Visa Cancellations for Clients with Criminal Histories

On 28 March 2012 Ben Mostyn presented a seminar on the Human Rights and the Criminal Law. Human Rights is big topic and Ben spoke about visa cancellations for our clients based on their criminal history.

There was lively discussion and we (mostly) used the microphone. Over all we were outraged by this legislation and its lack of understanding of the criminal law.

Legal Aid civil lawyers no longer represent people whose visa has been cancelled because of s501 Immigration Act. There was a big increase in the number which overwhelmed Legal Aid resources. Legal Aid's response was to produce a self help kit: Visa Cancellation Kit. A copy of this is on the Legal Aid internet and Ben had hard copies. Copies of the kit have been sent to Welfare Officers at the prison to assist the prisoners when they are notified their visa has been cancelled. Legal Aid will represent a small minority who have particular difficulties. PILCH and UNSW Kingsford Legal Centre provide some assistance.

So in the main our clients are on their own. For that reason we need to be aware of how the criminal law proceedings will impact on our client's visas.

Who is affected?

You have to assume it could affect any one of your clients. The visa cancellation is a threat to anyone who is not Australian born or a naturalised citizen. People who arrived as babies can be deported when they are in their 80s. New Zealanders who entered Australia without a visa, when that was allowed, were deemed to have a visa so that they can be cancelled if they fail the character test.

Ask every client where they were born.

Why it applies

The Minister cancels a visa under s501 because people fail the character test.

The section of the character test that most often applies to our clients is s501(6)(a), that a person has a substantial criminal record. That is defined in subsection (7). It includes those people sentenced to death who apply for visa when outside Australia. In relation to our clients it includes a term of imprisonment of 12 months or more or a sentence of 2 years in total. This is the full sentence and not just the non-parole period. The two years is over any period of time. It need not be continuous. The breaks can be years or decades apart.

The section also includes people who were acquitted on the basis of mental illness and detained in a facility or institution as a result of the proceedings. There was discussion (without result) about whether a limiting term was included.

What we need to do in Court

Days spent in court-ordered residential drug or mental illness schemes are taken as days spent in prison for the purpose of the character test. These are court ordered so it might be worth getting a recommendation rather than a court order.

Juvenile control orders were thought not to be included but we were not sure.

The bench book states that the issue of deportation cannot be taken into account adversely in determining the non-parole period (i.e. 'leaving the country on release so why bother' type sentence). In Western Australia there appears to be a policy of not granting parole to people who are going to be deported and they are serving their full sentences. There was discussion that the bench book direction did not prevent the deportation being taken into account as to the length of sentence on the subjective grounds.

What to advise the client if notice will be served that the visa is cancelled.

Once they have failed the character test the Minister may cancel the visa. The PTB (powers that be) keep a pretty close check on all sentences and orders and seem to not only know the new ones but are trawling old records to catch those they missed. DCS sends notices to DIAC. Probation and parole orders go to Immigration for alerts.

Once they find the record then the PTB issue a notice of intention to consider cancellation (NOICC). The letter will include the sentencing remarks, an AFP criminal history and a probation and parole report if there was one.

The person who receives the notice gets a chance to make out their case. The person has **28 days to write to the Minister asking him/her to consider exercising his/her discretion**. The material in the letter is considered by the fabulously named National Character Consideration Centre (NCCC). The client can ask for an extension of time and that is often granted if the client is in custody and likely to stay there.

The letter to the Minister, really the NCCC, considers the matters in Ministerial Direction [No 41] (according to section 499). The primary considerations must be considered according to case law but need not be applied, e.g. the refugee conventions must be considered. There are also secondary considerations. One of the primary considerations is the seriousness and nature of the conduct that is detailed in 10.1.1 of the Direction.

Matters to be addressed include:

- the seriousness of the offence. Offences considered serious include assault and accessory before and after the fact. Serious theft is another. It is worth addressing these if the actual conduct amounting to the conviction (or not if mentally ill) was not really serious.
- The level of the client's community ties and support
- The PTB apparently look very favourably on a person's education so that any course undertaken in custody are considered (although if the only course is RSA that might not carry much weight).
- The length of time they have been in Australia, e.g. if came as a baby can be described as an alien by the barest of threads but people here longer than ten years can still be deported.
- The best interests of the child must be considered, e.g. the client's children.

Warnings

Some people are given a warning rather than a notice of intention to cancel their visa. The decision is based on the National Character Consideration Centre's assessment. The considerations include a judgment call as to whether a person is likely to re-offend although

there are guidelines for the decision. In 2009-10 they made 1078 character assessments and issued 864 warnings and only cancelled 58 visas.

People can be issued with a warning where they have to sign agreeing to be of good behaviour. If they reoffend after signing the warning their visa is cancelled.

I should also point out that even if someone gets a warning from DIAC, if they continue to offend, deportation is not automatic. Sometimes people are given a second warning. But obviously (and under Ministerial Direction 41), a prior warning weighs heavily against them if they come to the attention of DIAC in the future.

What to do If Visa Cancelled

Panic. There are only 9 days to appeal to the AAT. The time limit is strictly enforced, no excuses or mistakes allowed.

If your client manages to comply with the 9 days limit, the AAT decisions are generally hard to subject to judicial review because they generally apply the law correctly. Ben recommended reading *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 (23 March 2012) for a lyrical and lovely decision.

The Minister can cancel anyone's visa in the national interest.

Detention without charge

People at the seminar had experience with clients held in custody past their sentence expiration date or held without charge while Immigration tried to find somewhere to send them. There is a case, Al-kateb where the High Court held in 2004 that the detention was lawful as long as it was not punitive.

Applying for Citizenship

1. All applicants for citizenship must be permanent residents (with some exceptions this would exclude NZ citizens)

2. There are time requirements that apply to NZ citizens. Critically a NZ citizen who entered Australia in the period 1 September 1994 to 26 February 2001 are considered to be permanent residents for the purposes of obtaining citizenship. If they arrived after that date they are not permanent residents and cannot apply for citizenship. (Unless they become a permanent resident through the other ways.)

3. All applicants must be of good character

4. The ACI state that an assessment of whether a person is of good character is a different assessment to the one undertaken under the Migration Act (there is case law that states the test should be higher, because of the benefit that accrues to a person given citizenship)

5. An application for citizenship cannot be approved (but can be made)
   (a) if a person has been in prison for at least 12 months on one offence – until 2 years after they get out

(b) if a person has been in prison for at least 12 months on two or more occasions – until 10 years after they get out of gaol. (so if you are a recidivist a period of 10 years has to pass before any application from you can be approved)

6. The four years you referred to was the residence requirement that applies generally – that is you have to be a permanent resident for at least four years prior to making an application for citizenship.

7. Not sure how our clients would go – it would depend entirely on their circumstances and how long between applying for citizenship and their last period of incarceration/offending.

Overall

There is far more detail and Ben can help anyone with an enquiry.

Overall we were outraged. We were also strangely energised to fight for our non-citizen client's right to stay.

Useful Reference Material

Legal Aid's Visa Cancellation Kit