considerations

Direction No. 55 provides that in deciding whether to refuse or cancel a person's visa under section 501, the following primary considerations must be taken into account:²⁸

- the protection of the Australian community from criminal or other serious conduct²⁹

- the best interests of minor children in Australia³⁰
- whether Australia owes international non-refoulement obligations to the person³¹ (under the *Convention Relating to the Status of Refugees* (Refugee Convention),³² the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),³³ and the *International Covenant on Civil and Political Rights* (ICCPR).³⁴

When considering whether to *cancel* a visa, the decision-maker must take into account the additional primary considerations of ‘the strength, duration and nature of the person’s ties to Australia’.³⁵

(c) *Other considerations*

Direction No. 55 sets out a range of other considerations that may be relevant and, if so, must be taken into account in determining whether to refuse or cancel a visa under section 501. These considerations are generally to be given less weight than the primary considerations set out above.³⁶ These other considerations include the impact of refusal or cancellation on:

- the person’s immediate family in Australia (if those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely)³⁷
- Australian business interests³⁸
- members of the Australian community, including victims of the person’s criminal behaviour and those victims’ families.³⁹

Again, in the case of cancellation of a visa (rather than refusal) there is an additional consideration, that is ‘the extent of any impediments that the person may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards’ in light of:

- the person’s age and health
- any substantial language or cultural barriers, and
- any ‘social, medical and/or economic support available to them in that country’.⁴⁰

3 What are the consequences of visa refusal or cancellation?

When a person’s application for a visa is refused or his or her visa is cancelled under section 501 of the Migration Act, unless he or she already holds a protection visa, the person becomes an unlawful non-citizen.⁴¹

Under the Migration Act, as an unlawful non-citizen the person must be placed in immigration detention and detained until he or she is either granted a visa, deported, or removed from Australia.⁴²

As at 23 May 2013, there were 49 people in immigration detention because their visas had been cancelled under section 501, and seven people in detention who had their visas refused under section 501.⁴³ In 2011-12, 78 people who had been

detained due to their visas being cancelled under section 501 were removed from Australia.⁴⁴

In addition to being detained and possibly removed from Australia, a person who has a visa refused or cancelled under section 501:

- will be prohibited from applying for another visa (other than a protection visa or a 'removal pending' bridging visa) while in Australia⁴⁵
- if removed from Australia following *cancellation* of their visa, will not be eligible to be granted most types of visas (and therefore to return to Australia) if their visa was cancelled because of a substantial criminal record, past or present criminal conduct, or a combination of past or present criminal and general conduct.⁴⁶

4 What are the human rights issues raised by refusal or cancellation of visas under section 501?

The Commission has a number of concerns about the impact on the human rights of people whose applications for visas are refused or whose visas are cancelled under section 501 of the Migration Act. The Commission is particularly concerned about the consequences for:

- refugees who have their applications for protection visas *refused* on character grounds
- long-term permanent residents of Australia who have their visas *cancelled* on character grounds.

The Commission's major concerns, discussed in the following sections, relate to:

- the risk that such persons may be subjected to arbitrary detention (including prolonged or indefinite detention), contrary to article 9(1) of the ICCPR
- the risk of separation from children and other family members due to a person's detention and/or removal from Australia, resulting in possible breaches of articles 17 and 23 of the ICCPR.

4.1 Impact of visa refusal on refugees

The Commission is concerned about the impact that the introduction of the new 'immigration detention offences' ground for visa refusal or cancellation in section 501⁴⁷ may have on asylum seekers who come to Australia seeking protection. This is because of the context in which this amendment was introduced (namely following the disturbances in the Christmas Island and Villawood Immigration Detention Centres),⁴⁸ and the fact that all asylum seekers who come to Australia without a visa are subject to mandatory detention. The new ground will allow the Minister or a delegate to refuse to grant a protection visa to an asylum seeker if he or she is convicted of *any* offence in relation to his or her detention, even if he or she is found to be a refugee, and therefore someone to whom Australia owes protection obligations. This is discussed further in section 4.3 below.

4.2 ***Impact of visa cancellation on long-term permanent residents***

The Commission is also particularly concerned about the impact that visa cancellation under section 501 may have on a person who has been residing in Australia for a long period of time. Prior to the introduction of section 501 in 1998, the deportation of non-citizens who had committed criminal offences was covered by sections 200 and 201 of the Migration Act. Under these sections, the Minister could only deport a non-citizen who had been convicted of a crime (punishable by imprisonment for one year or more) if the non-citizen had been resident in Australia for less than ten years.⁴⁹ Since 1998, the powers in section 501 of the Migration Act have been used to cancel the visas of permanent residents who have lived in Australia for more than ten years (hereafter referred to as ‘long-term’ permanent residents).⁵⁰ For example, as at May 2008, 24 of the 25 people in immigration detention whose visas had been cancelled under section 501 had lived in Australia for more than 11 years; 17 of them had lived in Australia for more than 20 years. The majority of these people were 15 years old or younger when they first arrived in Australia.⁵¹

The Commonwealth Ombudsman has suggested that the use of section 501 to cancel the visas of long-term permanent residents goes beyond the original intention of the provision.⁵² Nevertheless, in recent years section 501 has continued to be used to cancel the visas of long-term permanent residents.⁵³

CASE STUDY 1: *Cunliffe v Minister for Immigration and Citizenship* [2012] FCA 79

Leslie Cunliffe was a citizen of the United Kingdom who migrated to Australia with his parents and siblings in 1967, when he was 19 years old. In 1999 he was convicted of eight offences arising out of one incident, including kidnapping, blackmail and rape. He served 12 years in prison. After he was released on parole in April 2011, he was notified that the Minister intended to consider exercising his personal power under section 501A of the Migration Act to cancel his visa. On 10 June 2011, the Minister made a decision to cancel the visa of Mr Cunliffe, despite noting that he had been living in Australia for over 43 years. The Federal Court upheld the Minister’s decision. Mr Cunliffe was removed from Australia in March 2012.

Long-term permanent residents who have their visas cancelled may be removed from Australia and sent to a country where they have spent little time (or never lived); where they do not speak the language; and where they have few or no social or family connections. They may also face separation from their children, family and friends in Australia (this is discussed further in section 4.4 below).

CASE STUDY 2: *Nystrom et. al v Australia*

(UN Human Rights Committee Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (2011))

On 12 August 2004 the Minister cancelled the visa of Stefan Nystrom on the basis that, due to his criminal history, he did not pass the character test. Although born in Sweden, Mr Nystrom had arrived in Australia with his mother when he was 27 days old (in January 1974), and had lived in Australia for all of his life. His ties to the Australian community were so strong that the Full Court of the Federal Court had described him as an 'absorbed member of the Australian community'. His nuclear family lived in Australia, he had no ties to Sweden and he did not speak Swedish. Despite this, he was deported back to Sweden in December 2006. The UN Human Rights Committee considered that, in the circumstances, the deportation of Mr Nystrom from Australia constituted a breach of his right under article 12(4) of the ICCPR not to be arbitrarily deprived of the right to enter his 'own country'.

As mentioned above, under Direction No. 55 the 'strength, duration and nature of the person's ties to Australia' are primary considerations for DIAC officers when deciding whether to cancel a person's visa under section 501.⁵⁴ Decision-makers therefore must have regard to the length of time the visa holder has resided in Australia, including whether the person arrived in Australia as a young child.⁵⁵ In addition, the Direction acknowledges that:

Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.⁵⁶

However, the terms of the Direction do not prevent delegates of the Minister from cancelling the visas of long-term permanent residents under section 501. While the 'strength, duration and nature of the person's ties to Australia' are primary considerations which may support a decision not to cancel a visa, pursuant to the Direction they can be outweighed by other primary considerations, particularly the protection of the Australian community.⁵⁷ Further, as mentioned above, the Minister is not bound to follow the Direction when making visa cancellation decisions personally.

The Commission raised concerns about the visa cancellation and immigration detention of long-term permanent residents in its 2008 submission to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia.⁵⁸ In that submission, the Commission recommended that the Australian Government should review the operation of section 501 as a matter of priority, with the aim of excluding long-term permanent residents from the provision.⁵⁹

4.3 Risk of arbitrary detention

(a) General risk of arbitrary detention

As outlined above, if a person has their visa application refused or their visa cancelled under section 501, unless they also hold a protection visa they must be taken into immigration detention and remain in detention unless and until they are granted a new visa or removed from Australia.⁶⁰

Some people who have their applications for visas refused or their visas cancelled under section 501 can spend months or even years in immigration detention, for example while they seek review of the decision to refuse or cancel their visa, while travel documents are arranged, or while a claim for a protection visa is assessed. As at 23 May 2013, six of the 49 people in detention because of visa cancellation under section 501 had been detained for 2-3 years, and three of the seven people who had been detained following *refusal* of their visa applications under section 501 had been detained for 1-2 years.⁶¹

Often, a long-term permanent resident's visa is cancelled under section 501 because they have been convicted of a criminal offence. In such cases, the person's visa is usually cancelled when they are near the end of serving their prison sentence. On completion of their sentence they are placed in immigration detention, because they no longer hold a valid visa. In 2008 the Commonwealth Ombudsman observed that it was not uncommon for people who were detained following cancellation of their visa under section 501 to spend more time in immigration detention than they did in prison.⁶²

Holding people in immigration detention for prolonged and indefinite periods can lead to breaches of Australia's international obligations. Under article 9(1) of the ICCPR, the Australian Government has an obligation not to subject any person to arbitrary detention, including for immigration control purposes.⁶³ Detention can be arbitrary even though it is provided for by law; arbitrariness in this context includes concepts of 'inappropriateness, injustice and lack of predictability'.⁶⁴ Detention will also be arbitrary if it is a disproportionate response to a legitimate aim,⁶⁵ and/or if it continues beyond a period for which the Australian Government can provide appropriate justification.⁶⁶

For over a decade the Commission has consistently called for an end to Australia's system of mandatory detention for 'unlawful non-citizens' because it leads to breaches of Australia's international human rights obligations.⁶⁷ The Commission is concerned that a blanket policy of mandatory detention for all people who have their visa refused or cancelled under section 501 may result in the detention of some individuals who do not, in fact, pose a significant risk to the Australian community. The failure to impose a set time limit on their detention increases the risk that some individuals will be held in immigration detention for prolonged or indefinite periods, contrary to article 9(1) of the ICCPR.

(b) *Relevance of Australia's non-refoulement obligations to risk of arbitrary detention*

In some cases, people who have their visa application refused or visa cancelled on character grounds cannot be returned to their country of origin because of Australia's international obligations. This will be the situation of all people who are denied a protection visa on character grounds, but are recognised as refugees under the Refugee Convention. As a party to that Convention, Australia has a legal obligation not to *refoule* (that is, expel or return) a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.⁶⁸ However, this *non-refoulement* obligation under the Refugee Convention does not apply to a refugee if there are reasonable grounds for regarding that person as a danger to Australia's security, or if that person, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the Australian community.⁶⁹

In some cases, the grounds under which a person may be excluded from the *non-refoulement* obligation under the Refugee Convention may overlap with the grounds upon which a person will fail the section 501 character test under the Migration Act (for example, because they have a 'substantial criminal record'⁷⁰).

However, some of the grounds upon which a person will fail the section 501 character test are much broader than the grounds upon which a person can be excluded from the *non-refoulement* obligation under the Refugee Convention. The exclusion grounds in the Refugee Convention require that a person be a danger to Australia's security or to the Australian community – whereas a person can fail the section 501 character test on grounds as general as being 'not of good character' having regard to their 'past or present general conduct'.⁷¹

Further, Australia may owe *non-refoulement* obligations to a person even if they are not a recognised refugee. In addition to its obligations under the Refugee Convention, Australia also has *non-refoulement* obligations under the ICCPR,⁷² the CAT,⁷³ and the *Convention on the Rights of the Child* (CRC).⁷⁴ These *non-refoulement* obligations mean that Australia must not return any person who is in Australia to a country where there are substantial grounds for believing that they face a real risk of death, torture or cruel, inhuman or degrading treatment or punishment. Unlike the *non-refoulement* obligation under the Refugee Convention, these *non-refoulement* obligations are absolute. That is, there are no situations in which the person's expulsion or removal can be justified if there are substantial grounds for believing that there is a real risk of these types of harms occurring.

In practical terms, the narrow exceptions to the *non-refoulement* protection under the Refugee Convention, and the absolute nature of the *non-refoulement* obligations under the ICCPR, the CAT and the CRC, may result in refugees and other people:

- being refused a visa (including a protection visa) or having their visa cancelled under section 501 because they fail the character test, but
- being found to engage Australia's *non-refoulement* obligations (whether under the Refugee Convention or the other international treaties).

The Commission is concerned about the fate of those people who fall into this legal limbo. Under the Migration Act they must remain in immigration detention until they

are either granted a visa or removed from Australia, but under international law they cannot be returned to a country where there is a real risk they would face persecution or significant harm. Unless they can meet the requirements for grant of a protection visa (which itself includes satisfying the character test),⁷⁵ or there is a third country where they can be resettled in which they do not face a real risk of persecution or significant harm, they face the prospect of indefinite detention.

CASE STUDY 3: Mr NK v Commonwealth of Australia (Department of Immigration and Citizenship)

(Report into arbitrary detention, the right of people in detention to protection of the family and freedom from arbitrary interference with the family [2011] AusHRC 43)

Mr NK, who had left the People's Republic of China and entered Australia on a student visa in 1989, was convicted in Australia on two counts of murder and spent 15 years in prison. When he was released from prison in October 2006 his bridging visa was cancelled, and he was placed in immigration detention as an unlawful non-citizen. His application for a further bridging visa was refused, on character grounds. His application for a protection visa was also refused. However, Mr NK could not be removed from Australia back to the PRC, because there was a real risk that he would 'face the death penalty or torture as a necessary and foreseeable consequence of his removal', and therefore his removal would place Australia in breach of its *non-refoulement* obligations. As DIAC refused to grant him a visa to allow him to live in the community due to his criminal record, Mr NK had, at the date of the report, been held in immigration detention for over 4 years.

(c) *Guidance given in the Direction regarding non-refoulement*

As mentioned above, under Direction No. 55 Australia's *non-refoulement* obligations under the Refugee Convention, the CAT and the ICCPR are primary considerations for DIAC officers when deciding whether to refuse or cancel a person's visa under section 501.⁷⁶

Direction No. 55 points decision-makers to the interpretation of Australia's international *non-refoulement* obligations contained in section 36 of the Migration Act (which sets out the criteria for the grant of a protection visa). In addition to referring to the protection obligations under the Refugee Convention (including its exclusions), section 36 of the Migration Act provides that Australia owes protection (including *non-refoulement*) obligations towards a non-citizen where there are:

substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

A non-citizen will suffer *significant harm* if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or

- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.⁷⁷

However, the Direction expressly states that the fact that Australia may owe a *non-refoulement* obligation to a person does not preclude a decision-maker refusing or cancelling that person's visa under section 501.⁷⁸ Rather, the instruction given in the Direction is that:

any non-refoulement obligation should be weighed carefully against the seriousness of the person's criminal offending or other serious conduct in deciding whether or not the person's visa application should be refused [or the person should continue to hold a visa].

The question is then what will happen when a person meets the test in section 36 of the Migration Act as someone to whom Australia owes *non-refoulement* obligations, but their visa application is refused or their visa cancelled on character grounds. This scenario is increasingly likely given that, as mentioned above in section 2.3(c), the amendments to the character test in 2011 have effectively lowered the 'criminality' threshold for failure of the character test for those who are convicted of committing an offence while in immigration detention.

In its submission to the Senate Legal and Constitutional Affairs Committee which considered the 2011 amendments to the character test, DIAC confirmed that 'the Government will not return people to whom it owes *non-refoulement* obligations to a place where there is a real risk of these significant types of harm'.⁷⁹ DIAC stated that:

In circumstances where it is not possible to remove refugees, or other persons who engage these obligations, whose permanent visa has been refused or cancelled on character grounds ... such persons will also not be detained indefinitely. The Government ... will consider the grant of existing temporary visas under the Act to manage persons who are owed *non-refoulement* [obligations], but whose permanent visa has been refused or cancelled on character grounds. In such cases, the Minister may consider the exercise of his personal power under section 195A of the Act to grant a visa placing these persons in the community with appropriate support arrangements until such time that their removal from Australia is possible. Other obligations relating to the presence of refugees in Australia will also continue to be met.⁸⁰

The Commission is concerned that the Minister's personal power under section 195A may not be a sufficient safeguard against indefinite detention. The Minister's power under section 195A is discretionary. The Minister is not under any duty to consider whether to exercise his power in section 195A to grant a visa, even if he or she is requested to do so.⁸¹ A person therefore cannot challenge the Minister's decision not to exercise this power. The Commission is also concerned that, even if the Minister grants a 'removal pending' bridging visa under section 195A, such a visa is a temporary solution which only permits the holder to remain in the Australian community until he or she can safely be removed - it does not offer the holder any certainty about their future in cases where removal is not currently practicable.⁸²

4.4 Risk of separation from children and other family members

(a) *Obligation to consider the best interests of the child*

Visa refusal or cancellation under section 501 may result in the separation of a parent and their child or children. If the parent's visa is refused or cancelled, they will be taken into immigration detention, and may be removed from Australia. The CRC requires that in all actions concerning children, the best interests of the child must be a primary consideration.⁸³

The Commission welcomes that under Direction No. 55 'the best interests of minor children in Australia' is one of the primary considerations DIAC officers must take into account when deciding whether to refuse to grant or to cancel a person's visa under section 501.⁸⁴ If there are minor children who will be affected by the decision to refuse or cancel a visa, under the Direction the relevant decision-maker *must* make a determination about whether refusal or cancellation is or is not in the best interests of the child.⁸⁵

(b) *Obligations in relation to avoiding arbitrary interference with, and protecting, the family*

Under article 17 of the ICCPR, all people have the right to be free from 'arbitrary or unlawful interference' with their family.⁸⁶ Also, article 23(1) of the ICCPR provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. In some circumstances, the refusal or cancellation of a person's visa leading to their subsequent detention and/or removal from Australia could result in Australia being in breach of its obligations under those articles.⁸⁷

As explained above, people whose visas are cancelled under section 501 are often long-term permanent residents who moved to Australia as a child and have lived here for many years prior to their visa cancellation.⁸⁸ Many of them have family members in Australia, some of whom may be long-term permanent residents themselves, or even Australian citizens.

The prolonged detention and/or removal of a person from Australia after their visa cancellation could result in that person being separated from their family members who reside in Australia. Depending on the reason they failed the character test, a person who is removed may then effectively be permanently excluded from Australia, and consequently prevented from returning to visit family members who remain in the country.⁸⁹

Cancelling a person's visa and holding them in detention for a long period of time and/or removing them from Australia can therefore impact that person's (and their family members') right to respect for family life. Under article 17 of the ICCPR, such interference with the right to family life is only permissible if it is not arbitrary, which means it must be 'reasonable in the particular circumstances'.⁹⁰

CASE STUDY 4: Brown v Commonwealth of Australia (Department of Immigration & Citizenship)

(Report into arbitrary detention, the right to be treated with humanity and with respect for the inherent dignity of the human person and the right to be free from arbitrary interference with and to protection of the family [2012] AusHRC 51)

Mrs Brown, a New Zealand citizen, had her visa cancelled on character grounds pursuant to section 501 on 3 November 2008, and on 14 November 2008 she was placed in immigration detention. Her placement in immigration detention separated her from her fiancé, four children, eight siblings and five grandchildren, all of whom were living in the Australian community. After a series of unsuccessful applications to have the decision to cancel her visa overturned, and her request to be placed in community detention was refused, she ultimately voluntarily returned to New Zealand on 23 May 2011. Accordingly, for the 30 months Mrs Brown was detained she was separated from her family. Former Commission President Catherine Branson found that the decision to detain Mrs Brown in closed detention rather than community detention was not a reasonable or proportionate response to any risk she presented to the community if released. Accordingly, the interference with her family was arbitrary, in breach of articles 17 and 23 of the ICCPR.

(c) Consideration of the effect on family members under the Direction

When deciding whether to cancel a person's visa under section 501, Direction No. 55 requires that, as part of the primary consideration of a person's ties to Australia, decision-makers must consider:

the strength, duration and nature of any family, social and/or employment links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.⁹¹

Further, as mentioned above in section 2.4(c), under Direction No. 55 the decision-maker is required to consider the impact that refusal or cancellation would have on the applicant's or holder's immediate family members before making a decision to refuse an application or cancel a visa.⁹²

The Commission welcomes these requirements. However, the Commission is concerned that, as the above case study illustrates, the terms of the Migration Act and Direction No. 55 may not adequately protect against breaches of Australia's obligations under articles 17 and 23(1) of the ICCPR. Even if a decision-maker determines that a decision to refuse or cancel a visa would severely limit the person's ability to maintain a relationship with family members who reside in Australia, the decision-maker is still able to refuse or cancel the visa.⁹³ Under the terms of Direction No. 55, a person with strong family ties in Australia (including dependent children) could have his or her visa cancelled, be detained, be removed, and even possibly be excluded from Australia, due to conflicting or overriding considerations.⁹⁴

5 Can a person seek review of a decision under section 501 to refuse or cancel a visa?

5.1 Access to merits review

Depending on the circumstances, a person who has an application for a visa refused or a visa cancelled under section 501 may be able to apply to the Administrative Appeals Tribunal (AAT) for review of the merits of the decision, or they may only be able to challenge the legality of the decision through the courts. Whether the person can apply for merits review by the AAT depends on whether the decision was made by the Minister personally, or by a delegate of the Minister. A decision made by a delegate (e.g. a DIAC officer) to refuse to grant or to cancel a visa under section 501 is subject to merits review by the AAT, but a decision made by the Minister is not.⁹⁵

When conducting a merits review, the AAT reviews the original decision and determines if it is the correct or preferable decision. The AAT can affirm, vary or set aside the original decision.⁹⁶ If it sets the decision aside, it can make a decision itself or remit the decision to the delegate, along with directions or recommendations, for the delegate to make again. However, if the AAT decides not to exercise the power to refuse to grant or to cancel a person's visa, in certain circumstances the Minister may set the AAT's decision aside and refuse or cancel the visa.⁹⁷

The Minister also has the power, in certain circumstances, to set aside an original decision made by a DIAC officer under section 501.⁹⁸ The Minister can then substitute the original decision (whether that decision was favourable or unfavourable to the applicant or visa holder) with his or her own decision to refuse or cancel the visa. The Minister can do this even if the person has applied to the AAT for review of the delegate's original decision to refuse or cancel their visa.⁹⁹ As noted above, if the Minister personally decides to refuse or cancel a person's visa, the Minister's decision is not subject to review by the AAT.

5.2 Access to judicial review

All decisions to refuse to grant or to cancel a person's visa under section 501, whether made by a DIAC officer or by the Minister personally, are subject to judicial review by the Federal Court or the High Court of Australia. Under judicial review, courts are restricted to reviewing the lawfulness of an administrative decision, rather than considering whether it was the correct decision.

If a court finds that a visa refusal or cancellation decision was affected by jurisdictional error, the court can set aside the original decision and return the case to the decision-maker to be reconsidered. For example, this might be the case if the decision-maker failed to take into account primary or other relevant considerations that it was bound to take into account or (to the extent that rules of natural justice apply)¹⁰⁰ carried out its decision-making functions in a way that was unfair to the relevant person.

5.3 The Minister's personal powers to refuse or cancel visas

Given the potentially serious interference with a person's human rights which can follow from a decision to refuse to grant or to cancel a visa on character grounds, it is concerning that the Minister's personal, discretionary powers to refuse or cancel a visa on the basis of the character test are very broad, and that the Minister's decisions are subject to limited review.

As mentioned above, under sections 501, 501A and 501B of the Migration Act the Minister has the power, in certain circumstances to:

- make an initial decision to refuse or cancel a person's visa¹⁰¹
- set aside a decision by a DIAC officer or the AAT *not* to exercise the power to refuse or cancel a person's visa, and substitute it with his or her own decision to refuse to grant or to cancel the visa¹⁰²
- set aside a decision by a DIAC officer to refuse or cancel a person's visa, and substitute it with his or her own refusal or cancellation.¹⁰³

In making these decisions, the Minister is not bound by Direction No. 55. Further, a person cannot apply to the AAT for merits review of any of these Ministerial decisions; they can only challenge the legality of these decisions through judicial review (as explained in the section above). In some circumstances, the Act provides that the rules of natural justice do not apply to a decision by the Minister, further limiting the potential for review.¹⁰⁴

The Commission has raised concerns about the extent of the Minister's discretionary powers under the Migration Act in parliamentary submissions. For example, in its 2008 submission to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia, the Commission recommended that the Minister's powers under section 501 should be reduced, and measures should be put in place to provide for transparent and accountable decision-making processes which are subject to review.¹⁰⁵

6 Links to further information

6.1 Commission projects and publications

The Commission has considered issues relating to the human rights of people impacted by section 501 visa refusals or cancellations in the following work:

- The Commission's report: [2011 Immigration detention at Villawood: Summary of observations from visit to detention facilities at Villawood](#)¹⁰⁶
- The Commission's 2009 [submission](#) to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009¹⁰⁷
- The Commission's 2008 [submission](#) to the Joint Standing Committee on Migration's inquiry into immigration detention in Australia¹⁰⁸
- The Commission's 2008 [submission](#) to the Clarke Inquiry on the case of Dr. Mohamed Haneef.¹⁰⁹

For further information, see the Commission's [immigration detention, asylum seekers and refugees](#) webpage.¹¹⁰

6.2 Other useful links

- Department of Immigration and Citizenship factsheet, [The Character Requirement](#)
- Commonwealth Ombudsman report no. 1 (2006), [Administration of s 501 of the Migration Act 1958 as it applies to long-term residents](#)
- Commonwealth Ombudsman report no. 10 (2007), [Report into referred immigration cases: other legal issues](#)
- Commonwealth Ombudsman, [Immigration detention review reports](#) (many of which relate to section 501 detainees)
- Susan Harris Rimmer, [The Dangers of Character Tests: Dr Haneef and other cautionary tales](#), The Australia Institute, Discussion Paper Number 101
- Refugee and Immigration Legal Service & Immigration Advice and Rights Centre, [Legal Information Kit: Visa Cancellation under s501 of the Migration Act](#)

¹ Under sections 501A and 501B of the *Migration Act 1958* (Cth) the Minister for Immigration and Citizenship has the power to set aside an initial decision to refuse to grant or to cancel a visa made under section 501, and substitute it with his or her own decision to refuse to grant or to cancel the visa, on a similar basis (i.e. for failure of the character test). Throughout this paper, general references to visa refusal or cancellation under section 501 should be taken as also referring to refusal or cancellation decisions made by the Minister under sections 501A and 501B, unless the context suggests otherwise.

² Department of Immigration and Citizenship, *Annual Report 2011-12* (2012), p 174. At <http://www.immi.gov.au/about/reports/annual/2011-12/> (viewed 24 June 2013).

³ Minister for Immigration and Citizenship, *Direction No. 55 - Visa refusal and cancellation under s 501*, given under section 499 of the *Migration Act 1958* (Cth) and signed on 25 July 2012 (Ministerial Direction No. 55). At www.immi.gov.au/media/fact-sheets/79-ministerial-direction-55.pdf (viewed 24 June 2013).

⁴ See *Migration Act 1958* (Cth), s 499(2A).

⁵ *Migration Act 1958* (Cth), s 501(6).

⁶ Ministerial Direction No. 55, note 3.

⁷ *Migration Act 1958* (Cth), s 501(6)(a).

⁸ *Migration Act 1958* (Cth), s 501(7).

⁹ See the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth).

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2011, p 3509 (The Hon Chris Bowen MP, Minister for Immigration and Citizenship).

¹¹ *Migration Act 1958* (Cth), s 501(6)(aa).

¹² *Migration Act 1958* (Cth), s 501(6)(ab).

¹³ *Migration Act 1958* (Cth), s 501(6)(b).

¹⁴ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 3(2).

¹⁵ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 3(3).

¹⁶ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 3(3).

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- ¹⁷ Ministerial Direction No. 55, note 3, Annex A, Section 2, paras 4(3) and (4).
- ¹⁸ See further Ministerial Direction No. 55, note 3, Annex A, Section 2, para 4.1(1).
- ¹⁹ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 4.2(1).
- ²⁰ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 4.2(1)(a).
- ²¹ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 4.2(2).
- ²² For further detail regarding how these grounds are to be interpreted, see Ministerial Direction No. 55, note 3, Annex A, Section 2, paras 5.1-5.3.
- ²³ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 5(2).
- ²⁴ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 5(3).
- ²⁵ Ministerial Direction No. 55, note 3, Annex A, Section 2, para 5.3(2).
- ²⁶ Ministerial Direction No. 55, note 3, Section 2, para 7.
- ²⁷ Ministerial Direction No. 55, note 3, Section 2, para 7.
- ²⁸ Ministerial Direction No. 55, note 3, Part A, para 9 and Part B, para 11.
- ²⁹ Further guidance on how decision-makers should assess the level of risk of harm to the community is provided in Ministerial Direction No. 55, note 3, Part A, paras 9.1, 9.1.1 and 9.1.2 and Part B, paras 11.1, 11.1.1 and 11.1.2. Under the Direction this assessment should include consideration of the nature and seriousness of the relevant conduct, and the risk that the conduct may be repeated.
- ³⁰ For further detail see Ministerial Direction No. 55, note 3, Part A, para 9.3 and Part B, para 11.2.
- ³¹ For further detail see Ministerial Direction No. 55, note 3, Part A, para 9.4 and Part B, para 11.3. Note that s 36 of the Migration Act contains 'Australia's interpretation of these obligations' and the tests which should be applied by decision-makers in order to comply with these obligations: see Ministerial Direction No. 55, note 3, Part A, para 9.4(3) and Part B, para 11.3(3).
- ³² Opened for signature 28 July 1951, 189 UNTS 137, (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Refugee Convention). At <http://www.austlii.edu.au/au/other/dfat/treaties/1954/5.html> (viewed 24 June 2013).
- ³³ Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT). At <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1989/21.html> (viewed 24 June 2013).
- ³⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR). At <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (viewed 24 June 2013).
- ³⁵ Ministerial Direction No. 55, note 3, Part A, para 9.2.
- ³⁶ Ministerial Direction No. 55, note 3, Section 2, para 8(4).
- ³⁷ Ministerial Direction No. 55, note 3, Part A, para 10(1)(a), and Part B, para 12(1)(a).
- ³⁸ Ministerial Direction No. 55, note 3, Part A, para 10(1)(b), and Part B, para 12(1)(c).
- ³⁹ Ministerial Direction No. 55, note 3, Part A, para 10(1)(c), and Part B, para 12(1)(b).
- ⁴⁰ Ministerial Direction No. 55, note 3, Part A, para 10(1)(d).
- ⁴¹ *Migration Act 1958* (Cth), ss 13, 14, 501F. Under section 501F of the Migration Act, once a person's application for a visa is refused or his or her visa is cancelled under section 501, all visas issued to that person, except for a protection visa or a type of visa specified in the Migration Regulations, are cancelled, and all applications for visas other than a protection visa are deemed to be refused. There are currently no other visas specified in the Migration Regulations for the purposes of section 501F.
- ⁴² *Migration Act 1958* (Cth), ss 189(1), 196(1).
- ⁴³ *Department of Immigration and Citizenship*, Response to 'Request for Information from the Australian Human Rights Commission (AHRC) - Section 501 Visa Cancellation and Refusal DIAC Ref 1300157', 29 May 2013.
- ⁴⁴ Department of Immigration and Citizenship, above.
- ⁴⁵ *Migration Act 1958* (Cth), s 501E. Under section 501E(2), a person may still apply for a protection visa or a visa specified in the Migration Regulations (at the time of writing, the only visa specified in the Regulations was the subclass 070 Bridging (Removal Pending) visa: see the Migration Regulations, reg 2.12AA). However, see section 48A of the Migration Act, which may prevent a

person from making an application for a protection visa while in Australia if they have already had a protection visa application refused, or a protection visa cancelled.

- ⁴⁶ See *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c). The effect of that clause is that a person who has been removed from Australia following cancellation of their visa because of a substantial criminal record, past or present criminal conduct, or a combination of past or present criminal and general conduct will not be eligible to be granted any visa to which criteria 5001 applies.
- ⁴⁷ See the discussion in section 2.3(c) above.
- ⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2011, p 3509 (The Hon Chris Bowen MP, Minister for Immigration and Citizenship).
- ⁴⁹ See *Migration Act 1958* (Cth), s 201.
- ⁵⁰ See, for example, Commonwealth Ombudsman, *Administration of section 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006 (2006), para 2.10. At http://www.ombudsman.gov.au/files/investigation_2006_01.pdf (viewed 24 June 2013).
- ⁵¹ Question 423, Commonwealth Senate Hansard (17 June 2008), pp 2625-2626. At http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2008-06-17/0159/hansard_frag.pdf;fileType=application%2Fpdf (viewed 24 June 2013).
- ⁵² Commonwealth Ombudsman, note 50, para 2.10.
- ⁵³ See M Grewcock, 'Punishment, deportation and parole: The detention and removal of former prisoners under section 501 Migration Act 1958' (2011) 44(1) *Australian and New Zealand Journal of Criminology* 56, particularly the cases mentioned on pp 56-61.
- ⁵⁴ Ministerial Direction No 55, note 3, Part A, para 9(1)(b).
- ⁵⁵ Ministerial Direction No 55, note 3, Part A, para 9.2(1)(a).
- ⁵⁶ Ministerial Direction No 55, note 3, Section 1, para 6.3(4).
- ⁵⁷ Ministerial Direction No 55, note 3, Section 2, paras 8(5) and 9(1)(a).
- ⁵⁸ Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into immigration detention in Australia* (2008), paras 60-68. At http://humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (viewed 24 June 2013).
- ⁵⁹ Human Rights and Equal Opportunity Commission, above, para 68 (recommendation 5).
- ⁶⁰ *Migration Act 1958* (Cth), ss 13, 14, 189(1), 196(1), 501F(3).
- ⁶¹ Department of Immigration and Citizenship, note 43.
- ⁶² Commonwealth and Immigration Ombudsman, *Submission to the Joint Standing Committee on Migration's Inquiry into Immigration Detention in Australia* (2008), p 11. At http://www.ombudsman.gov.au/files/Joint_Standing_Committee_on_Migration_Inquiry_to_immigration_detention_in_Australia.pdf (viewed 24 June 2013).
- ⁶³ Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* UN Doc A/37/40, Annex V (1982), para 1. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) (viewed 24 June 2013). See also Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), at <http://www.unhcr.org/refworld/docid/3ae6b71a0.html> (viewed 24 June 2013); Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), at <http://www.unhcr.org/refworld/docid/3f588ef00.html> (viewed 24 June 2013); Human Rights Committee, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003). At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 24 June 2013).
- ⁶⁴ Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, UN Doc A/45/40 Vol. II (1990), Annex IX sect. M (1990), para 5.8. At http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/117_netherlands305vws (viewed 24 June 2013).
- ⁶⁵ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92 [152]. See also Human Rights Committee, *A v Australia*, note 63, para 9.2; M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (1993) p 172.

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- ⁶⁶ Human Rights Committee, *C v Australia*, note 63, para 8.2.
- ⁶⁷ See, for example, Human Rights and Equal Opportunity Commission, *Those who've come across the seas: Detention of unauthorised arrivals* (1998), at http://humanrights.gov.au/human_rights/immigration/seas.html (viewed 24 June 2013); Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004), at http://humanrights.gov.au/human_rights/children_detention_report/index.html (viewed 24 June 2013). For more recent submissions and reports by the Commission which recommend an end to mandatory detention, see the Commission's 'Immigration detention, asylum seekers and refugees' page at <http://www.humanrights.gov.au/immigration-detention-asylum-seekers-and-refugees>.
- ⁶⁸ Refugee Convention, note 32, art 33(1).
- ⁶⁹ Refugee Convention, note 32, art 33(2).
- ⁷⁰ *Migration Act 1958* (Cth), s 501(6)(a).
- ⁷¹ *Migration Act 1958* (Cth), s 501(6)(c).
- ⁷² ICCPR, note 34, arts 6(1), 7; *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* (1989), at <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1991/19.html> (viewed 24 June 2013).
- ⁷³ CAT, note 33, art 3(1).
- ⁷⁴ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC), arts 6(1), 37. At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 24 June 2013).
- ⁷⁵ *Migration Regulations 1994* (Cth), Schedule 2, clause 866.225, and Schedule 4, reg 1.03, Part 1.
- ⁷⁶ Ministerial Direction No. 55, note 3, Part A, para 9.4 and Part B, para 11.3.
- ⁷⁷ See *Migration Act 1958* (Cth), sub-ss 36(2)(aa) and (2A) and Ministerial Direction No. 55, note 3, Part A, para 9.4(3) and Part B, para 11.3(3). Note that s 36(2B) of the Act sets out circumstances in which there will be taken not to be a real risk of significant harm.
- ⁷⁸ Ministerial Direction No. 55, note 3, Part A, para 9.4(2) and Part B, para 11.3(2).
- ⁷⁹ Department of Immigration and Citizenship, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Strengthening the Character Test and other Provisions) Bill 2011* (May 2011), p 8. At <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=9b894535-53fa-42c7-a9b0-1e909ea76160> (viewed 24 June 2013).
- ⁸⁰ Department of Immigration and Citizenship, above, p 8.
- ⁸¹ *Migration Act 1958* (Cth), s 195A(4).
- ⁸² See *Migration Regulations 1994* (Cth), Schedule 2, clause 070.511.
- ⁸³ Article 3(1) of the CRC states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.
- ⁸⁴ Ministerial Direction No. 55, note 3, Part A, para 9(1)(c), Part B, para 11(1)(b). Note that this only applies to a child who is under 18 years of age at the time of the decision to refuse or cancel a person's visa. The best interests of a child who is 18 years or older is not a primary consideration, but is one of the 'other considerations' to be taken into account.
- ⁸⁵ Ministerial Direction No. 55, note 3, Part A, para 9.3(1), Part B, para 11.2(1).
- ⁸⁶ ICCPR, note 34, art 17(1).
- ⁸⁷ See Human Rights Committee, *Nystrom et. al v Australia*, Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (2011), paras 7.7 to 7.11. At http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/australia_t5_ccpr_1557_2007 (viewed 24 June 2013). For a relevant international example, see also the judgment of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* [2008] ECHR 1638/03 (23 June 2008). There, the Court held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his private and family life.
- ⁸⁸ See section 4.2 of this paper.

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- ⁸⁹ See the explanation of *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c) in note 46.
- ⁹⁰ Human Rights Committee, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17), UN Doc CCPR/C/21/Rev.1, 19 (1988), para 4. At <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453883f922> (viewed 24 June 2013).
- ⁹¹ Ministerial Direction No. 55, note 3, Part A, para 9.2(1)(b).
- ⁹² Ministerial Direction No. 55, note 3, Part A, para 10(1)(a), and Part B, para 12(1)(a).
- ⁹³ See, for example, the recent case of *Durani v Minister for Immigration and Citizenship* [2013] AATA 273 (6 May 2013), in which a delegate of the Minister had made a decision to cancel the applicant's visa under subsection 501(2), but upon review this decision was overturned because the Administrative Appeals Tribunal determined that cancellation was not in the best interests of the applicant's four-year-old child.
- ⁹⁴ See Ministerial Direction No. 55, note 3, Section 2, para 8 for detail as to how decision-makers should weigh up the primary and other considerations.
- ⁹⁵ *Migration Act 1958* (Cth), s 500(1)(b).
- ⁹⁶ *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).
- ⁹⁷ *Migration Act 1958* (Cth), s 501A. The criteria for the exercise of this power essentially mirror those for the Minister's power to make an initial refusal or cancellation decision under subsections 501(1), (2) and (3), except that under section 501A the Minister must in every case be satisfied that the refusal or cancellation is in the national interest.
- ⁹⁸ *Migration Act 1958* (Cth), ss 501A, 501B. For section 501A, see the note above. Under section 501B the Minister may set aside a DIAC decision to refuse or cancel a person's visa under subsection 501(1) or (2) and substitute it with his or her own decision to refuse or cancel the person's visa if: the Minister reasonably suspects that the person does not pass the section 501 character test; the person does not satisfy the Minister that they pass the character test; and the Minister is satisfied that the refusal or cancellation is in the national interest.
- ⁹⁹ *Migration Act 1958* (Cth), sub-s 501B(5).
- ¹⁰⁰ See *Migration Act 1958* (Cth), sub-ss 501(5) and 501A(4).
- ¹⁰¹ *Migration Act 1958* (Cth), s 501. See the discussion in section 2.2.
- ¹⁰² *Migration Act 1958* (Cth) s 501A. See the discussion in section 5.1.
- ¹⁰³ *Migration Act 1958* (Cth) s 501B. See the discussion in section 5.1.
- ¹⁰⁴ *Migration Act 1958* (Cth), sub-ss 501(5) and 501A(4).
- ¹⁰⁵ Human Rights and Equal Opportunity Commission, note 58, paras 104-107.
- ¹⁰⁶ At <http://www.humanrights.gov.au/publications/2011-immigration-detention-villawood#s9> (viewed 24 June 2013).
- ¹⁰⁷ At <http://www.humanrights.gov.au/legal-research-and-resources-0> (viewed 24 June 2013).
- ¹⁰⁸ At http://humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html (viewed 24 June 2013).
- ¹⁰⁹ At http://www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html (viewed 24 June 2013).
- ¹¹⁰ At http://www.humanrights.gov.au/human_rights/immigration/index.html (viewed 24 June 2013).